

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

In the Matter of	)	
	)	
Presubscribed Interexchange Carrier Charges	)	CC Docket No. 02-53
	)	CCB/CPD File No. 01-12
	)	RM-10131
	)	

**ORDER AND NOTICE OF PROPOSED RULEMAKING**

**Adopted:** March 14, 2002

**Released:** March 20, 2002

**Comment Date:** 30 days after publication in the Federal Register

**Reply Comment Date:** 45 days after publication in the Federal Register

By the Commission:

**I. INTRODUCTION**

1. On May 16, 2001, the Competitive Telecommunications Association (CompTel) petitioned the Commission to initiate a rulemaking proceeding to examine presubscribed interexchange carrier-change charges (PIC-change charges).<sup>1</sup> PIC-change charges are federally-tariffed charges imposed by incumbent local exchange carriers (LECs)<sup>2</sup> on end-user subscribers when these subscribers change their presubscribed interexchange carriers (IXCs).<sup>3</sup> These charges currently are subject to a \$5 safe harbor within which a PIC-change charge is considered

<sup>1</sup> Petition for Rulemaking Regarding Presubscribed Interexchange Carrier Charges, Competitive Telecommunications Association Petition for Rulemaking (filed May 16, 2001) (Petition).

<sup>2</sup> Competitive LECs also may impose PIC-change charges on their end-user customers. Although the Commission has, in many instances, chosen not to regulate the rates charged by competitive LECs, including the PIC-change charge, we note that competitive LECs may look to the PIC-change charges assessed by incumbent LECs as a benchmark in setting their own PIC-change charges. Therefore, although the instant order and notice of proposed rulemaking specifically addresses only incumbent LEC PIC-change charges, the proceeding may affect competitive LEC PIC-change charges as well.

<sup>3</sup> In addition to residential and business end users, incumbent LECs may also impose PIC-change charges on end-user payphone subscribers when they change their presubscribed IXCs. *See, e.g.*, Ameritech Operating Companies Tariff F.C.C. No. 2, Sec. 4.2(C). PIC-change charges imposed on payphone end-user subscribers are included in the scope of this order and notice of proposed rulemaking.

reasonable.<sup>4</sup> CompTel bases its petition in large part on evidence submitted in a formal complaint proceeding indicating that incumbent LEC costs related to PIC changes have declined substantially since the \$5 safe harbor was implemented.<sup>5</sup> The Common Carrier Bureau sought comment on the Petition.<sup>6</sup> Upon review of the record, we conclude that significant industry and market changes have occurred since the implementation of the safe harbor in 1984, and that it is appropriate for the Commission to reexamine the existing safe harbor for incumbent LEC PIC-change charges at this time. Accordingly, with this Order and Notice of Proposed Rulemaking (NPRM), we grant the Petition and seek comment on the Commission's policies for regulating PIC-change charges.

## II. BACKGROUND

2. The PIC-change charge evolved as part of the regulatory framework established by the Commission in 1983 to open the interstate telecommunications market to competition.<sup>7</sup> Under this framework, the Commission required all LECs to replace their existing methods of compensation for exchange plant used in interstate telephone service with access tariffs.<sup>8</sup> Carriers filed tariffs that revised the rates and terms for nearly every interstate telecommunications service. The plan established an overall rate structure for LECs as well as a cost allocation methodology.

3. The Commission's regulatory framework did not, however, establish either actual carrier costs or the forecasts on which their proposed rates were based. Upon review of initial carrier tariff filings, the Commission found that the carriers' representations about their costs and forecasts raised substantial concerns about the reasonableness of their rates. The Commission then initiated a comprehensive tariff investigation "to resolve at least the major issues necessary to assure that generally reasonable, workable access tariffs" were adopted.<sup>9</sup> The Commission concluded both that it was reasonable for carriers to recover costs associated with changing an end user's presubscribed IXC and that establishing the exact costs incurred by incumbent LECs

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<sup>4</sup> *Annual 1985 Access Tariff Filings*, CC Docket No. 86-125, Memorandum Opinion and Order, 2 FCC Rcd 1416, 1445-46, paras. 272-74 (1987) (*1987 Access Tariff Order*). A carrier may, however, establish that a higher PIC-change charge is warranted by providing the Commission with appropriate cost support data. *Id.*

<sup>5</sup> See Petition at 2-3. See also *MCI Telecommunications Corp. v. U S WEST Communications, Inc.*, File Nos. E-97-08, E-97-20 through 24, Memorandum Opinion and Order, 15 FCC Rcd 9328, 9330-32, paras. 7-9 (2000) (*MCI Order*).

<sup>6</sup> *CompTel Files Petition for Rulemaking Re: Presubscribed Interexchange Carrier Charges*, RM No. 10131, CCB/CPD File No. 01-12, Public Notice, 16 FCC Rcd 11085 (2001) (*PIC Change Rulemaking Public Notice*).

<sup>7</sup> *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, 93 F.C.C.2d 241 (1982) (*1982 Access Charge Order*), modified on recon., 97 F.C.C.2d 682 (1983).

<sup>8</sup> See *1982 Access Charge Order*, 93 F.C.C.2d at 246, para. 11-12.

