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 Copps dissenting and issuing a statement.

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I. INTRODUCTION

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

[1] *See 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

[2]47 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.

[3]*See 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).

[4]47 U.S.C. § 252(i).

[5]47 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.

concluded that this approach would provide adequate protection from 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

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

[8] *See 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*.

[12] Petition 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.

[13] *See* 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

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]

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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 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.

[14]Letter 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).

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

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

[17]*See 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.

[18]*See 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.

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 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]

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[19] *See 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.").

[21] 47 U.S.C. § 252(i) (emphasis added); *see Local Competition Order,* 11 FCC Rcd at 16137-39, paras. 1310, 1315.

[22] *See* 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.

[23] *See* 47 U.S.C. § 252(i).

[24] *See 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.

[26] The 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

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

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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. 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.

[30] *See* 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.

[32] Specifically, 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.

[33] *See, 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

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.

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

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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).

[35]A 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).

[36]Negotiations 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.

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

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[37] *See* section III.C, *infra*.

[38] *See* Verizon Comments at 5.

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

[40] *Id.* at 17413, para. 722.

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

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

[43] *See, 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.

[44] *See* 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).

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 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-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

[45] *See 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.

[46] *See* 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.).

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

[48] *See* 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.

[49] *See* 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.

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

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 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

[51] *See, 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.

[52] *See* 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.

[53] *See* para. 21, *infra.*

[54] *See* 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).

[55] *See* CLEC Coalition Comments at 12-13.

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

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 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

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

[58] *See* para. 21, *infra.*

[59] *See, 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.

[60] *See* 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.

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

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 any portion thereof) discriminates against a telecommunications carrier not a party to the

[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).

agreement . . . ."[71] 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

[71]47 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.

[72]47 U.S.C. § 252(e)(6).

[73]47 U.S.C. § 208; *see Local Competition Order*, 11 FCC Rcd at 16141, para. 1321; para. 29, *supra*.

[74]*See* 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.

[75]*See* 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.

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

[77]*But see* LecStar Comments at 5.

[78]For 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]

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[79] *See* 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.

[80] *See 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.").

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

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

[84] *See* 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

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

[86] *See* 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.

[87] *See, 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.

[88] *See* 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.

[89] *See* 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

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[90] *See, 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.

[91] *See, e.g.*, CLEC Coalition Comments at 18; AFB *et al.* Reply at 9; CLEC Coaliton 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).

[92] *See, 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.").

[93] *See, 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

[94]47 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).

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

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

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

[98]47 U.S.C. § 251(c)(1).

[99]*See, 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.

[100]Several 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*.

inserting an onerous provision into an agreement when the provision has no reasonable relationship to the 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

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

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

[103] Under 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*.

[104] We 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.

[106] *See* 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).

[107] *See 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*

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

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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, 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."

[123] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517110 (changed from 513310 in October 2002).

[124] FCC, 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.

[125] 13 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.

[127] 13 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 fewer

[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).

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 "small" or "very small" businesses.

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[139]U.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).

[140]U.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."

[141]U.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).

[142]U.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."

[143]*See 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).

[144]*See 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).

[145]*See, 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).

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).

Other Wireless Telecommunications" companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.[154] According to the Census Bureau data for 1997, only twelve firms out of a total of 1,238 such firms that operated for the entire year in 1997, had 1,000 or more employees.[155] If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business standard.

47. *220 MHz Radio Service – Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for defining "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[156] This small business standard indicates that a "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[157] A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years.[158] The SBA has approved these small size standards.[159] Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[160] In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.[161] Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.[162] A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.[163]

48. *Specialized Mobile Radio*. The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years.[164] The

[154]13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[155]U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513322 (October 2000).

[156]*Amendment of Part 90 of the Commission's Rules to Provide For the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, Third Report and Order, 12 FCC Rcd 10943, 11068-70, paras. 291-95 (1997).

[157]*Id.* at 11068, para. 291.

[158]*Id.*

[159]*See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

[160]*See generally 220 MHz Service Auction Closes*, Public Notice, 14 FCC Rcd 605 (WTB 1998).

[161]*See FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made*, Public Notice, 14 FCC Rcd 1085 (WTB 1999).

