

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

In the Matter of)
Toll Free Service Access Codes) CC Docket No. 95-155
Petition to Change the Composition of)
SMS/800, Inc.) WC Docket No. 12-260

ORDER

Adopted: November 1, 2013

Released: November 1, 2013

By the Commission: Acting Chairwoman Clyburn and Commissioner Pai issuing separate statements.

I. INTRODUCTION

1. In this Order, we approve the plan proposed by SMS/800, Inc., which oversees the toll free Service Management System (SMS), to assume tariffing authority and responsibility for SMS services, to change its membership and governance structure to be more representative of the community of SMS users, and to make other changes to the administration of the SMS. Currently, SMS/800, Inc.'s membership and governance consists of the three remaining regional Bell Operating Companies (BOCs), who are responsible for governing SMS/800, Inc. and for filing and enforcing the SMS/800 tariff. SMS/800, Inc. seeks to assume direct responsibility for filing and enforcing the tariff and to expand its membership and restructure its Board to include representatives from Responsible Organizations (RespOrgs) and Service Control Point (SCP) Owner/Operators, as well as independent non-industry

1 Petition to Change the Composition of SMS/800, Inc., CC Docket 95-155, WC Docket No. 12-260 (filed Sept. 13, 2012) (SMS/800 Petition).

2 When the Commission required SMS access to be tariffed, the Commission directed the seven regional BOCs to file the tariff and oversee operation of the SMS. See generally Provision of Access for 800 Service, CC Docket No. 86-10, Order, 8 FCC Rcd 1423, 1426-27, paras. 25-31, 1429, Appendix A (1993) (Comptel Declaratory Ruling). These companies—Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Telesis, Nevada Bell, and US West later consolidated into the three current regional BOCs: AT&T, Inc., Verizon Communications, and CenturyLink. SMS/800 Petition at 2-3; see also Margaret Rouse, Regional Bell Operating Company, UNIFIED COMMUNICATIONS (March 2008), http://searchunifiedcommunications.techtarget.com/definition/regional-Bell-operating-company (last visited Apr. 22, 2013); RBOC (Regional Bell Operating Company), TECH-FAQ (2012), http://www.tech-faq.com/rboc.html (last visited Nov. 1, 2013).

3 SMS services are provided to both RespOrgs and SCP Owner/Operators. RespOrgs are companies that have access to the SMS to perform number management functions for toll free customers. RespOrgs obtain numbers from the SMS upon request from toll free subscribers and then charge those subscribers reservation fees (i.e., tariffed service charges) for the use of such numbers. They were initially established in 1993 as part of the Order that mandated the creation of the SMS. See Toll Free Service Access Codes; Database Services Management, Inc. Petition for Declaratory Ruling; Beehive Telephone Company Petition for Declaratory Ruling, CC Docket No. 95-155, NSD File Nos. L-99-87, L-99-88, Fifth Report and Order, 15 FCC Rcd 11939, 11941, para. 3 (2000) (Toll Free Fifth Report and Order); Comptel Declaratory Ruling 8 FCC Rcd at 1423; see also What Is a Toll-Free Number and How Does it Work?, Federal Communications Commission (2013), http://www.fcc.gov/guides/toll-free-numbers-and-how-they-work (last visited Nov. 1, 2013). RespOrgs manage every individual toll free number and may be

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members.⁴ We find that SMS/800, Inc.'s proposal is in the public interest because it will broaden participation in management of the SMS to better represent the community of users and will allow the provision of SMS services to be more responsive to the needs of toll free users. We also anticipate that the new corporate structure will reduce the cost of providing SMS service due to greater administrative efficiencies of the restructured corporation—in particular, once the restructuring and transition period are complete, SMS/800, Inc. employees will directly perform most of the necessary functions. Because our rules require the tariffed rates charged to RespOrgs to be based on the cost of providing SMS service, any savings realized as a result of SMS/800, Inc.'s corporate restructuring is likely to be reflected in lower tariffed rates for RespOrgs, which should in turn lead to lower charges for toll free subscribers.

2. We find that the corporation, as restructured, will meet the impartiality requirements required by section 251(e) and set forth in section 52.12 of the Commission's rules, and would be a neutral administrator of the SMS⁵ so long as SMS/800, Inc. files and maintains the SMS Tariff,⁶ adheres to the terms and conditions of the tariff, and complies with our transition and ongoing corporate requirements discussed herein. We find that transferring tariff filing responsibility to SMS/800, Inc. is in the public interest and will help streamline the provision of SMS service by placing this authority squarely in the hands of the party that will be overseeing the SMS. For these reasons, we grant SMS/800, Inc.'s request to acquire tariff filing responsibility from the BOCs upon release of this Order and assume the role of neutral SMS administrator once the new twelve-member Board is in place.⁷

3. The Commission grants these SMS/800, Inc. requests subject to Commission oversight and other requirements set forth below. These requirements will ensure that SMS/800, Inc. will administer the SMS equitably and without interruption.

II. BACKGROUND

A. The Toll Free Service Management System

4. *History of the SMS.* The Communications Act of 1934, as amended (the Act), grants the Commission "exclusive jurisdiction over those portions of the North American Numbering Plan (NANP) that pertain to the United States."⁸ Moreover, the Act "require[s] the Commission to ensure the efficient, fair, and orderly allocation of toll free numbers."⁹

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long distance carriers, resellers, end users, or independent companies that offer an outsourced service. *See Toll-Free Numbers And How They Work*, Federal Communications Commission (May 26, 2011), <http://www.fcc.gov/guides/toll-free-numbers-and-how-they-work> (last visited Apr. 22, 2013). There are approximately 300 RespOrgs. *RespOrg Information*, Level 3 Communications (2012), <http://www.etollfree.net/resporg-information/resporg-information.html> (last visited Nov. 1, 2013). SCP Owner/Operators operate real-time database systems that contain instructions for routing toll free calls. *See Toll Free Fifth Report and Order*, 15 FCC Rcd at 11941, paras. 2–3.

⁴ SMS/800 Petition at 1, 5, 8.

⁵ SMS/800 asks to assume the role of neutral SMS administrator once its corporate membership and governance have been restructured. SMS/800 Petition at 1, 10, 16.

⁶ SMS/800, Inc. asks to acquire tariff filing responsibility from the BOCs. *See SMS/800 Functions Tariff F.C.C. No. 1 (SMS Tariff)*.

⁷ *See* Appendix A for a description of the transition over a three-year period.

⁸ 47 U.S.C. § 251(e)(1). The NANP is the basic numbering scheme for communications networks located in the United States and its territories, Canada, and parts of the Caribbean. *See* 47 C.F.R. § 52.5(c).

⁹ *Toll Free Service Access Codes; Petition to Modify 888 Number Allocation Plan filed by LCI International, Inc.; Petition to Modify 888 Number Allocation Plan filed by UniDial, Inc.; Petition to Modify 888 Number Allocation Plan filed by Consolidated Communication Telecom Services Inc.*, CC Docket No. 95-155, NSD File Nos. 97-10, 97-15, 97-16, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 11162, 11176,

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5. In 1993, the Commission mandated that the BOCs develop a centralized database system to allow toll free customers to change their service providers without having to change their numbers.¹⁰ The Commission also required the BOCs to offer the service as a common carrier service, under tariff, to ensure that they offer it on a non-discriminatory basis and at reasonable rates.¹¹ In response, the BOCs created the SMS. Since its creation in 1993, the SMS has contained all toll free numbers in the NANP, along with electronic records for those numbers.¹² Moreover, the BOCs have offered access to the database through the SMS Tariff.¹³ The tariff sets forth the regulations, rates, and charges applicable to SMS services. It describes the features and functions of the SMS, establishes RespOrg responsibilities and eligibility criteria, and prohibits unlawful use of the system.¹⁴ The tariff also lists both the monthly and non-recurring charges for database access and other SMS services.¹⁵

6. *Structure of SMS.* As described in the SMS Tariff, the SMS is “an operations and administrative support system used for the creation and maintenance of call processing records for toll-free telephone numbers” as well as “the source of toll-free number availability and reservation status information.”¹⁶ It contains all customer records and routing instructions for toll free numbers.¹⁷ In addition to allowing RespOrgs to reserve toll free numbers and create or modify records for toll free subscribers, the SMS sends up-to-date information to regional database systems – the SCPs – which contain routing and other processing instructions for toll free calls.¹⁸

7. *SMS Administrator.* The BOCs formed the SMS Management Team (SMT), which comprises a representative of each of the BOCs, to manage all aspects of SMS service.¹⁹ In response to the Commission’s 1993 mandate to create a centralized database system, the SMT selected Database Service Management, Inc. (DSMI) to serve as the SMS administrator.

8. In 1996, Congress added to the Communications Act the neutrality provisions of section 251(e) as part of its effort to open local markets to competition.²⁰ Section 251(e)(1) requires the

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para. 18 (1997) (*Toll Free Second Report and Order*); see also 47 U.S.C. §§ 151, 251(e). Toll free service is an interexchange service in which subscribers agree in advance to pay for all calls made to them using a predesignated toll free telephone number. See *Toll Free Fifth Report and Order*, 15 FCC Rcd at 11940, para. 2.