<sup>9</sup> *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, 97 F.C.C.2d 1082, 1085, para. 8 (1984).

for this service was a difficult process.<sup>10</sup> In light of these findings, the Commission established a safe harbor within which a PIC-change charge would be considered reasonable.<sup>11</sup> In the *1984 Access Charge Order*, the Commission stated:

A presubscription charge that covers the unbundled costs of a subscription [PIC] change would be reasonable. Also, to the extent that a presubscription charge is intended to discourage excessive amounts of shifting back and forth between or among interexchange carriers, we do not believe a charge geared to this purpose would be unreasonable. Absent proper cost support for presubscription charges, we believe a charge of \$5 per change (after one initial free preselection) would be reasonable. It would reflect some cost recovery and would not pose a barrier to competitive entry or exercise of customer choice.<sup>12</sup>

4. The next review of the PIC-change charge arose in the course of the Commission's review of the LECs' 1985 revised annual interstate access tariffs.<sup>13</sup> These filings were the first general update to the initial interstate access tariff filings and contained proposed increases to the individual carrier PIC-change charges. With the exception of one carrier, the Commission determined that the carriers had not provided sufficient cost support for increasing their PIC-change charges. Although it left open the possibility that a carrier could provide sufficient cost support for an increase to its PIC-change charges in the future, the Commission determined that, absent such support, "[it would] . . . require all carriers . . . to continue to apply a fixed rate of \$5.00 per presubscription change."<sup>14</sup> The Commission has not reviewed the reasonableness of the \$5 safe harbor on PIC-change charges since the *1987 Access Tariff Order*.

5. On May 16, 2001, CompTel petitioned the Commission to initiate a rulemaking proceeding to revise its policies governing the PIC-change charge. The Petition was largely based on a Commission decision on a formal complaint concerning such charges.<sup>15</sup> In that order, the Commission found that costs had fallen, but held in favor of the defendant incumbent LECs, concluding that a \$5 PIC-change charge did not violate section 201(b) of the Telecommunications Act of 1934, as amended, which requires just and reasonable rates. The Commission based its conclusion on the *1984 Access Tariff Order* and the *1987 Access Tariff Order* discussed above, which had established the \$5 safe harbor within which PIC-change

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<sup>10</sup> *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, 55 Rad. Reg. 2d (P&F) 1422, App. B at 13-5 (Apr. 27, 1984) (*1984 Access Tariff Order*); *1987 Access Tariff Order*, 2 FCC Rcd at 1446, para. 274.

<sup>11</sup> *1984 Access Tariff Order*, App. B at 13-5.

<sup>12</sup> *Id.* at App. B, 13-5.

<sup>13</sup> *See 1987 Access Tariff Order*, 2 FCC Rcd at 1443-46, paras. 252-77.

<sup>14</sup> *1987 Access Tariff Order*, 2 FCC Rcd at 1446, para. 274.

<sup>15</sup> *See generally MCI Order*, 15 FCC Rcd 9328.

charges were deemed reasonable.<sup>16</sup> In particular, the Commission found that, because it previously had determined that \$5 was a reasonable safe harbor for such charges, its rules do not require that carriers share with end users the substantial cost savings that they had realized from the automation of PIC-change processes over the previous 15 years.<sup>17</sup> Although a complaint proceeding was not the proper venue for altering existing rules governing the reasonableness of the \$5 safe harbor, the Commission stated that parties were free to initiate a rulemaking to address this issue.<sup>18</sup>

6. CompTel argues that key facts upon which the Commission based its 1987 decision have changed, and, therefore, the Commission should initiate a proceeding to determine what constitutes a reasonable PIC-change charge in the current environment. In particular, CompTel contends that it is no longer difficult for carriers to establish the costs associated with PIC changes and that those costs have been reduced substantially since 1987. On May 25, 2001, the Common Carrier Bureau released a public notice seeking comment on CompTel's petition.<sup>19</sup>

7. Both long distance carriers and incumbent LECs commented in this proceeding.<sup>20</sup> Petitioner, long distance carriers, and long distance carrier associations support the initiation of a rulemaking to examine the reasonableness of PIC-change charges based on current cost data. Petitioner and some long distance carriers support the implementation of a new, lower ceiling of \$1.49 on PIC-change charges.<sup>21</sup> A few commenters that otherwise support the Petition oppose the use of a new ceiling, arguing that incumbent LECs should be obligated to base their rates on actual costs.<sup>22</sup> They note that evidence of one carrier's 1990 costs may not be the best evidence of current nationwide costs for carriers. The incumbent LECs that commented on the Petition universally opposed the initiation of a rulemaking proceeding, arguing that the \$5 ceiling on PIC-change charges remains reasonable.<sup>23</sup>

### III. DISCUSSION

#### A. A Rulemaking Examining the Reasonableness of PIC-Change Charges is Appropriate.

8. We conclude that CompTel has provided in its Petition sufficient reasons supporting the initiation of a rulemaking proceeding, and deem it desirable to issue notice and

<sup>16</sup> See *MCI Order*, 15 FCC Rcd at 9334, paras. 13-14.

<sup>17</sup> See *MCI Order*, 15 FCC Rcd at 9334, para. 14.

<sup>18</sup> See *MCI Order*, 15 FCC Rcd at 9329, para. 2.

<sup>19</sup> See *PIC Change Rulemaking Public Notice*, 16 FCC Rcd at 11085.