[162]*See Phase II 220 MHz Service Spectrum Auction Closes*, Public Notice, 14 FCC Rcd 11218 (WTB 1999).

[163]*See Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

[164]47 C.F.R. § 90.814(b)(1).

Commission awards "very small entity" bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years.[165] The SBA has approved these small business size standards for the 900 MHz Service.[166] The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.[167] A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.[168]

49. *Common Carrier Paging.* The SBA has developed a small business size standard for wireless firms within the broad economic census categories of **"**Cellular and Other Wireless Telecommunications."[169] Under this SBA category, a wireless business is small if it has 1,500 or 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.[170] 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.[171] Thus, under this category and associated small business size standard, the great majority of firms can be considered small.

50. In the *Paging Second Report and Order*, the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[172] A small business is an entity that, together with its affiliates and controlling

[165] *Id.*

[166] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999. We note that, although a request was also sent to the SBA requesting approval for the small business size standard for 800 MHz, approval is still pending.

[167] *See* "Correction to Public Notice DA 96-586 'FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,'" Public Notice, 18 FCC Rcd 18367 (WTB 1996).

[168] *See* "Multi-Radio Service Auction Closes*," Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

[169] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[170] U.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).

[171] U.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."

[172] *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, Second Report and Order, 12 FCC Rcd 2732, 2811-2812, paras. 178-181 (*Paging Second Report and Order*); *see also Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 10030, 10085-10088, paras. 98-107 (1999).

principals, has average gross revenues not exceeding $15 million for the preceding three years.[173] The SBA has approved this definition.[174] An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold.[175] Fifty-seven companies claiming small business status won 440 licenses.[176] An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.[177] One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.[178] Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service,* 608 private and common carriers reported that they were engaged in the provision of either paging or "other mobile" services.[179] Of these, we estimate that 589 are small, under the SBA-approved small business size standard.[180] We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

51. *700 MHz Guard Band Licenses.* In the *700 MHz Guard Band Order*, we adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[181] A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[182] Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[183] SBA approval of these definitions is not required.[184] An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.[185] Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were

[173] *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

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

[175] *See 929 and 931 MHz Paging Auction Closes*, Public Notice, 15 FCC Rcd 4858 (WTB 2000).

[176] *See id.*

[177] *See Lower and Upper Paging Band Auction Closes*, Public Notice, 16 FCC Rcd 21821 (WTB 2002).

[178] *See id.*

[179] *See Trends in Telephone Service May 2002 Report* at Table 5.3.

[180] 13 C.F.R. § 121.201, NAICS code 517211.

[181] *See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 5299 (2000).

[182] *See id.* at 5343, para. 108.

[183] *See id.*

[184] *See id.* at 5343, para. 108 n.246 (for the 746-764 MHz and 776-794 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

[185] *See 700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 15 FCC Rcd 18026 (2000).

small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[186] *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[187] A significant subset of the Rural Radiotelephone Service is the BETRS.[188] The Commission uses the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.[189] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

52. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.[190] We will use SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.[191] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard.

53. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.[192] Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million

[186] *See 700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 16 FCC Rcd 4590 (WTB 2001).

[187] The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[188] BETRS is defined in sections 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757, 22.759.

[189] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

[190] The service is defined in § 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[191] 13 CFR § 121.201, NAICS codes 513322 (changed to 517212 in October 2002).

[192] 13 CFR § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

dollars.[193] There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards.

54. *Fixed Microwave Services.* Fixed microwave services include common carrier,[194] private operational-fixed,[195] and broadcast auxiliary radio services.[196] At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.[197] The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies proposed herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

55. *Offshore Radiotelephone Service.* This service operates on several ultra high frequencies (UHF) television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.[198] There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for "Cellular and Other Wireless Telecommunications" services.[199] Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[200]

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[193] *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

[194] *See* 47 C.F.R. §§ 101 *et seq.* (formerly, Part 21 of the Commission's Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

[195] Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[196] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

[197] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[198] This service is governed by Subpart I of Part 22 of the Commission's Rules. *See* 47 C.F.R. §§ 22.1001-22.1037.