¹⁰ *Comptel Declaratory Ruling*, Order, 8 FCC Rcd 1423 (1993). For a detailed discussion of the toll free administration system, see *Toll Free Fifth Report and Order*, 15 FCC Rcd at 11941-44, paras. 3-9.

¹¹ *Comptel Declaratory Ruling*, 8 FCC Rcd at 1426-27.

¹² See *Toll-Free Service Access Codes*, CC Docket No. 95-155, Order on Reconsideration, 22 FCC Rcd 22188, 22188, para. 2 (2007).

¹³ The tariffed service is described as “a system which is used to update deployed databases,” and is the “focal point for initial service provisioning and all subsequent changes to the toll-free subscriber’s service.” It “supports number administration, creation and modification of customer records.” SMS Tariff at 47.

¹⁴ SMS/800 Petition at 2-3. The SMS Tariff also sets forth the regulations, rates, and charges applicable to the toll free services offered to RespOrgs. See SMS Tariff § 1.1. By detailing the criteria for which RespOrgs may gain access to the SMS system, the tariff seeks to ensure that toll free numbers are administered in a competitively neutral manner. See *generally id.* § 2.

¹⁵ *Id.* § 4.2.

¹⁶ *Id.*

¹⁷ See *800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services*, CC Docket Nos. 93-129, 86-10, Report and Order, 11 FCC Rcd 15227, 15233, para. 10 (1996).

¹⁸ SMS/800 Petition at 2; see also *Toll Free Fifth Report and Order*, 15 FCC Rcd at 11941, para. 2.

¹⁹ See *Toll Free Fifth Report and Order*, 15 FCC Rcd at 11941, para. 3.

²⁰ See 47 U.S.C. § 251(e).

Commission to “create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis.”²¹ The following year, the Commission issued the *Toll Free Second Report and Order*, in which it sought comment on who should administer the SMS in light of the requirement of section 251(e) that the Commission create or designate one or more “impartial” entities to administer telecommunications numbering.²² The Commission eventually concluded that the administrator at the time, DSMI (then a subsidiary of the BOC-owned Bellcore, now Telcordia), did not qualify as an impartial administrator as then structured, and directed the North American Numbering Council (NANC) to recommend a new SMS administrator.²³ In 1998, the NANC recommended that DSMI remain the SMS administrator. It noted that Bellcore had recently been sold to Science Applications International Corporation, which was not identified with any particular segment of the telecommunications industry.²⁴ In 2000, the Commission accepted the NANC recommendation. The Commission used the same criteria first applied to evaluate the neutrality of the North American Numbering Plan Administrator and determined that DSMI met “the impartiality requirements in section 251(e)(1) of the Act, and thus may continue to serve as the toll free database administrator.”²⁵

9. DSMI continued to serve as the SMS administrator on behalf of the BOCs until January 28, 2008. At this time, the SMT created the nonprofit membership corporation, SMS/800, Inc., to manage the SMS on behalf of the BOCs.²⁶ Since the January 2008 creation of SMS/800, Inc., DSMI has continued to serve as the SMS administrator under a new contract with SMS/800, Inc. rather than the BOCs.²⁷

10. *Roles of SMS/800, Inc. and DSMI.* SMS/800, Inc. is a nonprofit membership corporation consisting of one representative from each of the three BOCs. The company is responsible for the overall management of the SMS and has final authority on all SMS-related matters.²⁸ DSMI is responsible for operation and maintenance of the SMS in its capacity as SMS administrator.²⁹

²¹ See 47 U.S.C. § 251(e)(1). We use the term “neutral SMS administrator” when discussing the neutrality requirement imposed on the SMS administrator.

²² See *Toll Free Second Report and Order*, 12 FCC Rcd at 11162.

²³ See *Toll Free Access Codes*, CC Docket No. 95-155, Third Report and Order, 12 FCC Rcd 23040 (1997) (*Third Report and Order*).

²⁴ Letter from Alan C. Hasselwander, Chairman, North American Numbering Council, to A. Richard Metzger, Jr., Chief, Common Carrier Bureau, CC Docket No. 95-155 (filed Mar. 25, 1998).

²⁵ See *Toll Free Fifth Report and Order*, 15 FCC Rcd at 11939.

²⁶ See SMS/800, Inc., *History of SMS/800*, SMS/800 (2011), <http://www.sms800.com/Controls/NAC/Historyofsms800.aspx> (last visited Nov. 1, 2013).

²⁷ See SMS/800 Petition at 3.

²⁸ See SMS/800, Inc., *Who is SMS/800?*, SMS/800 (2011), <http://www.sms800.com/Controls/NAC/Whoissms800.aspx> (last visited Nov. 1, 2013).

²⁹ DSMI is responsible for performing four primary functions. First, it monitors toll free number utilization data to determine if sufficient toll free numbers are available to meet market needs. Second, DSMI ensures that the mainframe of the SMS database, as well as the associated servers and other hardware and software components, are maintained and upgraded as needed to promote efficiency. Third, DSMI helps to ensure the neutral distribution of toll free numbers by reviewing, *inter alia*, software enhancements, vendor contracts, and proposed amendments to the SMS Tariff to ascertain whether any issues exist that may compromise neutrality. Finally, DSMI acts as an interface with the Commission and other regulatory bodies by responding to agency subpoenas, inquiries from RespOrgs or other interested parties, and communicating with the Commission where appropriate. See DSMI Comments at 1-2.

B. SMS/800, Inc. Petition

11. On September 13, 2012, SMS/800, Inc. filed a request to change its membership and governance.³⁰ SMS/800, Inc. proposes to change control of the corporation by (1) expanding its membership beyond the BOCs, and (2) restructuring its Board to include representatives from RespOrgs and SCP Owner/Operators, as well as independent non-industry members.³¹ As part of its Petition, SMS/800, Inc. further requests to take over tariff filing responsibilities from the BOCs, and later to assume the role of neutral SMS administrator once its membership and governance structure have been altered.³² We discuss each element of the SMS/800, Inc. Petition below.

1. Change of Membership and Governance Structure

12. *Corporate Membership.* SMS/800, Inc. is organized as a nonprofit membership corporation with the three BOCs as the only members.³³ Under the proposed plan, any RespOrg in good standing with SMS/800, Inc.³⁴ and each of the eight SCP Owner/Operators in good standing with SMS/800, Inc.³⁵ would be eligible for membership in the corporation.

13. *New Board Structure.* The Petition proposes a three-year phased implementation of a new Board for SMS/800, Inc.³⁶ The company's Board currently consists of one representative from each of the three BOCs.³⁷ Under the proposed plan, the new Board would consist of 12 seats in its first year: one elected seat filled by a representative of a large RespOrg;³⁸ one elected seat filled by a representative of a small RespOrg;³⁹ one elected seat filled by a representative of an SCP Owner/Operator; one elected at-large seat filled by a representative of any RespOrg or SCP Owner/Operator; four seats filled by independent directors appointed by the rest of the Board; one seat filled by the Chief Executive Officer (CEO) of SMS/800, Inc.; and three seats filled by representatives from each of the BOCs.⁴⁰ In its second year, the BOCs would give up one seat, leaving two BOC representatives on the Board.⁴¹ By the end of the third year, the remaining two BOC seats would be eliminated and replaced with one at-large seat. Thus, at the end of the three-year implementation period, there would be ten Board members and no seats would be reserved specifically for a BOC. Each seat would have one vote on the Board, and no single

³⁰ See generally SMS/800 Petition.

³¹ *Id.* at 4-5.

³² *Id.* at 10-20.

³³ See *id.* at 4.

³⁴ In the Petition, a RespOrg is considered to be in "good standing" if it has not ever had service suspended pursuant to the terms of the SMS Tariff. See SMS/800 Petition at 5 n.10. *But see* para. 33, *infra*, for further discussion.

³⁵ In the Petition, an SCP Owner/Operator is considered to be in "good standing" if it is not in breach of its contract with SMS/800, Inc. See SMS/800 Petition at 5 n.11.

³⁶ See Appendices A and B for diagrams of the proposed Board structure and election cycle and SMS/800 Petition at Exhibit A, pp. 28-29.

³⁷ See SMS/800 Petition at 5.

³⁸ A "large" RespOrg is defined as one that controls more than the mean number of toll free numbers as of the most recent report preceding in a given nomination period. See *id.* at 5 n.13.

³⁹ A "small" RespOrg is defined as one that controls fewer than the mean number of toll free numbers as of the most recent report preceding in a given nomination period. See *id.* at 5 n.14.

⁴⁰ See *id.* at 5.