<sup>20</sup> A list of parties filing comments and reply comments on the Petition is included at Attachment A.

<sup>21</sup> Commenters base the \$1.49 proposed safe-harbor on the PIC-change charge BellSouth has imposed since July 1, 1990. See Petition at 4-9. See also ASCENT Comments; Excel Comments; WorldCom Comments at 4-7.

<sup>22</sup> See AT&T Comments at 5-6, n. 8; IDT Comments at 5, n. 21.

<sup>23</sup> See CBT Comments at 3-6; SBC Comments at 3-8; Verizon Comments at 4-5.

receive public comment on the issues outlined herein.<sup>24</sup> We find it appropriate to initiate a rulemaking proceeding because the comments we have received demonstrate that circumstances have changed since the Commission's last comprehensive review of this issue, and the \$5 safe harbor may no longer be reasonable. The current safe harbor was established based on the difficulty of assessing actual costs by carrier for this service, what was known generally about the costs of providing this service, and a determination that it was good policy to discourage excessive switching of carriers.<sup>25</sup> All three of these factors are now ripe for reexamination. The PIC-change charge is not included in, and is therefore not constrained by, LEC price cap regulation. In the *MCI Order* the Commission concluded that MCI had "offered persuasive evidence that the costs to LECs have dropped significantly due to the automation of the PIC-change process . . . ."<sup>26</sup> This evidence raises questions about two of the factors on which the safe harbor is based, the difficulty of assessing actual costs and the reasonableness of the \$5 safe harbor. The third factor, a policy of discouraging excessive switching among long distance carriers, is called into question by the changes to the competitive landscape since the safe harbor was adopted. Seventeen years ago long distance competition was just beginning. Today the long distance market is highly competitive, and we believe the ability of end users to change carriers easily has contributed to the competitiveness of that market.<sup>27</sup> Experience with the working of the long distance market should be taken into account in determining both what constitutes excessive switching and whether we should discourage it.<sup>28</sup> In addition, several of the former Bell Operating Company (BOC) LECs have been granted authority to enter the long distance market pursuant to section 271 of the Communications Act of 1934, as amended.<sup>29</sup> Given these significant developments since the Commission last examined the \$5 safe harbor, we conclude that it is appropriate to initiate a rulemaking.

9. CompTel relies on the Commission's analysis of the evidence in the *MCI Order* to demonstrate that the current costs of providing PIC-change services are significantly different than those that formed the basis for the safe harbor and that it is not prohibitively difficult to

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<sup>24</sup> See 47 C.F.R. § 1.407.

<sup>25</sup> See *1984 Access Tariff Order*, App. B at 13-5.

<sup>26</sup> *MCI Order*, 15 FCC Rcd at 9329, para. 2.

<sup>27</sup> We currently do not have empirical evidence demonstrating the effect of the PIC-change charge on competition for long distance service. The evidence we do have is that numerous long distance carriers regularly pay this charge on behalf of new customers. See ASCENT Comments at 4; AT&T Comments at 4; CBT Comments at 6-7 (stating that its data suggests that the IXC practice of reimbursing customers for PIC-change charges is on the decline); SBC Comments at 6; Verizon Comments at 2. We do not believe this practice would be so commonplace if payment of the charge did not affect the willingness of end users to change carriers. Thus we believe the absence of this charge as a direct cost to end users has contributed to the vibrancy of the long distance service market.

<sup>28</sup> We note that in addition to end-user customers, LECs may impose PIC-change charges on other carriers. For example, when a long distance reseller changes its underlying long distance carrier, a LEC may impose multiple PIC-change charges on the reseller to switch each of the reseller's customers to the new long distance carrier. Unreasonable PIC-change charges would thus harm resale carriers as well as end-user customers.

<sup>29</sup> See 47 U.S.C. § 271.

determine what those costs are.<sup>30</sup> In the *MCI Order*, the Commission concluded that MCI had established that:

- 1) [T]he manual procedures used by the defendants for processing PIC changes in 1985 were extremely labor intensive and time consuming and 2) the defendants have since automated procedures for the majority of their PIC changes.<sup>31</sup>

The Commission also concluded that defendant parties, which comprised the majority of former BOCs, failed to refute this evidence.<sup>32</sup> MCI thus demonstrated in its formal complaint that the PIC-change process has changed significantly since the *1987 Access Tariff Order*,<sup>33</sup> and called into question whether substantiating costs remains as difficult as it once was. The evidence presented by MCI supports our decision to initiate this rulemaking.

10. We find it significant that the opponents of the Petition do not challenge whether circumstances have changed since the *1987 Access Tariff Order*.<sup>34</sup> Instead, the commenting incumbent LECs use changes in circumstances to bolster their arguments that \$5 remains a reasonable safe harbor. For example, they rely on costs associated with responding to allegations by end users of unauthorized PIC changes, commonly known as “slamming,” as evidence that costs related to PIC changes have not been reduced by automation.<sup>35</sup> They argue that the PIC-change charge is their only avenue for recovering such costs. Whether or not it is appropriate for incumbent LECs to recover the costs of administering slamming complaints through the PIC-change charge is a good question and one the Commission has not addressed. “Slamming” was not part of the telecom vocabulary in 1987, and such costs were not considered when the Commission determined that \$5 was an appropriate safe harbor for PIC-change charges. The LECs’ argument would expand the types of costs to be recovered through the PIC-change charge. We lack a sufficient record to determine whether it is appropriate to expand the basis for the safe harbor in this manner. Accordingly, we find that the incumbent LECs’ arguments in this

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<sup>30</sup> Petition at 2-4, 6.