[199] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[200] *Id.*

56. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years.[201] The SBA has approved these definitions.[202] The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670-1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

57. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of $40 million or less in the three previous calendar years.[203] An additional size standard for "very small business" is: an entity that, together with affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[204] The SBA has approved these small business size standards.[205] The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and polices proposed herein.

58. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service.* Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).[206] In connection with the 1996 MDS auction, the Commission defined "small business" as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years.[207] The SBA has approved of this standard.[208] The MDS auction resulted

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[201] *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS)*, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

[202] *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.

[203] *See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, Report and Order, 12 FCC Rcd 18600 (1997); 63 Fed.Reg. 6079 (Feb. 6, 1998).

[204] *Id.*

[205] *See* Letter to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998) (VoIP); Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Hector Barreto, Administrator, Small Business Administration, dated January 18, 2002 (WTB).

[206] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995) (*MDS Auction R&O*).

[207] 47 C.F.R. § 21.961(b)(1).

in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).[209] Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.[210]

59. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution,[211] which includes all such companies generating $12.5 million or less in annual receipts.[212] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[213] Of this total, 1,180 firms had annual receipts of under $10 million, and an additional 52 firms had receipts of $10 million or more but less than $25 million.[214] Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies.

60. Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities.[215] There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

61. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[216] The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for

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[208] *See* Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Bureau, from Gary Jackson, Assistant Administrator for Size Standards, Small Business Administration, dated March 20, 2003 (noting approval of $40 million size standard for MDS auction).

[209] Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. *See MDS Auction R&O*, 10 FCC Rcd at 9608, para. 34.

[210] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for "other telecommunications" (annual receipts of $12.5 million or less). *See* 13 C.F.R. § 121.201, NAICS code 517910.

[211] 13 C.F.R. § 121.201, NAICS code 517510.

[212] *Id.*

[213] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4 (issued October 2000).

[214] *Id.*

[215] In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

[216] *See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[217] An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[218] The SBA has approved these small business size standards in the context of LMDS auctions.[219] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winning that won 119 licenses.

62. *218-219 MHz Service.* The first auction of 218-219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs).[220] Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.[221] In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years.[222] A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million for the preceding three years.[223] The SBA has approved of these definitions.[224] At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and

[217] *See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

[218] *See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

[219] *See* Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

[220] *See Interactive Video and Data Service (IVDS) Applications Accepted for Filing*, Public Notice, 9 FCC Rcd 6227 (1994).

[221] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

[222] *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999).

[223] *Id.*

[224] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

message communications industries, we assume for purposes of this analysis that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

63. *Incumbent 24 GHz Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of "Cellular and Other Wireless Telecommunications" companies. This category provides that such a company is small if it employs no more than 1,500 persons.[225] According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.[226] 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.[227] Thus, under this size standard, the great majority of firms can be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent[228] and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

64. *Future 24 GHz Licensees.* With respect to new applicants in the 24 GHz band, we have defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million.229 "Very small business" in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years.230 The SBA has approved these definitions.231 The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

65. *Internet Service Providers.* The SBA has developed a small business size standard for Internet Service Providers. This category comprises establishments "primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others."[232] Under the SBA size standard, such a business is small if it has average annual receipts of $21 million or

[225]13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

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

[227]*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."

[228]Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

[229]*Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules To License Fixed Services at 24 GHz*, Report and Order, 15 FCC Rcd 16934, 16967, para. 77 (2000) (*24 GHz Report and Order*); *see also* 47 C.F.R. § 101.538(a)(2).

[230]*24 GHz Report and Order*, 15 FCC Rcd at 16967, para. 77; *see also* 47 C.F.R. § 101.538(a)(1).

[231]*See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Gary M. Jackson, Assistant Administrator, Small Business Administration, dated July 28, 2000.