⁴¹ *Id.*

company would be allowed to hold more than one elected seat, unless that company held both a RespOrg seat and an SCP Owner/Operator seat.⁴²

14. Once the new Board is established, the Petition provides for an election cycle with staggered terms and no term limits. In the first year, the two RespOrg seats and the SCP seat would be filled by directors elected to three-year terms. The at-large seat would be filled by a director elected to a one-year term in both the first and second years. In the third year, the two at-large seats would be filled by directors elected to three-year terms.⁴³

15. *Board Eligibility.* The Petition provides that candidates for elected Board seats could nominate themselves or be nominated by a Nominating Committee. Each candidate would be required to satisfy the following: be employed by an entity in good standing with SMS/800, Inc.; demonstrate the support of his or her employer organization; and disclose certain personal information, such as affiliations, citizenship status, criminal convictions, and regulatory enforcement actions. According to the Petition, candidates must also disclose any regulatory enforcement actions taken against their employer organization.⁴⁴ In addition, the Nominating Committee would consider each candidate's commitment to the toll free industry as a whole, willingness and ability to devote time to serve on the Board, and capacity for independent judgment in fulfilling the fiduciary obligations of the director role.⁴⁵

16. *Selection of Nominating Committee.* Under the proposed plan, the Nominating Committee for the initial Board would consist of one current Board member, one industry member appointed by the current Board, and the CEO of SMS/800, Inc. Going forward, the Petition provides that the seated Board would determine the composition of each future Nominating Committee, although no organization would be permitted to have more than one representative on the Nominating Committee at any given time.⁴⁶ During a set period of time preceding each election, the Nominating Committee would accept expressions of interest from and recruit candidates who meet the eligibility and service criteria. Self-nominating candidates would have to register their candidacy through the SMS/800, Inc. website.⁴⁷ The Nominating Committee would then assemble the slate of candidates.⁴⁸ Each candidate would be required to submit the information set forth above. According to the Petition, candidates would also be required to disclose any record of criminal convictions or of formal Commission investigations into the candidate, the candidate's employer, or any previous employer of the candidate. Finally, each candidate would be required to submit a letter of support from his employer entity.⁴⁹

17. *Selection of Board Members.* The Petition provides that the Nominating Committee would announce the final slate of candidates at least 10 calendar days before the election, and voting would take place through an online application using an electronic ballot. For the RespOrg and SCP Owner/Operator seats, each RespOrg and SCP Owner/Operator member of SMS/800, Inc. would have one vote. For the at-large seats, in the first two years, each RespOrg and SCP Owner/Operator would also

⁴² See *id.* at 6. The three BOCs will remain eligible to compete for the at-large Board seats and the seats reserved for RespOrgs, even after the guaranteed BOC seats are eliminated. However, following the restructure, the BOCs could not constitute a majority of the proposed ten-person Board since there will only be five elected seats on the proposed Board.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 6-7.

⁴⁶ See *id.* at 7.

⁴⁷ *Id.*

⁴⁸ No Nominating Committee member would be eligible for nomination in an election for which that member participated in selecting the slate of candidates. *Id.*

⁴⁹ *Id.*

have one vote.⁵⁰ Under the proposed plan, beginning in the third year of the proposed transition, the two at-large seats would be filled by proportional representation, with each entity receiving one vote for each toll free number it controlled. One existing Board member, the SMS/800, Inc. CEO, and the SMS/800, Inc. General Counsel would oversee the election process and tally the votes, announcing the results within seven calendar days of the close of the voting period.⁵¹

18. *Independent Directors.* Following the election, the new Board members would be charged with appointing the four independent directors.⁵² Under the proposed plan, the independent directors would have to demonstrate that they have no current or recent affiliation with members or participants in the toll free industry, that they have experience in corporate governance, and that they have expertise in some other areas relevant to SMS/800, Inc.'s business, such as general telecommunications, finance, technology, IT, or startup and emerging company development.⁵³

19. *Board Compensation.* Although elected directors would receive no compensation for their Board service, they would be reimbursed by SMS/800, Inc. for their reasonable expenses related to Board activities.⁵⁴ Independent directors would receive "appropriate compensation" as determined by the other Board members.⁵⁵

20. *Benefits of the Proposed Restructuring.* SMS/800, Inc. maintains that the proposed membership and governance structure will help serve the public interest by expanding control of the company to the toll free industry at large. SMS/800, Inc. argues further that this expansion will make the provision of toll free service more representative of the full industry served by the SMS.⁵⁶ It notes further that the gradual phase-out of guaranteed BOC representation on the Board will help ensure a seamless transition of control and prevent disruptions in the provision of SMS service.⁵⁷

2. Transfer of Tariff Filing Authority

21. Since 1993, the BOCs have offered access to the SMS through the SMS Tariff filed with the Commission.⁵⁸ This tariff sets forth the regulations, rates, and charges applicable to SMS services, and describes the features and functions of the SMS. It also establishes RespOrg responsibilities and eligibility criteria, and prohibits unlawful use of the system.⁵⁹ The SMS Tariff further sets forth the regulations, rates, and charges applicable to the toll free services offered to RespOrgs.⁶⁰ The tariff also lists both the monthly and non-recurring charges for database access and other SMS services.⁶¹

⁵⁰ *Id.* at 8.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 7-8.

⁵⁵ *Id.* at 8.

⁵⁶ *Id.* at 8-9.

⁵⁷ *Id.* at 9.

⁵⁸ *See supra* notes 13-14.

⁵⁹ SMS/800 Petition at 2-3.

⁶⁰ *See* SMS Tariff at § 1.1. By detailing the criteria for which RespOrgs may gain access to the SMS system, the tariff seeks to ensure that toll free numbers are administered in a competitively neutral manner. *See generally id.* at § 2.

⁶¹ *Id.* at § 4.2.

22. Currently, the BOCs are responsible for jointly filing and maintaining the SMS Tariff.⁶² However, the Petition proposes to transfer this tariff filing responsibility from the BOCs to SMS/800, Inc.⁶³ SMS/800, Inc. proposes to transfer responsibility for filing and maintaining the SMS Tariff from the BOCs to SMS/800, Inc. by filing a joint transfer of control application under section 214 of the Act and section 63.03 of the Commission's rules.⁶⁴

3. Neutral SMS Administrator

23. SMS/800, Inc. proposes to assume the role of neutral SMS administrator as it restructures its membership and governance and assumes responsibility for filing and maintaining the SMS Tariff.⁶⁵ SMS/800, Inc. argues that it should administer SMS service directly, instead of contracting with a third party such as DSMI. Although SMS/800, Inc. currently contracts with DSMI to serve as neutral SMS administrator and to support its operation of the SMS, SMS/800, Inc. currently runs the day-to-day operations of the SMS service, holds the contracts with the SCP Owner/Operators, and holds the contracts with the third-party vendors that provide the operational components of the SMS service.⁶⁶

24. SMS/800, Inc. argues that allowing it to assume the role of neutral SMS administrator would result in more efficient administration and provision of SMS service, since the company already has direct access to and control of the SMS database and currently runs the operations and vendor contracts of the SMS service. SMS/800, Inc. argues further that because the company as restructured would be directed by the toll free industry at-large, rather than by the BOCs alone, and because service would be provided under the strict terms of the SMS Tariff, SMS/800, Inc. as restructured would qualify as a neutral administrator under section 251(e)(1) of the Act.⁶⁷

4. Comments on the Petition

25. On September 17, 2012, the Wireline Competition Bureau (Bureau) released a Public Notice seeking comment on the SMS/800, Inc. Petition.⁶⁸ The record uniformly supports granting the

⁶² When the Commission decided that SMS service must be tariffed, it assigned tariff filing responsibility to the BOCs because they "control[ed] all fundamental aspects of SMS/800 access." *Comptel Declaratory Ruling*, 8 FCC Rcd at 1427, para. 31.

⁶³ SMS/800 Petition at 10.

⁶⁴ 47 U.S.C. § 214; 47 C.F.R. § 63.03; *see also infra* paras. 34-36 for a discussion of the Commission's treatment of the transfer of responsibility for filing and maintaining the tariff and operating authority for SMS services from the BOCs to SMS/800, Inc.

⁶⁵ *Id.* at 16.

⁶⁶ *Id.*; *see also* CLEC Commenters Comments at 4.

⁶⁷ SMS/800 Petition at 16.