<sup>31</sup> *MCI Order*, 15 FCC Rcd at 9331, para. 8 (citations omitted).

<sup>32</sup> *MCI Order*, 15 FCC Rcd at 9332, para. 9.

<sup>33</sup> *MCI Order*, 15 FCC Rcd at 9331, para. 8.

<sup>34</sup> Several commenters opposing the initiation of an NPRM argue that CompTel has not established any changed circumstances since the Commission decided in the *MCI Order* that the safe harbor was reasonable. See CBT Comments at 7-8; USTA Comments at 3-4; SBC Reply Comments at 4. In that complaint proceeding, the Commission was constrained by the existence of a prior Commission decision that had established as a matter of law that \$5 was a reasonable ceiling on PIC-change charges. Under those circumstances, a rulemaking proceeding, rather than a formal complaint, is the appropriate vehicle to revisit the reasonableness of such a safe harbor rule, as the Commission explicitly acknowledged in the *MCI Order*. See *MCI Order* at 9329, para. 2 (“We emphasize that, although we find the \$5 charge to be consistent with *existing* Commission orders, nothing in this order should be construed as discouraging any party from *initiating or participating in rulemaking proceedings* to reevaluate the Commission’s policy regarding PIC-change charges in light of the market changes in long distance competition and local phone service over the past fifteen years.”) (emphasis added).

<sup>35</sup> See SBC Comments at 2, 5; Verizon Reply Comments at 1-2.

regard, rather than persuading us that this rulemaking is unnecessary, support our decision to initiate this rulemaking.

11. The incumbent LECs also argue that a cost-based charge may result in a higher PIC-change charge, as there are many legitimate costs they do not recover through the current charge.<sup>36</sup> For the past 15 years, however, the Commission's rules have allowed carriers to demonstrate higher costs and tariff higher PIC-change charges.<sup>37</sup> We note that during this time period the incumbent LECs have not submitted any requests to the Commission seeking to make up any claimed under-recovery of costs associated with the PIC-change process. Regardless of the accuracy of the contention, however, we do not believe that such a potential outcome justifies denial of the Petition. We have no way of knowing, absent the initiation of this proceeding, what a reasonable PIC-change charge should be at this time. We therefore reject the arguments that we should not initiate this proceeding because it could result in higher charges to end users.

12. Commenting parties contest what the Commission meant when it stated that establishing a \$5 safe harbor would serve to discourage excessive switching of customers between long distance carriers. Those commenters supporting the Petition argue that the safe harbor's goal of discouraging consumers from switching long distance carriers is inconsistent with the pro-competitive policy framework of the Telecommunications Act of 1996.<sup>38</sup> SBC, however, argues that the Commission's intent in establishing the \$5 safe harbor was not to deter customers from changing long distance providers, but to deter excessive switching by allowing incumbent LECs to recover the costs associated with PIC changes directly from the customer submitting the request.<sup>39</sup> In any event, it is prudent to reconsider the policy of discouraging excessive shifting among long distance carriers in light of 17 years of experience with the competitive long distance market. This Commission relies on the fiercely competitive nature of the long distance market to ensure reasonable prices for consumers. The ability of end users to change carriers easily and for any reason gives long distance carriers an incentive to provide their services at reasonable rates and to maintain customer-friendly business practices. The breadth of available knowledge about the competitive long distance industry has clearly changed since 1987. Accordingly, it is appropriate to consider the effect on the long distance market of PIC-change charges that are not strictly cost-based.

13. We conclude that CompTel has established that the factual circumstances upon which the PIC-change charge safe harbor was based have changed significantly since 1987, the last time this safe harbor was reviewed. On the record before us, we are simply unable to conclude whether the existing safe harbor remains reasonable, thus necessitating the inquiry we initiate in this Notice of Proposed Rulemaking. Accordingly, we grant the Petition.

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<sup>36</sup> See SBC Comments at 2, 7; Verizon Comments at 5.

<sup>37</sup> See *1987 Access Tariff Order*, 2 FCC Rcd at 1446, para. 274. See also *1984 Access Tariff Order*, App. B at 13-5.

<sup>38</sup> See Petition at 7; Excel Comments at 4; IDT Comments at 4; WorldCom Comments at 5-6; AT&T Reply Comments at 2.

<sup>39</sup> See SBC Comments at 2, 6.