[232]Office of Management and Budget, North American Industry Classification System, page 515 (1997). NAICS code 514191, "On-Line Information Services" (changed to current name and to code 518111 in October 2002).

less.[233] According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year.[234] Of these, 2,659 firms had annual receipts of under $10 million, and an additional 67 firms had receipts of between $10 million and $24,999,999.[235] Thus, under this size standard, the great majority of firms can be considered small entities.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

66. In this Order, we eliminate the current pick-and-choose rule. The changes will restrict competitive LECs' choices to opt into specific terms and conditions of existing interconnection agreements, requiring competitors to opt into entire agreements or negotiate their own agreements with incumbents. We do not expect the new rule to impose additional burdens beyond those under the existing rule.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

67. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[236]

68. In this Order, we amend the pick-and-choose rule in a manner that encourages more customized contracts between competitive and incumbent LECs, as envisioned by the Act. The Order seeks to remove disincentives to the ability of incumbent LECs and competitive LECs to negotiate more customized agreements, including agreements that may include significant concessions in exchange for negotiated benefits. Changing the current rules, in favor of an approach where competitive LECs – including small entities – must opt into entire agreements, rather than individual terms and conditions, may impose additional burdens on these parties than they currently bear. The Commission finds that the current rules, however, expose incumbent LECs to the risk that subsequent entrants may reap a one-sided benefit from negotiated concessions made between the incumbent LEC and the actual contracting competitive LEC, and this creates a disincentive to negotiation to both negotiating parties. This may, in turn, impose additional burdens on competitors and incumbents as the parties attempt to reach agreements and resolve disputes, often through arbitration and litigation, in a regulatory environment that creates disincentives for either party to compromise. For this reason, we do not establish a separate pick-and-choose regime to govern small business incumbents or competitors. We believe the alternative adopted in this Order will serve the Commission's goal of encouraging negotiation while protecting the rights and

[233] 13 C.F.R. § 121.201, NAICS code 518111.

[234] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 4, Receipts Size of Firms Subject to Federal Income Tax: 1997, NAICS code 514191 (issued October 2000).

[235] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 4, Receipts Size of Firms Subject to Federal Income Tax: 1997, NAICS code 514191 (issued October 2000).

[236] 5 U.S.C. § 603(c)(1) – (c)(4).

interests of competitors, including small businesses. We believe that this approach is the least burdensome way to achieve market-driven contract negotiations. Alternatives proposed to address small business concerns were not adopted because they do not accomplish the Commission's objectives in this proceeding.[237]

69. **Report to Congress:** The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[238] In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.

B. Final Paperwork Reduction Act Analysis

70. This Report and Order does not contain information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.

V. ORDERING CLAUSES

71. Accordingly, IT IS ORDERED that pursuant to sections 1, 3, 4, 252(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 252(i), 303(r), the *Report and Order* in CC Docket No. 01-338 IS ADOPTED, and that Part 51 of the Commission's Rules, 47 C.F.R. Part 51, is amended as set forth in Appendix B. The requirements of this Report and Order shall become effective 30 days after publication in the Federal Register.

72. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[237] *See* paras. 27-29, *supra.*

[238] *See* 5 U.S.C. § 801(a)(1)(A).

APPENDIX A
LIST OF COMMENTERS

Comments in Pick-and-Choose Proceeding, CC Docket No. 01-338

Comments	**Abbreviation**
American Farm Bureau, Inc. Anew Telecommunications Corporation d/b/a Call America Creative Interconnect, Inc. Enhanced Communications Network, Inc. Utilities Commission of New Smyrna Beach A+ American Discount Telecom, LLC	AFB *et al.*
Association for Local Telecommunications Services	ALTS
BellSouth Corporation	BellSouth
California Public Utilities Commission	California Commission
CenturyTel, Inc.	CenturyTel
CLEC Coalition Excel Telecommunications, Inc. KMC Telecom Holdings, Inc. NuVox Inc. SNiP LiNK LLC Talk America VarTec Telecom, Inc. XO Communications, Inc. Xspedius LLC	CLEC Coalition
Covad Communications Company	Covad
Cox Communications, Inc.	Cox
Florida Public Service Commission	Florida Commission
Iowa Utilities Board	Iowa Commission
LecStar Telecom, Inc.	LecStar
Mpower Communications Corp.	Mpower
National Association of State Utility Consumer Advocates	NASUCA
New York State Department of Public Service	New York Commission
PAETEC Communications, Inc.	PAETEC
Promoting Active Competition Everywhere Coalition The Competitive Telecommunications Association	PACE/CompTel
Qwest Communications International Inc.	Qwest
Rural Independent Competitive Alliance	RICA
SBC Communications Inc.	SBC
Sprint Corporation	Sprint
The Public Utilities Commission of Ohio	Ohio Commission
United States Telecom Association	USTA
US LEC Corp. TDS Metrocom, LLC	US LEC *et al.*