⁶⁸ *Wireline Competition Bureau Seeks Comment on SMS/800, Inc. Petition to Change the Composition of SMS/800, Inc.*, CC Docket No. 95-155, WC Docket No. 12-260, Public Notice, 27 FCC Rcd 11105 (2012) (*SMS/800, Inc. Public Notice*). The following parties filed comments in this proceeding: DSMI; HyperCube Telecom, LLC, Americatel Corporation, Matrix Telecom, Inc., Excel Telecommunications, Inc., and U.S. TelePacific Corporation d/b/a TelePacific Communications (CLEC Commenters); ICIM Corporation d/b/a Indatus (Indatus); OneStream Networks, LLC (OneStream); Signal One; Single One, Call-Em-All, LLC, MessageVision, FaxCore, Inc. SIPxchange, Forethought, ComAudit Services, FreeConferenceCall.com, Telecentris, Global Convergence Solutions, Cardinal Point Communications, Computer Telephony Innovations, CallSource, Fractal, LLC, EC Data Systems, Inc., ExpectMedia, L2Networks, Corporation, Dial 800, Telecompute Corporation, Natural Networks, Mongoose Metrics, MessageVision, Baltimore-Washington Telephone Company, IDictate, Easy Link, Communicateco, Selloxx, Inc., Nexxphase, Sandler Partners, iBasis, BinFone Telecom, Conference America, Inc., Network Enhanced Telecom, LLP, YourTel America, Midcontinent Communications, and Rick Sanchez (Joint Commenters); Disaster Recovery Center, Inc. d/b/a/ Telecom Recovery (Telecom Recovery); and the SMS/800, Inc. Transition Committee (Transition Committee). The Transition Committee consists of representatives from ATL

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Petition to change the composition of SMS/800, Inc. from an organization operated and overseen primarily by the BOCs to one more representative of the toll free industry, arguing that the proposed restructuring will “facilitate a smooth transition, . . . enhance the toll free services customer experience and . . . serve the public interest, convenience, and necessity.”⁶⁹ The CLEC Commenters note further that the expansion proposed in the Petition will ensure that all industry participants have an opportunity to become members of SMS/800, Inc. and be represented on its Board in a balanced manner.⁷⁰ They also note that the process SMS/800, Inc. developed to complete the proposed expansion sets forth a reasonable nominating process and sufficient candidate criteria to assure fair representation on the SMS/800, Inc. Board and a seamless transition of control.⁷¹ DSMI, the current SMS administrator, filed comments outlining the major roles and responsibilities it performs to assist the Commission as it considers the SMS/800 Petition.⁷²

26. On March 15, 2013, the Bureau released a second Public Notice seeking further comment on the SMS/800, Inc. Petition, in particular, SMS/800, Inc.’s neutral administrator and tariff filing proposal.⁷³ These comments uniformly support SMS/800, Inc.’s request to assume tariff filing responsibility for the SMS Tariff and to assume the role of neutral SMS administrator. The commenters argue that SMS/800, Inc. as restructured would meet the Commission’s neutrality requirements, and that the transfer of tariff filing responsibilities, along with assuming the role of neutral SMS administrator, would streamline the provision of SMS service by eliminating the need for an additional contracting party.⁷⁴

III. DISCUSSION

27. We grant SMS/800, Inc.’s request to expand its corporate membership and restructure its Board to include representatives from RespOrgs, SCP Owner/Operators, and independent non-industry members, subject to modifications and oversight requirements discussed below.⁷⁵ We also grant SMS/800, Inc.’s request to assume tariff filing responsibility from the BOCs upon release of this Order.⁷⁶ We further grant SMS/800, Inc.’s request to assume the role of neutral SMS administrator once the new twelve-member Board is in place.

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Communications, Grande Communications, Verizon, Windstream Corporation, Telesmart Networks, 800 Response Information Services, Hawaiian Telcom, and Level 3 Communications, LLC.

⁶⁹ See Indatus at 1; Joint Commenters Comments at 1; Signal One Comments at 1; Telecom Recovery Comments at 1; see also CLEC Commenters Comments at 1; OneStream Comments at 1; Transition Committee Comments at 1.

⁷⁰ CLEC Commenters Comments at 2.

⁷¹ *Id.* at 3.

⁷² See DSMI Comments at 1-2; see also Letter from William T. O’Brien, Counsel for DSMI, to Ann Stevens, Deputy Chief, Competition Policy Division, Wireline Competition Bureau, Docket No. 12-260, at 2 (filed Apr. 23, 2013) (stating that while DSMI has been honored to serve as SMS administrator, it wishes to be relieved of that responsibility as soon as possible.).

⁷³ *Wireline Competition Bureau Seeks Comment on SMS/800, Inc. Proposal to Become Toll Free Database Neutral Administrator and to Transfer Tariffing Responsibilities*, CC Docket No. 95-155, WC Docket No. 12-260, Public Notice, 28 FCC Rcd 2569 (2013). The following parties filed comments in response to the second Public Notice: Hypercube Telecom, LLC, Americatel Corporation, Matrix Telecom, Inc., Excel Telecommunications, Inc., and U.S. TelePacific Corp. d/b/a TelePacific Communications (Joint Commenters); and COMPTTEL.

⁷⁴ Joint Commenters Comments at 2-3; COMPTTEL Comments at 2-5.

⁷⁵ See SMS/800 Petition at 4-6.

⁷⁶ 47 U.S.C. § 214; 47 C.F.R. § 63.03.

A. SMS/800, Inc. Corporate Restructuring

28. We find that expanding membership and control of SMS/800, Inc. from the three BOCs to the broader toll free industry will make the entity more representative of and responsive to the industry as a whole.⁷⁷ Moreover, industry interests will be balanced by a more diversified Board that will include independent, non-industry members as well as the SMS/800, Inc.'s CEO.

29. As commenters note, SMS/800, Inc. has established a reasonable nominating process and sufficiently stringent candidate criteria to "assure fair representation and a seamless transition."⁷⁸ The gradual phasing out of guaranteed BOC representation on the Board will preserve continuity during the transition process, minimize confusion and inefficiency, maintain stability in operating costs, and prevent disruptions in the provision of SMS service. Therefore, we find that SMS/800, Inc.'s proposal will facilitate a smooth transition to the restructured Board, enhance the toll free services customer experience and, as discussed in the record, will serve the public interest.⁷⁹ The Commission has previously delegated to the Bureau various number administration responsibilities. Delegation to oversee SMS/800 Inc. during and after the transition to new membership and governance is consistent with these numbering responsibilities.⁸⁰

30. *Requirements for Corporate Restructuring.* We grant SMS/800, Inc.'s Petition, subject to the requirements described below to ensure a smooth transition and efficient administration of toll free numbers consistent with section 251(e).⁸¹ We also allow SMS/800, Inc. to assume the role of neutral administrator once the new twelve-member Board is in place. However, our ongoing approval is conditioned upon transitioning the Board as discussed herein, as well as meeting these requirements while carrying out the role of neutral administrator. We impose the following transitional and ongoing

⁷⁷ CLEC Commenters Comments at 2.

⁷⁸ *Id.* at 3.

⁷⁹ See Indatus Comments at 1; Joint Commenters Comments at 1; Signal One Comments at 1; Telecom Recovery Comments at 1. See also CLEC Commenters Comments at 1; OneStream Comments at 1; Transition Committee Comments at 1.

⁸⁰ 47 U.S.C. § 155(c); see also 47 C.F.R. §§ 0.91 and 0.291. For example, the Bureau was delegated authority to oversee several limited toll free reassignment proceedings, specifically involving 1-800-RED-CROSS and three suicide prevention hotlines. See *Toll Free Service Access Codes*, CC Docket No. 95-155, Order, 21 FCC Rcd 9925, 9925-26, paras. 203 (2006); *U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration Petition for Permanent Reassignment of Three Toll Free Suicide Prevention Hotline Numbers; Toll Free Service Access Codes*, WC Docket No. 07-271, CC Docket No. 95-155, Order, 27 FCC Rcd 2965, 2967, para. 5 (2012). In addition, the Commission delegated authority to the Bureau to review NANC recommendations relating to local number portability, and to take actions to select the next local number portability administrator. See *Local Number Portability Porting Interval and Validation Requirements; Telephone Number Portability*, WC Docket No. 07-224, CC Docket No. 95-116, Report and Order, 25 FCC Rcd 6953, 6965, para. 22 (2010); see generally *Petition of Telcordia Technologies Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration and to End the NANPM LLC's Interim Role in Number Portability Administration Contract; Telephone Number Portability*, WC Docket No. 09-109, CC Docket No. 95-116, Order and Request for Comment, 26 FCC Rcd 3685 (2011). See also 47 C.F.R. § 52.12 (discussing the Commission oversight of the NANP Administrator (NANPA)); *Administration of the North American Numbering Plan; Toll Free Service Access Codes*, CC Docket Nos. 99-237, 95-155, Third Report and Order, 12 FCC Rcd 23040, 23049, para. 15 (1997) (delegating authority to the Office of the Managing Director, the Wireline Competition Bureau, the Consumer and Governmental Affairs Bureau, and the Office of General Counsel to select the NANPA based on a competitive bidding process).

⁸¹ These requirements are consistent with section 251(e)(1) of the Act, which gives the Commission exclusive jurisdiction over telephone number administration in the United States, including administration of toll free numbers. 47 U.S.C. § 251(e)(1).

requirements pursuant to section 251(e) of the Act and section 52.9 and 52.101-111 of the Commission's rules.⁸²

31. To ensure that SMS/800, Inc. continues to provide high quality toll free service without disruption, and consistent with the Commission's responsibilities under section 251(e) to make numbers available on an "equitable basis,"⁸³ the Bureau will oversee the Board selection process as well as SMS/800, Inc. The protections identified below will help us execute this statutory responsibility. Specifically, the pool of potential candidates for Board membership is increasing to include hundreds of RespOrgs, some of which are not carriers and thus may not currently be subject to the same Commission oversight and enforcement authority. Therefore, we impose the following requirements on SMS/800, Inc. These requirements apply during the three-year transition and on an ongoing basis.