**B. We Seek Comment on the Commission's Regulation of PIC-Change Charges.**

14. As discussed above, the Commission established a safe harbor of \$5 in the *1984 Access Charge Order* based on three factors: 1) the difficulty of assessing actual costs incurred by carriers for performing PIC changes; 2) what was known generally about the costs of providing this service; and 3) a policy determination to discourage excessive switching of carriers.<sup>40</sup> The Commission revisited this issue and affirmed the safe harbor in the *1987 Access Tariff Order*.<sup>41</sup> Circumstances and technology have changed in the intervening years, and we undertake this rulemaking with the goal of establishing a reasonable PIC-change charge under current conditions. In their comments, parties raised a variety of issues that we must consider in establishing this standard. We will examine whether to base the PIC-change charge on an examination of carrier costs or whether we can rely on market forces to ensure reasonable rates. We will consider what costs carriers reasonably can recover through the PIC-change charge and whether to take non-cost factors into account in determining a reasonable charge. We will also examine whether to establish a national safe harbor, whether carriers should submit individualized cost support with their tariffs, or whether we should review rates solely through our enforcement processes. We seek comment on these issues, as well as any alternative means of ensuring the reasonableness of PIC-change charges.<sup>42</sup>

15. As a threshold matter, we think it is important to examine whether the PIC-change charge should be a regulated cost-based charge, or whether market forces will constrain PIC-change charges to reasonable levels. The current safe harbor was established in 1984, based largely on an analysis of carrier costs. When a market is not competitive we cannot rely on market forces to constrain rates.<sup>43</sup> Thus, we must examine the market for PIC-change services to determine whether a cost-based or market-based approach is the appropriate means to regulate PIC-change charges. Under current network configurations, a PIC change must be completed by an end user's LEC. The change relates, however, to a customer-carrier relationship between the end user and an IXC, which may or may not be affiliated with the end user's LEC. We seek comment on the nature of the market for PIC-change services and the need for the Commission to continue to apply a cost-based standard to ensure reasonable rates for PIC-change charges. We also seek comment on whether reliance on market forces could be made more practicable by modifying network configurations or the relationships between LECs, IXCs, and end users.

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<sup>40</sup> See *1984 Access Tariff Order*, App. B at 13-5. See also *1987 Access Tariff Order*, 2 FCC Rcd at 1445-46, paras. 272-74.

<sup>41</sup> See *1987 Access Tariff Order*, 2 FCC Rcd at 1445-46, paras. 272-74.

<sup>42</sup> Although in its comments AT&T raised other issues related to PIC changes, we decline to examine them in this proceeding. See AT&T Comments at 6-8. We also are not addressing here the issue of who pays the PIC-change charge in instances of slamming. Those issues would be addressed more appropriately in the slamming proceeding. *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129 (petitions for reconsideration pending).

<sup>43</sup> See *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, 16 FCC Rcd 9923, 9948, para. 59 (2001) (imposing a tariff benchmark mechanism on competitive LEC access charges due to the failure of market forces to restrain rates).

16. If we conclude that market forces will not ensure reasonable PIC-change charges, we must determine whether PIC-change charges should be based on costs, and, if so, what costs those charges should recover. In the *1984 Access Charge Order*, the Commission simply said, “[a] presubscription charge that covers the unbundled costs of a subscription [PIC] change would be reasonable.”<sup>44</sup> Parties have widely varying contentions with regard to the relevant costs. WorldCom contends that costs related to the actions necessary to process a request and implement the change are the only costs that should be recovered.<sup>45</sup> SBC contends that the PIC-change charge should recover a wider array of costs, including costs incurred in administering customer allegations of slamming.<sup>46</sup> We seek comment on the types of costs that should or should not be recovered through the PIC-change charge and why. We ask that commenters be as specific as possible. Our goal is to establish a standard that does not require continuous revision as technology evolves. Accordingly, we ask that commenters identify the individual functions that make up the PIC-change process, describe the process in detail, and explain why each function is necessary. For example, if customer care personnel perform multiple functions manually, commenters shall separately identify each function and its purpose. Likewise, commenters should identify by function the services that are automated, not merely name the automated facilities that are used to perform these services.

17. Some commenters assert that it is more costly to perform PIC-change services for certain customers than others. For example, SBC notes that customers subscribing to SBC’s “PIC freeze” service require more manual intervention than non-subscribers to process a PIC change.<sup>47</sup> The carrier also suggests that “excessive” PIC changes would justify an above-cost PIC-change charge.<sup>48</sup> Many parties contend that this is no longer a valid policy reason for maintaining a safe harbor that is not supported by current cost data.<sup>49</sup> We seek comment on whether and how such issues should be taken into account in establishing a reasonable PIC-change charge. Should the same PIC-change charge apply to all customers, regardless of whether they subscribe to an incumbent LEC’s PIC-freeze service, or should LECs impose a higher charge for PIC-freeze usage? Carriers may allow customers to freeze their PICs for multiple services, i.e., interstate, intraLATA intrastate, and local service. If commenters argue that the additional costs of conducting a PIC change for a customer subscribing to a PIC-freeze service should be recovered through the PIC-change charge, we seek comment on how to allocate the additional costs among jurisdictions. Should end users incur the same charge each time they request a PIC change, or should a higher charge be imposed upon a customer that

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<sup>44</sup> See *1984 Access Charge Order*, App. B at 13-5.

<sup>45</sup> See WorldCom Reply Comments at 6-7.

<sup>46</sup> See SBC Comments at 1-2.

<sup>47</sup> SBC customers whose accounts have a PIC freeze are blocked from automated PIC-change requests submitted by long distance carriers. The long distance carrier must contact the SBC customer service center with the end user on the line to verify the customer’s authorization to change long distance carriers. Manual orders are then placed to effectuate these changes. See SBC Comments at 3-4, n.6.

<sup>48</sup> See SBC Comments at 5-6; para. 12, *supra*.