Focal Communications Corporation Pac-West Telecomm, Inc. Globalcom, Inc. Lightship Telecom, LLC OneEighty Communications, Inc.	
Verizon Telephone Companies	Verizon
Verizon Wireless	Verizon Wireless
WorldCom, Inc./MCI	MCI
Z-Tel Communications, Inc.	Z-Tel

Replies in Pick-and-Choose Proceeding, CC Docket No. 01-338

Replies	**Abbreviation**
American Farm Bureau, Inc. Anew Telecommunications Corporation d/b/a Call America Creative Interconnect, Inc. Utilities Commission of New Smyrna Beach A+ American Discount Telecom, LLC	AFB *et al.*
Arizona Corporation Commission	Arizona Commission
AT&T Wireless Services, Inc.	AT&T Wireless
BellSouth Telecommunications, Inc.	BellSouth
Birch Telecom, Inc.	Birch
Cablevision Lightpath, Inc.	Lightpath
CenturyTel, Inc.	CenturyTel
CLEC Coalition KMC Telecom Holdings, Inc. NuVox Inc SNiP LiNK LLC Talk America XO Communications, Inc. Xspedius LLC	CLEC Coalition
Cox Communications, Inc.	Cox
National Association of State Utility Consumer Advocates	NASUCA
Nextel Communications, Inc.	Nextel
SBC Communications Inc.	SBC
Sprint Corporation	Sprint
T-Mobile USA, Inc.	T-Mobile
US LEC Corp. TDS Metrocom, LLC Focal Communications Corporation Pac-West Telecomm, Inc. Globalcom, Inc. Lightship Telecom, LLC OneEighty Communications, Inc. Cavalier Telephone	US LEC *et al.*
Verizon Telephone Companies	Verizon
WorldCom, Inc./MCI	MCI

Comments in the Mpower Flex Contract Proceeding, CC Docket No. 01-117

Comments	Abbreviation
Association of Communications Enterprises	ASCENT
AT&T Corp.	AT&T
BellSouth Corporation	BellSouth
Covad Communications Company	Covad
Focal Communications Corporation	Focal
Qwest Corporation	Qwest
Sprint Corporation	Sprint
Verizon Telephone Companies	Verizon
WorldCom, Inc.	WorldCom
Z-Tel Communications, Inc.	Z-Tel

Replies in the Mpower Flex Contract Proceeding, CC Docket No. 01-117

Replies	Abbreviation
Association of Communications Enterprises	ASCENT
Association for Local Telecommunications Services	ALTS
AT&T Corp.	AT&T
Focal Communications Corporation	Focal
Mpower Communications Corp.	Mpower
United States Telecom Association	USTA
Verizon Telephone Companies	Verizon
WorldCom, Inc.	WorldCom

APPENDIX B
FINAL RULES

PART 51 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 51 – INTERCONNECTION

1. Section 51.809 is amended by revising the section heading, paragraphs (a), (b), and (c) to read as follows:

§ 51.809 Availability of agreements to other telecommunications carriers under section 252(i) of the Act.

(a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local, access, or interexchange) as the original party to the agreement.

(b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

(1) The costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or

(2) The provision of a particular agreement to the requesting carrier is not technically feasible.

(c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act.

STATEMENT OF
CHAIRMAN MICHAEL K. POWELL

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338) Second Report and Order

One of the Commission's most important goals is to advance competition that is meaningful and sustainable, and that will eventually achieve Congress' goal of reducing regulation and promoting facilities-based competition. As carriers continue their migration away from unbundled network elements and toward increased reliance upon network elements they own and control, they will require more specialized interconnection agreements with incumbent LECs. Today's decision removes a rule that has thwarted those individualized agreements.

Specifically, we adopt an "all-or-nothing" rule, in place of the current pick-and-choose interpretation of section 252(i). Through this action, the Commission advances the cause of facilities-based competition by permitting carriers to negotiate individually tailored interconnection agreements designed to fit their business needs more precisely. Consistent with the purpose of section 252(i), it also continues to safeguard against discrimination. Specifically, nothing in our decision diminishes the ability of a requesting carrier to avail itself of the arbitration process clearly set forth in section 252 of the Act.