- SMS/800, Inc. must submit to the Bureau the final slate of Board member candidates prior to announcing their candidacy to the public. Specifically, SMS/800, Inc. must file a letter in the above-referenced dockets that includes the names of each candidate for board membership, along with background information on each candidate demonstrating the candidate's fitness to serve as a board member.⁸⁴
- SMS/800, Inc. must confirm to the Bureau that each nominee to the Board is not an entity that is currently connected – or connected during the previous three years – to a matter before the Commission that would call into question the nominee's fitness to serve on the Board.⁸⁵ Such matters would include violations of Commission rules, like hoarding, warehousing, or brokering numbers. SMS/800, Inc. (and subsequently the Bureau) should take into account a potential candidate's overall past performance when determining eligibility to serve on the Board.⁸⁶ The Bureau has the discretion to identify concerns about a nominee's fitness to serve and may raise those with the SMS/800, Inc. Board or members thereof.⁸⁷ Based on the above criteria, the Bureau may reject the membership of any candidate it deems unfit to serve upon the Board. Once nominated and selected, each Board member must retain fitness for membership during his or her time on the Board.
- In order for an employee of an entity to obtain a position on the Board, the employee of the entity must provide the Bureau with the entity's Federal Registration Number (FRN) prior to

⁸² See 47 C.F.R. §§ 52.9 (general requirements that numbers be distributed equitably); 52.101 (toll free definitions); 52.103 (status categories of toll free numbers); 52.105 (warehousing prohibition); 52.107 (hoarding and brokering prohibition); 52.109 (cap on toll free number reservations); 52.111 (first-come, first-served toll free number assignment).

⁸³ 47 U.S.C. § 251(e).

⁸⁴ SMS/800, Inc. may seek confidential treatment of this submission, pursuant to section 0.459 of the Commission's Rules. See 47 C.F.R. § 0.459.

⁸⁵ The Commission has used a three-year period in other contexts as an appropriate period to cure past bad behavior. See, e.g., *Bay Springs Communications, Inc.*, EB File No. EB-11-IH-0610, Order, 27 FCC Rcd 2029 (2012) (requiring a three-year compliance plan as part of a consent decree); see also *CBS Radio East Inc., Licensee of Station KDKA(AM), Pittsburgh, Pennsylvania*, EB File No. EB-07-IH-9488, Order, 25 FCC Rcd 4390 (2010); 47 CFR § 54.8(g) (three-year time period for debarment from involvement with the schools and libraries support mechanism, the high-cost support mechanism, the rural health care support mechanism, and the low-income support mechanism); Letter from Theresa Z. Cavanaugh, Chief of the Investigations and Hearings Division, Enforcement Bureau, FCC, to Ms. Denisa Babcock, Notice of Debarment, EB File No. EB-12-IH-1396, 28 FCC Rcd 1123 (2013) (notice of a three-year debarment from the schools and libraries universal service support mechanism for conviction of criminal conduct).

⁸⁶ See SMS/800 Petition at 6. The Nominating Committee may consider relevant factors not only of the individual candidate, but also of the candidate's employer, such as the employer's past performance. *Id.*

⁸⁷ The Bureau, for example, may be aware of pending enforcement action that is not public.

requesting membership.⁸⁸ The Bureau will use this FRN to review the status of any delinquent debts owed by any RespOrg and SCP Owner/Operator requesting membership to the SMS/800, Inc. Board.

- Board members may not access proprietary information in the SMS database except under extraordinary circumstances where such information is necessary to execute Board decisions. Board members may not convey proprietary information to non-Board members.
- The Bureau may require periodic accounting of compensation and expenses and may require SMS/800, Inc. to demonstrate that these expenditures are reasonable in the event that concerns about costs arise. The Bureau may also require SMS/800, Inc. to reduce its expenditures if the company fails to make such a demonstration.⁸⁹
- SMS/800, Inc. will provide to the Bureau information on any proposed independent director that has any relationship with other industry members or telecommunications providers prior to announcing the director's names to the public. That information must include any current or recent associations with other industry members and the candidate's involvement in areas relevant to providing SMS service, general telecommunications, and technology. When requested, SMS/800, Inc. must provide the Bureau with any information involving SMS/800, Inc.'s membership or governance.

32. The Commission is committed to ensuring that SMS service continues during the transition without disruption and that the new Board will meet the needs of all members of the toll free industry. We balance the need to ensure integrity in the process of distributing toll free numbers with our commitment to avoid unnecessary regulation. Therefore, during the transition, we include some additional requirements to ensure a seamless transition. SMS/800, Inc. must provide the Bureau a timeline for selecting candidates for the Board, inform the Bureau of its progress at each step, provide the Bureau the criteria used in appointing independent directors, and identify the officials overseeing the

⁸⁸ This requirement only applies if the entity is required by Commission rules to have an FRN. *See* 47 C.F.R. § 1.8002 for a list of the entities that are obligated to obtain an FRN (requiring “anyone doing business with the Commission” to obtain an FRN). Note that candidates for the four independent seats are not required to register and obtain an FRN prior to serving on the Board. FRNs may be obtained through the Commission Registration System (CORES) at <https://apps.fcc.gov/coresWeb/publicHome.do>.

⁸⁹ We do not expect the proposed restructuring of the SMS/800, Inc.'s membership and Board to affect the net cost of operating that entity or providing SMS service. While the five elected directors will receive no compensation for their service on the Board, SMS/800, Inc. will reimburse them for their reasonable expenses related to Board activities. In addition, the four independent, non-industry directors will receive “appropriate compensation” as determined by the remaining Board members. *See* SMS/800 Petition at 7-8. These compensation and reimbursement provisions are consistent with the approach used today. *See* Letter from Melanie L. Bostwick, Counsel, SMS/800, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 12-260 (filed Oct. 31, 2012). Despite the increase in Board expenses, SMS/800, Inc. expects to see operational cost reductions because SMS/800, Inc., rather than DSMT, the BOCs, or outside consultants, will be performing most necessary operations. In addition, the company does not expect the proposed restructuring to affect net costs for data center operations or software support. *Id.* The confidential financial projections filed with the Commission demonstrate no increase in SMS/800, Inc.'s administrative and operational costs for the first year following the implementation of the expanded Board structure. Based on these representations, the Commission does not expect that the proposed expansion of SMS/800, Inc.'s corporate membership and Board will materially alter its operational and administrative costs or the price that toll free customers pay for SMS service. On the contrary, we anticipate that the added administrative efficiencies resulting from the restructured SMS/800, Inc. may in fact decrease expenses. Because section 61.38 of the Commission's rules requires the tariffed rates charged to RespOrgs to be based on the cost of providing SMS service, any savings realized as a result of SMS/800, Inc.'s corporate restructuring is likely to be reflected in lower tariffed rates for RespOrgs. *See* 47 C.F.R. § 61.38 (requiring supporting information for tariff changes).

election process and the procedure for tallying votes. These requirements will remain in effect for three years.

33. We direct SMS/800, Inc. to modify the definition of “good standing” in its relevant corporate documents so that a RespOrg that does not currently have its service suspended will be deemed to be in good standing with SMS/800, Inc. for purposes of being a Board member.⁹⁰ According to the Petition, any RespOrg that has not had its service suspended pursuant to the terms of the SMS Tariff and any SCP Owner/Operator that is not in breach of its contract with SMS/800, Inc. is considered to be in good standing with the company.⁹¹ As described in the Petition, a RespOrg that had service suspended at any time would not be in good standing, regardless of how substantive the violation was, how recently it occurred, or whether the same management of the RespOrg remains in place. We find that our modification of the definition of “good standing” will provide adequate assurance of fitness to serve, without unnecessarily eliminating a RespOrg from being a potential Board member.

B. Transfer of Tariff Filing Authority

34. We grant SMS/800, Inc.’s request to assign responsibility for filing and maintaining the tariff, and operating authority for SMS services from the BOCs to SMS/800, Inc.⁹² As discussed above, the BOCs have offered access to the SMS through the SMS Tariff since 1993.⁹³ In the *CompTel Declaratory Ruling*, the Commission concluded that the BOCs should file a tariff for SMS services.⁹⁴ SMS/800, Inc. now seeks to assign the tariff from the BOCs to SMS/800, Inc. to reflect the proposed broader composition of SMS/800, Inc. No one objected to or raised concerns about assigning the existing tariff and operating authority for these services. We agree with commenters that allowing the restructured SMS/800, Inc. to assume responsibility for filing and maintaining the SMS Tariff will help streamline the provision of SMS service and will assist in holding SMS/800, Inc. accountable for the SMS services it will be providing.⁹⁵ In addition, SMS/800, Inc. will be subject to enforcement under our section 251(e) authority regarding number administration. Thus, SMS/800, Inc. will have the same authority, responsibility, and obligations for filing and enforcing the tariff, and for providing SMS access on reasonable and non-discriminatory terms and rates that the BOCs currently have.⁹⁶

35. Currently, the BOCs are the only members of SMS/800, Inc.⁹⁷ To the extent that the action discussed above is an assignment,⁹⁸ in these unique circumstances we view it as a pro forma

⁹⁰ See SMS/800 Petition at 5.