<sup>49</sup> See Petition at 7; AT&T Comments at 3 n.3; Excel Comments at 4; WorldCom Reply Comments at 2-3.

requests “excessive” PIC changes? If the latter, why, and what constitutes “excessive” PIC changes? Additionally, when the Commission first identified the potential for excessive carrier switching as a basis for the safe harbor, significant uncertainty about the ability of carriers to identify the costs of PIC changes existed. There is evidence that this circumstance has changed. How should a carrier’s ability to identify accurately its actual PIC-change costs affect the weight to be given to non-cost-based rationales for a particular safe harbor?

18. In light of the existence of intrastate, intraLATA toll dialing parity, most end users currently have a choice of both interLATA and intraLATA interexchange service providers.<sup>50</sup> Accordingly, end users may change both their interLATA and intraLATA carriers simultaneously to a single carrier. In that circumstance, incumbent LECs may impose both an interstate and intrastate PIC-change charge for the transaction. We seek comment on whether this amounts to a double recovery. Interested parties are asked to comment on whether it is reasonable for incumbent LECs to recover both charges, a percentage of each charge, only one of the charges, or some totally different charge under these circumstances.

19. If we determine that the PIC-change charge should be cost-based, we must then establish a means to ensure incumbent LEC PIC-change charges recover only the costs associated with that service. We seek comment on whether the Commission should 1) require the filing of cost support with each PIC-change charge tariff; 2) rely on the formal complaint process and other enforcement mechanisms to review rates; or 3) establish a safe harbor to ensure reasonable rates.

20. If we conclude that a safe harbor is the most efficient means of ensuring reasonable rates, we will need to establish that safe harbor. We seek comment on the best means for doing so. Should we establish a safe harbor on the basis of the incumbent LECs’ average costs? Should we base the safe harbor on the incumbent LECs’ lowest cost, giving carriers the option of providing cost support to justify a higher charge? If so, what would the lowest cost be? In this respect, we note that some carriers charge substantially less than the current safe harbor. For example, as noted above, BellSouth charges \$1.49.<sup>51</sup> Does BellSouth’s \$1.49 charge, or any other charge differing from the safe harbor, establish a lower or upper bound? Commenters should provide cost evidence supporting any safe harbor proposed. Should the Commission distinguish between incumbent LECs, and, if so, on what bases? Should the Commission use a proxy and, if so, what is a reasonable proxy for the PIC-change service? Should there be separate proxies for large and small incumbent LECs? Do market proxies exist? Are state-arbitrated rates for UNE-P and resale migrations or state-regulated rates for intraLATA PIC-change charges reasonable proxies for the interstate PIC-change service?<sup>52</sup> Is there a weighted

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<sup>50</sup> See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392 (1996).

<sup>51</sup> See *MCI Order*, 15 FCC Rcd at 9331, para. 7; Petition at 9.

<sup>52</sup> “UNE-P” refers to the unbundled network element (UNE) platform provided by incumbent LECs to competitive LECs. The platform consists of the combination of loop, switching, and transport network elements. UNE-P and resale migrations involve transferring end users from an incumbent LEC to a competitive LEC that is providing service either by the UNE-P or by reselling incumbent LEC facilities. Incumbent LECs charge competitors for these migrations at rates regulated by state public utility commissions.

average of several rates that would constitute a reasonable proxy? Parties are asked to comment on these options, and submit alternative suggestions for our consideration.

#### IV. PROCEDURAL MATTERS

##### A. *Ex Parte* Requirements

21. This proceeding will be governed by “permit-but-disclose” *ex parte* procedures that are applicable to non-restricted proceedings under 47 C.F.R. § 1.1206. Parties making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required. *See* 47 C.F.R. § 1.1206(b)(2). Other rules pertaining to oral and written presentations are set forth in section 1.1206(b) as well. Interested parties are to file any written *ex parte* presentations in this proceeding with the Commission’s Acting Secretary, William F. Caton, 445 12<sup>th</sup> Street, S.W., TW-B204, Washington, D.C. 20554, and serve with three copies: Competitive Pricing Division, Common Carrier Bureau, 445 12<sup>th</sup> Street, S.W., Room 5-A452, Washington, D.C. 20554, Attn: Jennifer McKee. Parties shall also serve with one copy: Qualex International, Portals II, 445 12<sup>th</sup> Street, S.W., Room CY-B402, Washington, D.C. 20554, (202) 863-2893.

##### B. Initial Paperwork Reduction Act Analysis

22. This Notice of Proposed Rulemaking (NPRM) contains either a proposed or modified information collection. As part of the continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 *et seq.* Public and agency comments are due at the same time as other comments on this NPRM; OMB comments are due 60 days from the date of publication of this NPRM in the Federal Register. Comments should address: 1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; 2) the accuracy of the Commission’s burden estimates; 3) ways to enhance the quality, utility, and clarity of the information collected; and 4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

##### C. Initial Regulatory Flexibility Act Analysis

23. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>53</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the

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<sup>53</sup> 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, 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).

NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>54</sup> In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.