Preserving parties' ability to contract freely, and indeed encouraging transactions, is not simply an oft-cited legal policy – the 1996 Act makes it our statutory mandate. Our decision today ensures that facilities-based competitors are given a fighting chance to participate in local markets.

STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Second Report and Order in CC Docket No. 01-338 (adopted July 8, 2004).

I strongly support the Commission's decision to bolster incentives for marketplace negotiations by eliminating the "pick and choose" rule. In enacting the Telecommunications Act of 1996, Congress envisioned a sharing regime built primarily upon negotiated access arrangements, rather than governmental mandates. To be sure, the Commission was required to establish default unbundling rules, and state commissions were expected to set UNE prices and resolve interconnection disputes. But Congress anticipated that competitors and incumbents would establish most terms and conditions at the bargaining table, rather than in regulatory tribunals and courtrooms.

Unfortunately, this vision has not been realized. Instead, we have endured eight years of pitched regulatory battles and resource-draining litigation, and industry participants of all stripes agree that incumbent LECs and new entrants almost never engage in true give-and-take negotiations. There are undoubtedly many complex reasons why the Act's implementation took this course, many of which have nothing to do with the "pick and choose" rule. But I believe that the record in this proceeding confirms something I have long suspected: the "pick and choose" rule impedes marketplace negotiations and is not necessary to prevent discrimination. When the Supreme Court upheld the "pick and choose" rule as a valid interpretation of the Act, it recognized that the rule might "significantly impede negotiations (by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions)," and suggested that the Commission would be able to change course if that came to pass.[1] That absence of genuine trade-offs is precisely what has occurred, as incumbent LECs have proven reluctant to make significant concessions in negotiations as long as third parties can later come along and avail themselves of the benefit without making the same trade-off as the contracting party.

By requiring that competitors opt into interconnection agreements on an "all or nothing" basis, we ensure that third parties take the bitter with the sweet. In doing so, I am optimistic that we will promote more meaningful negotiations. Given the almost-complete dearth of marketplace deals, this change can only improve negotiations, notwithstanding claims that it will diminish competitors' leverage. In fact, I expect that the continuing application of the statutory duty of good faith, together with competitors' ability to opt into any negotiated or arbitrated agreement (on an all-or-nothing basis), will be sufficient to prevent discrimination.

The reform we adopt today is part of a much broader transformation. The "pick and choose" rule, along with a remarkably expansive unbundling regime, has fostered an expectation that the government will micromanage every aspect of the relationship between an incumbent LEC and its wireline competitors. The courts have now made unmistakably clear that the Commission must impose meaningful limits when adopting new unbundling rules. While I have no doubt that the Commission will continue to mandate the unbundling of bottleneck transmission facilities, it is equally apparent that the concept of maximum unbundling of all elements in all geographic markets cannot be sustained. As we move toward adopting new rules under which competitors will be increasingly required to rely on their

[1] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 396 (1999).

own facilities and to differentiate their services, the availability of customized interconnection agreements will be all the more vital. I expect that our elimination of the "pick and choose" rule will help pave the way toward a regime that is more dependent on negotiated access arrangements and less dominated by regulatory fiat.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338)*

Eight years ago, the Commission adopted its pick-and-choose rule. It provided structural assurance that interconnection, service and network elements would be available to all carriers at nondiscriminatory rates, terms and conditions. The rule was based on the strongest statutory reading of Section 252(i). It was designed to minimize contracting costs and was grounded in principles of equal treatment.

We have no looming judicial charge that compels us to depart from our pick-and-choose policy. Quite the contrary: the pick-and-choose rule was upheld by the Supreme Court five years ago. The highest court characterized the rule as "not only reasonable," but also "the most readily apparent" interpretation of the statute. This is strong stuff for a Commission whose policy pronouncements do not always pass muster with the courts of the land.