⁹¹ *Id.* at notes 10-11.

⁹² Petition at 3-4. SMS/800, Inc. states that it is a separate corporate entity that is a non-profit membership organization.

⁹³ See *supra* para. 5.

⁹⁴ *CompTel Declaratory Ruling*, 8 FCC Rcd at 1427, para. 31; see also COMPTTEL Comments at 4. The Commission previously determined that the service should be tariffed. No one has suggested that this service should not be tariffed, and we do not disturb the *CompTel Declaratory Ruling*’s findings here.

⁹⁵ COMPTTEL Comments at 4-5; Joint Commenters Comments at 2-3.

⁹⁶ Once SMS/800, Inc. alters its membership and governance structure as proposed, control over the company will pass from the BOCs to the RespOrgs, SCP Owner/Operators, and independent non-industry members on the company’s restructured Board. The BOCs state that none of these entities will individually have control over SMS/800, Inc.

⁹⁷ Petition at 3.

⁹⁸ Letter from Aaron Panner to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-260, CC Docket No. 95-155 (filed Sept. 4, 2013).

assignment.⁹⁹ Under our domestic section 214 transfer of control rules, a party is authorized to undertake a pro forma transaction without seeking Commission approval.¹⁰⁰

36. As described above, SMS/800, Inc. will expand its membership to all RespOrgs and SCP Owner/Operators.¹⁰¹ We expect that this action will result in the current members relinquishing 50 percent or more of their membership interests in SMS/800, Inc., with the result that SMS/800, Inc. will have significantly different membership control soon after it commences its transition plan. To the extent that section 214(a) of the Act is applicable, as the parties suggest, this membership change constitutes a “transfer of control” under our rules¹⁰² and a “transfer of lines” under section 214(a) of the Act.¹⁰³ To the extent necessary, we waive the standard 214 approval process¹⁰⁴ and instead address this proposal in a consolidated manner through this Order. We find that doing so is in the public interest because SMS/800, Inc.’s governance petition and proposed assumption of the tariff present a unique situation. The Commission has provided notice of the proposed transaction, and parties had the opportunity to comment in a manner consistent with our notice and comment procedures under section 63.03(a) of our rules.¹⁰⁵ In addition, we have already undertaken a broad-based review consistent with section 214(a) of the Act to determine whether the proposed transaction will serve the public interest, convenience, and necessity.¹⁰⁶

⁹⁹ 47 C.F.R. § 63.24(d) (“Transfers of control or assignments that do not result in a change in the actual controlling party are considered non-substantial or pro forma.”). In the *Comptel Declaratory Ruling*, the Commission had directed the BOCs to file a single tariff, *see Comptel Declaratory Ruling*, 8 FCC Rcd at 1427, para. 31. Because the service will now be tariffed by the nonprofit entity of which they will be the sole members initially, we view the matter as pro forma, but we do not suggest that other transactions involving joint activities would be so treated.

¹⁰⁰ 47 C.F.R. § 63.03(d).

¹⁰¹ Petition at 4-8.

¹⁰² 47 C.F.R. § 63.24(c) (“A change from 50 percent or more ownership to less than 50 percent ownership shall always be considered a transfer of control.”). Entities typically have to file a section 214 application with the Commission when transfer of control occurs, including when owners relinquish or significantly reduce their interests in an entity. *See Notice of Streamlined Domestic 214 Applications Granted, Domestic Section 214 Application Filed for Transfer of Control of Iowa Telecommunications Services, Inc. and Iowa Telecom Communications, Inc.*, WC Docket No. 04-157, Public Notice, 19 FCC Rcd 9704 (Wireline Comp. Bur. 2004); *Domestic Section 214 Application Filed for Transfer of Control of Iowa Telecommunications Services, Inc. and Iowa Telecom Communications, Inc.*, WC Docket No. 04-157, Public Notice, 19 FCC Rcd 8114 (Wireline Comp. Bur. 2004).

¹⁰³ 47 U.S.C. § 214(a). Because the parties proposed to comply with the requirements of section 214 here, we assume without deciding that they would apply.

¹⁰⁴ Section 63.03 of our rules sets out filing, notice, and review procedures for an application to approve a proposed domestic transfer of control. 47 C.F.R. § 63.03. We waive this rule on our own motion. Section 1.3 of our rules authorizes the Commission to suspend, revoke, amend, or waive a Commission rule for good cause shown. 47 C.F.R. § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown.”); *see also Northeast Cellular Telephone Co v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1969) (*citing WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (waivers must show special circumstances warranting a deviation from the general rule and show such a deviation will serve the public interest)).

¹⁰⁵ *See SMS/800, Inc. Public Notice*, 27 FCC Rcd 11105.

¹⁰⁶ 47 U.S.C. § 214(a); *see Applications of Softbank Corp, Starburst II, Inc., Sprint Nextel Corporation, and Clearwire Corporation for Consent to Transfer Control of Licenses and Authorizations*, IB Docket No. 12-343, Memorandum Opinion and Order, Declaratory Ruling and Order on Reconsideration, FCC 13-92, paras. 23-25 (2013) (stating the standard of review under section 214 of the Act for proposed transfers of control and explaining that, under this standard, the Commission determines whether a proposed transfer complies with specific provisions of the Act and Commission rules, and whether, on balance, any public interest harms outweigh any potential public interest benefits, including whether the public interest requires us to impose and enforce narrowly-tailored, transaction specific conditions) (internal citations omitted). We determine here that the proposed transfer of tariffing authority to a restructured SMS/800, Inc. complies with specific provisions of the Act and Commission rules, including the numbering impartiality requirements in section 251(e) of the Act and section 52.12 of the

(continued...)

To this end, we find that SMS/800, Inc.'s request to expand its corporate membership and restructure its Board to include representatives from RespOrgs, SCP Owner/Operators, and independent non-industry members will result in the tariff being held by an entity that is more representative of and responsive to the industry as a whole. We also subject the proposed expansion to specific modifications and oversight requirements. It is therefore unnecessary for SMS/800, Inc. to comply with section 63.03 of our rules regarding procedures for the filing, public notice, and review period associated with a domestic section 214 transfer of control application in order for us to evaluate the proposed transition we approve in this Order. We emphasize that SMS/800, Inc. is not relieved of any future section 214 obligations or rules to the extent that section applies to its activities,¹⁰⁷ and we direct it to notify the Commission of any deviations from the proposed governance structure specified in its petition.

37. Upon assuming tariff filing responsibility from the BOCs, we require SMS/800, Inc. to follow certain procedures. For one, SMS/800, Inc. must file within 35 days from the grant date its initial tariff adopting the SMS Tariff on not less than 15 days' notice.¹⁰⁸ SMS/800, Inc. may not make changes to the tariff other than the name change and must simultaneously cancel the SMS Tariff, pursuant to sections 61.87(a)(ii) and 61.171 of the Commission's rules.¹⁰⁹ Currently, the BOCs file each January 31 the SMS/800 tariff revisions on 15 days' notice. These revisions provide updated rates for SMS services based on a cost of service study, pursuant to section 61.38 of the Commission's rules, filed with the Commission as part of its Description and Justification.¹¹⁰ We require that SMS/800, Inc. continue this procedure.

38. Because SMS/800, Inc. will provide a non-competitive translation service for exchange access providers, it will be treated as dominant, subject to section 61.38 of the Commission's rules, and must file subsequent tariff revisions pursuant to the applicable Part 61 rules for a dominant carrier and be subject to the tariff filing requirements and enforcement provisions in the Act and the Commission's rules. Since SMS/800, Inc. is a nonprofit membership corporation, we require it, in its initial filing adopting the SMS Tariff, to include an explanation of how it plans to utilize or refund at the end of each calendar year any surplus retained after provisions have been made to cover its operating expenses. After the initial adopted tariff is filed and becomes effective, SMS/800, Inc. must continue to file tariff revisions once each calendar year on January 31 that update the rates for the service. Such filing must contain an updated cost of service study pursuant to section 61.38 of the Commission's rules. These tariff revisions must be filed on not less than 15 days' notice. In addition to the once a year tariff filing, as with any carrier, SMS/800, Inc. must file tariff revisions with the Commission and these revisions must become effective before SMS/800, Inc. is permitted to modify any rates, terms, or conditions. If SMS/800, Inc. files such tariff revisions, these revisions should also be filed on not less than 15 days' notice.