### **1. Need for, and Objectives of, the Proposed Rules**

24. In this NPRM, the Commission seeks comment on its policies for regulating presubscribed interexchange carrier-change charges (PIC-change charges). Specifically, we will examine whether to base the PIC-change charge on an examination of carrier costs or whether we can rely on market forces to ensure reasonable rates. We will consider what costs carriers reasonably can recover through the PIC-change charge and whether to take non-cost factors into account in determining a reasonable charge. We will also examine whether to establish a national safe harbor, whether carriers should submit individualized cost support with their tariffs, or whether we should review rates solely through our enforcement processes. We seek comment on these issues, as well as any alternative means of ensuring the reasonableness of PIC-change charges.

### **2. Legal Basis**

25. The legal basis for any action that may be taken pursuant to the NPRM is contained in sections 4, 201-202, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 201-202, and 303, and sections 1.1, 1.411, and 1.412 of the Commission's rules, 47 C.F.R. § 1.1, 1.411, and 1.412.

### **3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules will Apply**

26. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.<sup>55</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>56</sup> For the purposes of this NPRM, the RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act, 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.<sup>57</sup> Under the Small Business Act, a "small business concern" is one that: 1) is independently owned and operated; 2) is not dominant in its field of operation; and 3) meets any additional criteria established by the SBA.<sup>58</sup>

27. We have included small incumbent local exchange carriers (LECs) in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets

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<sup>54</sup> See 5 U.S.C. § 603(a).

<sup>55</sup> 5 U.S.C. §§ 603(b)(3).

<sup>56</sup> 5 U.S.C. § 601(6).

<sup>57</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

<sup>58</sup> 15 U.S.C. § 632.

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.”<sup>59</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>60</sup> We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

28. The Census Bureau reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.<sup>61</sup> This number contains a variety of different categories of carriers, including LECs, interexchange carriers (IXCs), competitive access providers, operator service providers, pay telephone operators, and resellers. It seems certain that some of these 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not “independently owned and operated.”<sup>62</sup> It seems reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this analysis.

29. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a special small business size standard for small LECs. The closest applicable category for these types of carriers under SBA rules is for telecommunications carriers, wired.<sup>63</sup> The most reliable source of information regarding the number of LECs nationwide appears to be the data that we collect annually in connection with FCC Form 499-A, the Telecommunications Reporting Worksheet.<sup>64</sup> According to our most recent data, there are 1,329 incumbent LECs.<sup>65</sup> Although some of these carriers may not be independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that

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<sup>59</sup> 15 U.S.C. § 632.

<sup>60</sup> See 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 CFR § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. See, e.g., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Red 15499, 16144-45, paras. 1341-42 (1996).

<sup>61</sup> U.S. Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities, UC 92-S-1, Subject Series, Establishment and Firm Size, at Firm Size 1-123 (1995) (*1992 Census*).

<sup>62</sup> See generally 15 U.S.C. § 632(a)(1).

<sup>63</sup> 13 CFR § 121.201, NAICS code 513310. See also 13 CFR § 121.201, NAICS codes 513330 (telecommunications resellers), and 513340 (telephone communications carriers, satellite).

<sup>64</sup> Information from the Telecommunications Reporting Worksheets is compiled in the *Carrier Locator* report. See *Carrier Locator: Interstate Service Providers*, FCC Common Carrier Bureau, Industry Analysis Division (rel. Nov. 2001) (*Carrier Locator*).

<sup>65</sup> *Carrier Locator* at Table 1.

would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are no more than 1,329 small entity incumbent LECs that may be affected by the proposals in the NPRM.

30. *Interexchange Carriers.* Although our actions as proposed would not directly affect IXC's, and therefore IXC's are not within the RFA for purposes of this IRFA, we voluntarily include them here to create a fuller record and encourage public comment. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services. The closest applicable definition under the SBA rules is for wired telecommunications carriers.<sup>66</sup> According to the most recent *Carrier Locator* report, 229 carriers reported that their primary telecommunications service activity was the provision of interexchange services.<sup>67</sup> We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of IXC's that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 229 or fewer small entity IXC's that may be affected by the rules.

#### **4. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements**

31. We are seeking comment on whether we can rely on market forces to set reasonable PIC-change charges, or whether these charges must be regulated. If we find that the market reasonably sets these charges, there will be no additional reporting or recordkeeping burden on incumbent LECs with respect to these charges. If we determine that the market will not successfully constrain PIC-change charges, we must determine whether to establish a safe harbor below which PIC-change charges are to be deemed reasonable, or whether these charges should be cost-based. If we adopt a safe harbor, incumbent LECs will be in the same situation as under the current rules, i.e., PIC-change charges tariffed at rates below the safe harbor are deemed reasonable, and LECs have the option of demonstrating that their costs for PIC changes exceed that rate. If we decide not to adopt a safe harbor and require incumbent LECs to set PIC-change charges at cost, incumbent LECs will be required to file information demonstrating the costs of providing PIC changes.

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

32. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed 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 or reporting requirements under the rule for small entities; 3) the use of performance, rather than design

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<sup>66</sup> 13 CFR § 121.201, NAICS code 513310. *See also* 13 CFR § 121.201, NAICS codes 513330 (telecommunications resellers), and 513340 (telephone communications carriers, satellite).

<sup>67</sup> *See Carrier Locator* at Table 1.

standards; and 4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>68</sup>

33. We are seeking comment on alternative methods of setting a PIC-change charge, including whether market forces will successfully constrain these charges, and whether to adopt a safe harbor below which rates are presumed reasonable.<sup>69</sup> These proposals would reduce the reporting and recordkeeping burden on all incumbent LECs, including small LECs.

