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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
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In the Matter of the Investigation into Preferred Carrier Arrangements and Other Potentially Anti-competitive Practices Involving Service to Residential or Business Developments	DOCKET NO. T-00000K-04-0927 **INITIAL COMMENTS OF ACCIPITER COMMUNICATIONS REGARDING PREFERRED PROVIDER AGREEMENTS AND REQUEST FOR PROCEDURAL CONFERENCE**

Accipiter Communications, Inc. ("Accipiter") by and through undersigned counsel hereby submits the following comments in the above-referenced generic docket ("Generic Docket"). Additionally Accipiter requests that the Arizona Corporation Commission ("Commission") schedule a procedural conference to establish a workshop and/or hearing schedule related to the subject matter of these comments as well as for any other issue pertinent to this Docket.

1. Procedural History

On 23 December 2004 on its own initiative the Commission opened this Generic Docket in order to examine preferred carrier arrangements and other potentially harmful anti-competitive practices by telecommunications providers and

other entities. The opening of this Generic Docket was in partial response to the facts and circumstances that resulted from the complaint proceeding captioned *In the Matter of the Formal Complaint of Accipiter Communications, Inc., Against Vistancia Communications, L.L.C., and Cox Arizona Telcom, L.L.C., Docket No. T-03471A-05-0064* ("Accipiter Complaint"). The Accipiter Complaint involved alleged anti-competitive practices through the use of a preferred provider arrangement by a CLEC.

On 6 March 2005 Commission staff ("Staff") issued its first set of data requests to various Arizona telecommunications providers in the Generic Docket, and on 12 March 2007 Staff issued its second set of data requests ("Second Set") to various telecommunications providers. The responses to the Second Set are due to be filed shortly.

2. Proposal for Use of Modified North Carolina Regulations Relating to PPAs.

Accipiter fully supports the Commission's inquiry into exclusivity arrangements including the use of preferred provider agreements ("PPAs"). We further urge the Commission to proceed expeditiously in support of customer choice consistent with Section 253 of the Telecommunications Act of 1996 and the policies of this Commission. Accipiter is submitting these comments to augment Staff's attempt to secure additional information through the issuance of the Second Set.

To the extent the Commission will permit telecommunications providers to

continue to use PPAs, Accipiter recommends that the Commission adopt regulations that will govern such use to ensure a robust and competitive telecommunications market creating consumer choice of providers, services, costs and technologies.

Accipiter conducted some preliminary research relating to the use of PPAs in other jurisdictions. North Carolina is the only U.S. state Accipiter found that has adopted such regulations which the North Carolina Utilities Commission promulgated as its Rule R20-2, entitled *Fair Competition Among Local Telecommunications Service Providers.* (A copy of this Rule is attached hereto as Attachment A.) These regulations were a direct result of a North Carolina Utilities Commission ("NCUC") complaint proceeding which appears to be similar to the still-pending Accipiter Complaint proceeding in Arizona. However before discussing the NCUC regulations including the events that led up to their adoption (as well as their subsequently realized shortcomings) we provide a short case history illustrative of PPAs. These agreements often result in the creation of 1900s' style monopolies in master planned communities with similar onerous impacts on consumers and on competition.

3. <u>Illustrative Case History of Accipiter in Vistancia and the Sun Valley Parkway Corridor.</u>

Founded in 1995 Accipiter is an incumbent local exchange carrier ("ILEC") that provides local telephone service to customers near Lake Pleasant and other

areas to the northwest of the Phoenix metropolitan area. Accipiter's certificated service area has been expanded and now encompasses about 1,100 square miles. This includes 700 square miles surrounding Lake Pleasant and Castle Hot Springs, and 400 square miles northwest of the White Tank Mountains along the Sun Valley Parkway corridor. Along with substantial unincorporated areas of Maricopa and Yavapai Counties, Accipiter's service area includes far reaching portions of the municipalities of Peoria, Surprise and Buckeye. Although large in a geographical sense, when measured by the number of customers Accipiter is a very small ILEC presently servicing about 205 mostly rural residential and business subscriber lines.