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Commission's rules. We do not find any harms and find that the benefits of SMS/800's assumption of tariffing authority will broaden participation in management of the SMS and allow SMS service provisioning to be more responsive to the needs of toll free users while reducing costs. We also condition our approval for the SMS/800, Inc. transition process on specific requirements related to Board member qualifications and potential reporting requirements for the accounting of Board compensation and expenses.

¹⁰⁷ See *supra* note 103.

¹⁰⁸ Although SMS/800, Inc. is permitted to file on 15 days' notice, we note that because it does not meet the definition of local exchange carrier pursuant to section 61.3(w) of the Commission's rules, its tariff is not eligible to receive "deemed lawful" status pursuant to section 204(a)(3) of the Act, 47 U.S.C. § 204(a)(3).

¹⁰⁹ 47 C.F.R. §§ 61.87(a)(ii), 61.171.

¹¹⁰ See 47 C.F.R. § 61.38; see also SMS/800, Inc. Tariff F.C.C. No. 1, Transmittal No. 39 (filed Jan. 31, 2013).

C. Neutral Administrator

39. In 1996, Congress added the neutrality provisions of section 251(e) to the Communications Act as part of its effort to open local markets to competition.¹¹¹ Section 251(e)(1) requires the Commission to “create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis.”¹¹² Under the Commission’s implementing rules an entity (1) may not be an affiliate of any telecommunications service providers or interconnected VoIP providers, and (2) may not issue a majority of its debt to, or derive a majority of its revenues from, any telecommunications service provider.¹¹³ An “affiliate” is defined as “a person that directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person.”¹¹⁴ “Control” is defined as having a 10 percent or greater equity interest in a company, having the power to vote 10 percent or more of the securities of a company, or having “the power to direct or cause the direction of the management and policies of” a person.¹¹⁵

40. The rules further provide that, notwithstanding the neutrality criteria described above, the numbering administrator “may be determined to be or not to be subject to undue influence by parties with a vested interest in the outcome of number administration and activities.”¹¹⁶ The Commission previously has exercised that discretion when it found DSMI to be neutral even though the Commission found that DSMI derived portions of its income from a telecommunications provider, and thus failed the second neutrality criteria. Despite failing the second criterion, the Commission determined that DSMI could act as SMS administrator under the unique terms of the toll free tariff. Specifically, because the tariff did not allow DSMI discretion to determine which RespOrgs could access or manage toll free numbers, the company could not be subject to undue influence and therefore qualified as a neutral SMS administrator.¹¹⁷

41. Applying the section 52.12 criteria used to evaluate neutrality below, we find that once the membership of SMS/800, Inc. has been expanded pursuant to the first year transition, SMS/800, Inc. would be impartial and therefore eligible to serve as neutral SMS administrator, provided that it offers service pursuant to the SMS Tariff and in accordance with the tariff’s terms and conditions and complies with the transitional and ongoing requirements set forth herein.¹¹⁸ Moreover, we find that allowing SMS/800, Inc. to assume the role of neutral SMS administrator will streamline the provision of SMS service and facilitate “efficient access to numbering resources”¹¹⁹ by eliminating the need to contract administrative services out to a third party.¹²⁰ We thus grant SMS/800, Inc.’s request to assume the role of neutral SMS administrator, once the new twelve-member Board is in place, provided that it restructures its membership and governance as discussed above, files and maintains the SMS Tariff, and adheres to its

¹¹¹ See 47 U.S.C. § 251(e).

¹¹² See 47 U.S.C. § 251(e)(1).

¹¹³ See 47 C.F.R. § 52.12(a)(1)(i)-(ii).

¹¹⁴ See 47 U.S.C. § 153(1); see also 47 C.F.R. § 52.12(a)(1)(i).

¹¹⁵ See 47 C.F.R. § 52.12(a)(1)(i)(A)-(C).

¹¹⁶ See 47 C.F.R. § 52.12(a)(1)(iii).

¹¹⁷ See *Toll Free Fifth Report and Order*, 15 FCC Rcd at 11948-49, paras. 23-25.

¹¹⁸ After the first year of the transition period there will be twelve Board members, four of which will be BOC designated seats. At this time, no Board member will have a 10 percent or greater voting interest. See *infra* Appendix A.

¹¹⁹ *Id.* at 11946, para. 17.

¹²⁰ See CLEC Commenters Comments at 2; Joint Commenters Comments at 3.

terms and conditions in administering SMS service.¹²¹ SMS/800, Inc. must continue its contract with DSMI until the new twelve-member Board is in place.

42. *First Criterion: Affiliate Relationship.* We are not convinced that SMS/800, Inc. satisfies the first neutrality criterion under section 52.12 of our rules. Commission rules provide that the SMS administrator “may not be an affiliate of any telecommunications service providers(s).”¹²² SMS/800, Inc. argues that, because the company is structured as a nonprofit membership corporation, it has no equity or securities.¹²³ SMS/800, Inc. also argues that, as restructured under the Petition, it would not be an “affiliate” of any telecommunications service providers or interconnected VoIP providers, because no one entity would hold an equity interest in the company or be able to exercise control over it.¹²⁴ While we agree with SMS/800, Inc. that no single entity will be able to control the actions of the restructured corporation or its Board, its membership will be comprised of individuals that represent companies, including telecommunications service providers, with a direct interest in access to toll free numbers. SMS/800, Inc. asserts, and we rely on its assertion, that it will not have stocks, securities, or other equity interests and thus does not meet the definition of an affiliate under section 52.12(a)(1)(i)(A) or (B). We note, however, that our definition also looks to whether a person possesses the power to direct or cause the direction of the management and policies of the SMS administrator by way of voting rights or some other means.¹²⁵ In this case, once the board is expanded, there will be twelve Board members, so none will have voting power of 10 percent or more. However, at the end of the three year transition period, each of the ten Board members will have 10 percent voting power on the Board and might have an incentive, acting alone or in concert, to use that power to “direct or cause the direction of the management and policies” for the benefit of his or her company’s interests.¹²⁶ Thus, the potential exists that some Board members would constitute an “affiliate” under section 52.12(a)(1)(i)(C).¹²⁷ Although we do not find that SMS/800, Inc. will satisfy the first neutrality criterion, we have flexibility to consider whether to determine, in a particular instance, the SMS administrator will be subject to “undue influence by parties with a vested interest in the outcome of numbering administration and activities.”¹²⁸ In this case, following the first year transition, no Board member will have more than a 10 percent voting interest on the Board and the rates and practices will be tariffed. We find that these protections are sufficient to address concerns regarding the first neutrality criterion.

43. *Second Criterion: Debt or Revenues From a Provider.* We find that SMS/800, Inc. satisfies the second neutrality criterion of section 52.12. SMS/800, Inc. argues that it will not “issue a majority of its debt to” or “derive a majority of its revenues from” any telecommunications service provider.¹²⁹ SMS/800, Inc. further states that while the company will derive “revenues” in connection with the operation of SMS from the user fees paid by RespOrgs and SCP Owner/Operators, no individual RespOrg or SCP Owner/Operator constitutes a majority of that customer segment. SMS/800, Inc. asserts

¹²¹ See *supra* paras. 30- 38.

¹²² 47 C.F.R. § 52.12(a)(1)(i).

¹²³ See SMS/800 Petition at 18; see also Letter from Aaron M. Panner, Counsel to SMS/800, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 95-155, WC Docket No. 12-260 at 4 (filed Nov. 20, 2012) (SMS/800 Nov. 20, 2012 Ex Parte Letter).

¹²⁴ SMS/800 Petition at 17.

¹²⁵ 47 C.F.R. § 52.12(a)(1)(i)(C).

¹²⁶ *Id.*

¹²⁷ By definition, the independent Board members are not affiliates with an industry member, but the SCP Owner/Operators and RespOrgs might be.

¹²⁸ 47 C.F.R. § 52.12(a)(1)(iii).

¹²⁹ See SMS/800 Petition at 19; see also SMS/800 Nov. 20, 2012 Ex Parte Letter at 5; 47 C.F.R. § 52.12(a)(1).

that the company does not issue debt, and we rely on that assertion.¹³⁰ Moreover, we find that the company will not derive a majority of its revenues from any single telecommunications service provider. Therefore, since SMS/800, Inc. meets both of these requirements and is consistent with the Commission's application of the section 52.12 neutrality criteria to DSMI in the *Toll Free Fifth Report and Order*, we find that SMS/800, Inc. satisfies the second neutrality criterion under section 52.12 of our rules.