#### **6. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules**

34. None.

#### **D. Filing of Comments and Reply Comments**

35. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before 30 days after publication of the NPRM in the Federal Register, and reply comments on or before 45 days after publication of the NPRM in the Federal Register. All comments and reply comments should reference the docket number of this proceeding, CC Docket No. 02-53. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS), or by filing paper copies.<sup>70</sup>

36. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the filing to each docket or rulemaking number referenced in the caption.<sup>71</sup> In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic copy by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message: "get form <your email address>." A sample form and directions will be sent in reply. Commenters also may obtain a copy of the ASCII Electronic Transmittal Form (FORM-ET) at <http://www.fcc.gov/e-file/email.html>.

37. Parties filing paper copies must file an original and four copies of each filing. If multiple docket or rulemaking numbers appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.<sup>72</sup> All filings must be addressed to the Commission's Acting Secretary, William F. Caton, Office of the

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<sup>68</sup> 5 U.S.C. § 603(c)(1)-(c)(4).

<sup>69</sup> See *infra* paragraphs 15 and 20.

<sup>70</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322, 11326, para. 8 (1998).

<sup>71</sup> Parties do not need to transmit additional electronic copies for CCB/CPD file numbers.

<sup>72</sup> Parties do not need to submit additional copies for CCB/CPD file numbers.

Secretary, Federal Communications Commission, 445 12<sup>th</sup> St., S.W., Washington, D.C. 20554.

38. Interested parties who wish to file comments via hand-delivery are also notified that effective December 18, 2001, the Commission will only receive such deliveries weekdays from 8:00 a.m. to 7:00 p.m., via its contractor, Vistrionix, Inc., located at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. **The Commission no longer accepts these filings at 9300 East Hampton Drive, Capitol Heights, MD 20743.** Please note that all hand deliveries must be held together with rubber bands or fasteners, and envelopes must be disposed of before entering the building. In addition, this is a reminder that as of October 18, 2001, the Commission no longer accepts hand-delivered or messenger-delivered filings at its headquarters at 445 12<sup>th</sup> Street, SW, Washington, DC 20554. Messenger-delivered documents (e.g., FedEx), including documents sent by overnight mail (other than United States Postal Service (USPS) Express and Priority Mail), must be addressed to 9300 East Hampton Drive, Capitol Heights, MD 20743. This location is open weekdays from 8:00 a.m. to 5:30 p.m. USPS First-Class, Express, and Priority Mail should be addressed to the Commission's headquarters at 445 12<sup>th</sup> Street, SW, Washington, DC 20554. The following chart summarizes this information:

TYPE OF DELIVERY	PROPER DELIVERY ADDRESS
Hand-delivered paper filings	236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002 (Weekdays - 8:00 a.m. to 7:00 p.m.)
Messenger-delivered documents (e.g., FedEx), including documents sent by overnight mail (this type excludes USPS Express and Priority Mail)	9300 East Hampton Drive, Capitol Heights, MD 20743 (Weekdays - 8:00 a.m. to 5:30 p.m.)
USPS First-Class, Express, and Priority Mail	445 12 <sup>th</sup> Street, SW Washington, DC 20554

39. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex International, Portals II, 445 12<sup>th</sup> Street S.W., CY-B402, Washington, D.C. 20554 (telephone 202-863-2893; facsimile 202-863-2898) or via e-mail at [qualexint@aol.com](mailto:qualexint@aol.com). In addition, one copy of each submission must be filed with the Chief, Competitive Pricing Division, 445 12<sup>th</sup> Street, S.W., Room 5-A225, Washington, D.C. 20554. Documents filed in this proceeding will be available for public inspection during regular business hours in the Commission's Reference Information Center, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554, and will be placed on the Commission's Internet site.

40. Written comments by the public on the proposed and/or modified information collections are due on the same day as comments on the NPRM, i.e., on or before 30 days after publication of the NPRM in the Federal Register. Written comments must be submitted by OMB on the proposed and/or modified information collections on or before 60 days after publication of the NPRM in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1-C804, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554, or via the Internet to [jbherman@fcc.gov](mailto:jbherman@fcc.gov), and to Jeanette Thornton, OMB Desk Officer, Room 10236 NEOB, 725 17<sup>th</sup> Street, N.W., Washington, D.C. 20503 or via

the Internet to [JThornto@omb.eop.gov](mailto:JThornto@omb.eop.gov).

## V. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED that the Petition for Rulemaking filed by the Competitive Telecommunications Association IS GRANTED.

42. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1, 4(i), 4(j), 201-205, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), (j), 201-205, and 303, NOTICE IS HEREBY GIVEN of the rulemaking described above and COMMENT IS SOUGHT on those issues.

43. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

**ATTACHMENT A****Comments Filed:**

Association of Communication Enterprises (ASCENT)

AT&T

Cincinnati Bell Telephone Company (CBT)

Excel Communications, Inc. (Excel)

IDT Corporation (IDT)

SBC Communications Inc. (SBC)

United States Telecom Association (USTA)

Verizon

WorldCom, Inc. (WorldCom)

**Reply Comments Filed:**

ASCENT

AT&T

CompTel

IDT

SBC

Verizon

WorldCom