The location of Accipiter's service area provides the opportunity for substantial growth as the pace of development expands to the northwest of the Phoenix metropolitan area. In this area there are numerous master planned communities and other residential developments currently under consideration. These developments are in all stages of the process—some in the initial planning stage, some awaiting governmental review and approvals, and a few in the process of ongoing construction. To compete for and service this ongoing and future development, Accipiter is focused on bringing advanced telecommunications technologies including high speed data to the current rural residences and businesses in the area using fiber-to-the-home and other state-of-the-art technologies. As more of the major developments move to construction in this

area, Accipiter will have its existing infrastructure nearby where it can economically expand to offer service to additional rural customers as well as to master planned communities and to business customers.

Accipiter's business plan depends on the existence of an open market for telecommunication services in Arizona; it expects a reasonable opportunity to bring telecommunications infrastructure into a community to compete for customers and to sell its services. Unfortunately that is not what Accipiter is finding in Arizona. In the first master planned community within Accipiter's service area, Accipiter tried to start laying fiber and installing plant and equipment. However Accipiter found itself blocked by private telecommunications utility easements with a $1,000,000 toll. That first master planned community was Vistancia where the private easements have now been removed. The Commission's review of that scheme is still pending in the Accipiter Complaint proceeding.[1] But Accipiter's experience with the anti-competitive impacts of PPAs did not stop at the borders of Vistancia. In each of the next three master planned communities that it attempted to enter, Accipiter faced preexisting PPAs creating further barriers to competitive market entry.

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[1] In 2005 Accipiter entered into a settlement agreement with the developer and Cox regarding the Accipiter Complaint that along with other terms included elimination of the private control over the telecommunications easements in Vistancia and elimination of certain exclusive marketing provision in the PPA in Vistancia. However it did not address PPAs in other parts of Accipiter's service areas. Pursuant to the terms of that settlement the parties are unrestricted in advocating their respective positions as to further regulation of PPAs in this or other proceedings. The Accipiter Complaint is still pending before the Commission with Staff and Cox as active participants.

The closing of Arizona's telecommunications markets and the carving up of territory through the use of PPAs is often less obvious than Vistancia's publicly recorded private telecommunications easements excluding competitors from entering the community. PPAs with confidential obligations to pay out a percentage of subscriber revenues at increasing levels depending on the efficacy of efforts to exclude competition create economic incentives that are often just as effective at eliminating competition between telecommunications services. Examples of the exclusionary conduct that competitors must face when attempting to enter a development with a PPA cover a wide range. The exclusionary conduct starts with the initial reaction of disbelief that a developer has when Accipiter contacts them to inquire about installing telecommunications infrastructure in the development. A common response is: "Why would you want to do that? We have a PPA with another carrier." Accipiter also faces dry utility trenches being furtively opened, the preferred provider installing conduit and the trenches closed without any notice to the ILEC. After this occurs the typical reaction ranges anywhere from apologies for the apparent bureaucratic mistake to another expression of disbelief that any other service provider would ever want access to the utility trenches to compete in a development where a PPA is in place. But the end result is the same. With the preferred carrier's purchase of the first mover advantage it becomes onerous for another carrier to enter a development and lay fiber and other infrastructure after

the trenches are closed, sidewalks and curbs installed, and streets paved.

In Arizona it has become exceedingly difficult for consumers to find competing telecommunications services and technologies where you would most expect to find them—in our newer and constantly expanding master planned communities and new housing developments. Unregulated PPAs effectively eliminate the opportunity and benefits that choice provides our consumers.

4. Further Curtailment of Competition in Arizona.

Other examples of exclusionary conduct and anti-competitive impacts stem from the elements of PPAs that grant exclusive marketing integrated with the housing sales offices and that tie homeowners' associations ("HOAs") to ready made compulsory subscription collection schemes within a PPA development. In a competitive market where more than one carrier wants to service the area, the only purpose left for a PPA is to create artificial incentives for excluding competition from Arizona's telecommunications markets. These "incentives" are often kept secret and subject to confidentiality provisions that prevent the competing providers, the consumers, the Commission and the public from knowing what the agreements contain. Often the yet to be created HOA in a PPA is used as an exclusionary tool; welded to a contract that mandates the payment of a portion of the homeowners' obligatory dues for rudimentary cable service from the preferred provider. The provider then uses that entrée to sell more expensive telephone, data, and

advanced cable channel packages to its captive consumers.