44. *Commission Discretion to Consider Undue Influence.* We find that SMS/800, Inc. satisfies the neutrality criteria under section 52.12 of the Commission's rules so long as SMS/800, Inc. provides service pursuant to the SMS Tariff, adheres to the terms and conditions of the tariff, and complies with our transitional and ongoing requirements discussed above.¹³¹ SMS/800, Inc. argues that the SMS Tariff is structured to ensure that the administration of toll free numbers is competitively neutral, and that it will have no discretion to administer the SMS service in a manner inconsistent with the tariff once it files and maintains it. As the Commission has previously said, the "terms of the SMS/800 Tariff are uniquely structured to ensure that the administration of toll free numbers is competitively neutral."¹³² Therefore, as long as SMS/800, Inc. provides service pursuant to the SMS Tariff and adheres to all the tariff's terms and conditions in administering SMS service, we agree that it will not be subject to undue influence by any party with a vested interest in the outcome of numbering administration and activities.¹³³ We also expect SMS/800, Inc. to continue to perform all functions provided by DSMI, including providing any information requested by Commission staff.¹³⁴

45. The third criterion gives the Commission flexibility to consider the ability of one or more industry members to unduly influence the administrator's decisions. On the one hand, as we acknowledged in discussing the first neutrality criterion, Board members may have an incentive to influence SMS/800, Inc.'s management and policies for the benefit of their representative companies. Moreover, RespOrgs may comprise half of the Board and thus, if they vote as a block, could prevent SMS/800, Inc. from taking action. On the other hand, there are hundreds of RespOrgs with diverse business plans.¹³⁵ We have no reason to believe that the RespOrgs share a particular common goal or interest sufficient to cause them to create a voting block.¹³⁶ We find that the diverse nature of the Board, along with SMS/800, Inc.'s and all its members' obligations to adhere to the terms of the SMS Tariff, will serve to eliminate any undue influence.

46. Under the neutrality criteria set forth in section 52.12, the Commission may exercise its discretion to determine whether the SMS administrator will be subject to undue influence by parties with a vested interest in the outcome of numbering administration and activities. If this criterion is met, the entity may be deemed "impartial," notwithstanding its failure to meet the requirements of criterion one

¹³⁰ See SMS/800 Petition at 19.

¹³¹ See *supra* paras. 30-38.

¹³² *Toll Free Fifth Report and Order*, 15 FCC Rcd at 11948, para. 24. The Commission further explained that "[u]nder the tariff, the administration of toll free numbers is impartial because DSMI does not determine which RespOrgs may access or manage which toll free numbers. Rather, RespOrgs retrieve toll free numbers themselves, via computer interface." *Id.* at para. 25.

¹³³ SMS/800 Petition at 19.

¹³⁴ See *supra* note 29 (explaining that DSMI acts as an interface with the Commission); see also DSMI Apr. 23, 2013 *Ex Parte* Letter at 2 (stating that one of its primary functions is to report to the Commission).

¹³⁵ See Letter from Aaron M. Panner, Counsel to SMS/800, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 95-155, WC Docket No. 12-260 (filed Apr. 4, 2013) (stating that "RespOrgs are a diverse group with diverse interests. Moreover, at least one board member will be elected by SCP Owner/Operators, and, even if the individual elected is affiliated with an entity that is also a RespOrg, that member would be expected to reflect SCP Owner/Operators' interests.>").

¹³⁶ To the extent our predictive judgment is wrong, we can correct such concentration of power, for example, by changing the Board structure or composition.

and/or two.¹³⁷ We find on balance that SMS/800, Inc. will not be subject to undue influence once it has restructured, in accordance with the terms of this Order. We also find that the restructured SMS/800, Inc., governed by the terms and conditions of the tariff, will qualify as an impartial administrator under section 52.12 of our rules and section 251(e) of the Act.

47. We find that allowing SMS/800, Inc. to restructure its corporate membership and governance structure and assume the role of the neutral administrator is in the public interest because both actions will broaden participation in the management of the SMS and streamline the operation of the database to better respond to the needs of all toll free users. Moreover, for the reasons discussed above, we expect that the added administrative efficiencies of the restructured corporation is likely to result in lower tariffed rates for RespOrgs and, in turn, lower toll free service charges to subscribers.

IV. ORDERING CLAUSES

48. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), and 251(e), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 251(e), and 47 C.F.R. §§ 52.9, 52.101–.111, the Petition of SMS/800, Inc. IS GRANTED to the extent set forth herein and subject to the requirements detailed above.

49. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 251(e) and 408 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 251(e) and 408, that this action is EFFECTIVE UPON RELEASE.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹³⁷ See 47 C.F.R. § 52.12(a)(1)(i)-(iii).

APPENDIX A

PROPOSED INDUSTRY BOARD STRUCTURE

The Board composition over the first 3 years will be as follows:

1 st Year	2 nd Year	3 rd Year	Notes
1 elected large RespOrg seat*	1 elected large RespOrg seat*	1 elected large RespOrg seat*	
1 elected small RespOrg seat*	1 elected small RespOrg seat*	1 elected small RespOrg seat*	
1 elected SCP Owner/Operator seat*	1 elected SCP Owner/Operator seat*	1 elected SCP Owner/Operator seat*	
1 elected At-large seat*	1 elected At-large seat*	2 elected At-large seats**	
4 independents	4 independents	4 independents	<i>All appointed by new Board</i>
CEO	CEO	CEO	<i>CEO has same vote as Board member</i>
3 BOC-designated Seats	2 BOC-designated Seats	0 BOC Seats	<i>While any one BOC sits in a "BOC-designated" seat it cannot also hold another RespOrg-elected seat</i>
12	11	10	<i>Total number of Board seats</i>

For all elected seats, no company can hold more than one seat; provided, however, that a company can hold a RespOrg-elected and a SCP Owner/Operator-elected seat.

* Voted all affiliated entities = one vote

** Voted by proportional representation (one vote per TFN controlled)

APPENDIX B

PROPOSED INDUSTRY BOARD STRUCTURE:

ELECTION CYCLE

Elected seats will have staggered terms, as follows, with no term limits:

1st Year Election

1 large RespOrg seat

elected to 3 year term

1 small RespOrg seat elected
to 3 year term

1 SCP O/O seat
elected to 3 year term

1 At-large seat
elected to 1 year term

2nd Year Election

1 At-large seat
elected to 1 year term

3rd Year Election

2 At-large seats
elected to 3 year terms

**STATEMENT OF
ACTING CHAIRWOMAN MIGNON CLYBURN**

Re: *Toll Free Service Access Codes*, CC Docket No. 95-155; *Petition to Change the Composition of SMS/800, Inc.*, WC Docket No. 12-260.

The Commission's action today broadens the membership of the organization that oversees distribution of toll free numbers. This change reflects that a wide array of entities have a direct stake in obtaining toll free numbers, and the order will ensure that toll free numbers continue to be distributed on a fair and impartial basis, which benefits consumers and the public interest. More significantly, our action demonstrates that the Commission understands that toll free numbers play an increasingly critical role in the success of businesses, non-profit organizations and others, and that access to numbers offers opportunities for economic growth. The way that toll free numbers are used has changed dramatically since the Commission first implemented toll free numbering rules nearly 15 years ago. This order represents one step in incorporating those changes into our regulations so that they more closely reflect the current marketplace.

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Toll Free Service Access Codes*, CC Docket No. 95-155; *Petition to Change the Composition of SMS/800, Inc.*, WC Docket No. 12-260.

Today the Commission takes another step to modernize our regulatory framework for telephone services—in this case the management of 800 numbers (in industry jargon: “toll free service access codes”). Twenty years ago, the Commission decided the toll free numbering system would be run by the regional Bell Operating Companies and tariffed as a common carrier service to ensure impartiality.¹ With the passage of the Telecommunications Act of 1996 and the revolution in technology and competition we’ve seen in the communications marketplace, it’s past time to reexamine those decisions. So I am pleased to support this item, which takes the first step down that path.

Looking ahead, there is still more to be done. For instance, we do not revisit here the pre-1996 decision that toll free numbering services must be tariffed.² Given that tariffs are going the way of the dodo and the Commission has other authority to ensure impartial numbering administration,³ the underpinnings of that decision have eroded. We also reserve the question of whether transferring control of toll free numbering services even triggers section 214 of the Communications Act of 1934.⁴ In my reading, it does not. Section 214 does not prescribe for us a role over each and every transfer of control affecting the telephone system. It only applies to transfers of “lines,”⁵ and no one has identified a single “line” that would be transferred here. Nevertheless, I agree with my colleagues that we need not resolve either of these issues today because nobody raised the tariffing question and the parties specifically invoked section 214 in their application. In the appropriate context, however, we should be willing to wrestle with these thorny issues and restructure our rules to better reflect our statutory authority and marketplace realities.

¹ See *Provision of Access for 800 Service*, CC Docket No. 86-10, Order, 8 FCC Rcd 1423, 1426–27, 1429, paras. 25–31 & App. A (1993).

² See *Order* at note 94.

³ See 47 U.S.C. § 251(e)(1) (added by the Telecommunications Act of 1996, Pub. L. No. 104-104, § 101(a), 110 Stat. 56, 61).

⁴ See *Order* at note 103.

⁵ See 47 U.S.C. § 214(a) (“No carrier . . . shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the . . . operation . . . of such additional or extended line”); see also *id.* (“As used in this section the term ‘line’ means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels”).