I am not convinced that dismantling the pick-and-choose rule and replacing it with an all-or-nothing approach will usher in a new era of negotiation and unique commercial deals. While statements about enhancing give-and-take negotiation have intuitive appeal, their logic here is thin. Trade-off, compromise and concession are good. They are features of any negotiation, including negotiation in a pick-and-choose environment. But in the wireline market, the only wholesaler is also the dominant force in retail competition. I know of no other industry where this is true. It makes contracting difficult. The hurly-burly and give-and-take that go on in so many commercial dialogues are not guaranteed in this one. Take-it-or-leave-it bargaining means competitors will walk away without any wholesale alternatives. To understand this difficulty, look no further than the lack of widespread commercial agreement reached during the months since the *USTA II* decision.

Pulling apart the fabric that supports competition will not speed its arrival. Discarding the pick-and-choose policy will increase the costs of contracting for smaller carriers. It will make it harder for them to compete. The real losers are consumers—residential and small business customers—who will face a dwindling set of choices and more limited competition as a result. For these reasons, I respectfully dissent.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
DISSENTING IN PART AND APPROVING IN PART

Re: Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, FCC 04-164.

Section 252 of the Communications Act establishes a framework for the negotiation and arbitration of interconnection agreements between incumbent carriers and new entrants. Section 252(i) provides a valuable tool for preventing discrimination between competitive carriers and incumbents, by requiring incumbents to make available "any interconnection, service, or network element" to other requesting carriers. Since 1996, the Commission's rules have implemented this provision by affording new entrants the ability to choose among individual provisions contained in publicly-filed interconnection agreements. That approach, called the "pick and choose" rule, was affirmed by the Supreme Court as the "most readily apparent" reading of the statute.

In the realm of our local competition rules, I am reticent to cast aside rules that have been affirmed by the Supreme Court. Maintaining some level of regulatory stability in this sector warrants such an approach. I nonetheless join today's Order to the extent that it provides incumbents and competitors with greater flexibility to develop comprehensive negotiated agreements. As a practical matter, the availability of the pick and choose rule appears to have influenced virtually all negotiations between incumbents and competitors, even if the parties to a specific negotiation did not invoke the pick and choose option. By affording parties the ability to balance a series of trade-offs, we should provide additional incentive for negotiated agreements.

The question remains whether this change will provide sufficient incentive for incumbents and competitors to reach mutually-acceptable agreements. The experience of the past 8 years, and particularly the past few months, has demonstrated how difficult it is for competitors and incumbents to reach negotiated agreements for access to unbundled network elements and other critical inputs. Competitors raise legitimate concerns about whether current market conditions create adequate incentives for both parties. The pick and choose rule has served to balance, to some degree, disparities in market power, and it is difficult to predict the effect of its wholesale elimination.

While I support providing parties with some avenue for reaching agreements outside of the pick and choose framework, I cannot fully support this item. Particularly in light of the Supreme Court's conclusion that our current rule "tracks the pertinent language of the statute almost exactly," I would have supported a more measured approach. For example, the Commission could have adopted its "all or nothing" approach for negotiated agreements, but allowed the limited use of the pick and choose rule for new entrants seeking to include previously-arbitrated provisions in new interconnection agreements. These arbitrated provisions have been reviewed by State commissions for consistency with the Act and our rules, and they do not reflect the give-and-take of purely negotiated agreements. Such an approach, though not compelled by our rules, would be a measured way to grant additional flexibility, now that we have concluded that multiple interpretations of the statute are permissible. Allowing the use of the pick and choose rule for previously-arbitrated issues would also address concerns raised by competitors, some state commissions, and consumer advocacy groups that adopting the "all or nothing" approach would lead to more arbitrations, potentially increasing cost and delay for smaller carriers.

This Commission should be cautious about an approach that may permit parties to delay unreasonably making available even those provisions of interconnection agreements that have been

arbitrated by state commissions. We should at minimum commit to monitoring the implementation of this new approach. Parties forcefully dispute whether the relief we provide here will lead to mutually-acceptable, non-discriminatory agreements or towards greater litigation costs because parties are forced to arbitrate more agreements. The difference in these outcomes is far from academic, but rather will be reflected in the existence and number of options available to consumers of telecommunications services. Our vigilance, and the commitment of our State commission colleagues who will review these agreements, is essential if we are to ensure that consumers continue to enjoy the benefits of choice.