For all of these reasons the Commission should expedite consideration of the impact of PPAs and other exclusionary practices on consumers in Arizona's new master planned communities.

5. Adoption of the North Carolina Regulations.

In November 2001 the ILEC Alltel of North Carolina, Inc. ("Alltel") filed a complaint at the NCUC against CTC Exchange Services, Inc. ("CTC"). The complaint alleged that in January 2000 Alltel attempted to obtain easements and rights-of-way from CIMG (the owner and developer of a subdivision called Morrison Plantation) to allow Alltel to install buried cable and other infrastructure necessary for Alltel to provide service to those future residents and businesses in the development. CIMG denied Alltel's request on the basis that CIMG had entered into a PPA with CTC making CTC the "exclusive" telecommunication service provider in Morrison Plantation. As a result CIMG would not grant Alltel access to any easement, right-of-way or property at Morrison Plantation to install facilities needed to serve the development. Alltel also alleged that ILECs in other areas of North Carolina were encountering the same problems with developers who had entered into PPAs with CTC all of which had the effect of preventing ILECs from providing service in their NCUC jurisdictional service areas to residential and business customers requesting service from the ILEC. The complainant asked the

NCUC for an order directing CTC to cease and desist its efforts to prevent Alltel from obtaining access; declaring the PPA and all similar contracts void as anti-competitive and not in the public interest; and instituting a generic proceeding to investigate the use of PPAs, and other relief.

At the conclusion of the proceeding the NCUC found that two provisions of the PPA were anti-competitive and struck them from the PPA between CTC and CIMG. The first provision was the exclusivity provision that CTC should be the exclusive provider to all the tenants at the Morrison Plantation development. The second was the provision that prohibited the developer from granting a right-of-way across the property for use in providing any telecommunications services of the type provided under the PPA.

In October 2005 in response to this complaint matter, the NCUC adopted R20-2, entitled *Fair Competition Among Local Telecommunications Service Providers* ("North Carolina Rule"). The North Carolina Rule unequivocally prohibits a carrier from entering into PPAs that contain:

- exclusive access agreements;
- exclusive provisioning terms; and
- use of weighted commissions in PPAs unless the carrier is either an Electing Provider[2] or an Exempted Provider[3].

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2 An "Electing Provider" is a provider that has chosen to make subloops available to competitors.

3 An "Exempted Provider" is a LEC not required to make subloops available to competitors.

The North Carolina Rule requires that before entering into a PPA the telecommunications provider must file with the NCUC notice for each development where a PPA exists or will be entered into in the future. The notice must contain the following information:

- the name and location of the development;
- the identity of the parties to the PPA;
- the identity of the ILEC if any in whose franchise area the development is located;
- whether the PPA includes exclusive provisioning requirements;
- whether the PPA includes exclusive access provisions; and
- whether the PPA includes weighted commission provisions, and if so whether the provider is filing as an Electing Provider under subsection (f) of the Rule or an Exempted Provider under subsection (g) of the Rule. [*See* definitions in footnotes 2 and 3 above.]

In order to ascertain the effectiveness of the North Carolina Rule, Accipiter contacted the NCUC. The NCUC Staff member indicated that he did not believe the North Carolina Rule was effective primarily because it is predicated on Electing and/or Exempted Providers making their respective networks available to competitors through the use of subloops or resale. Although such providers are willing to affirm that they will make their networks available—thus permitting them to enter into PPAs under the North Carolina Rule—in reality competitors do not avail themselves of this not too attractive opportunity. Therefore the competition and

customer choice that the North Carolina Rule was intended to promote has largely not materialized.

Notwithstanding the above Accipiter believes that with the additional requirements set forth below, the North Carolina Rule could still form the basis of important Commission regulations to govern the use of PPAs in Arizona. Accipiter believes that the North Carolina Rule is fair and reasonable because it not only prohibits the use of exclusive provisioning and access requirements but requires Commission oversight of such arrangements. If a provider is unwilling or unable to abide by the North Carolina Rule, a PPA for that development would not be permitted.

6. Proposed Modification of the North Carolina Rule for Arizona.

The North Carolina Rule essentially requires a notice filing (although there is a provision for objections to Exempted Providers to be made within 30 days of the filing.) If the Commission were to adopt similar regulations for Arizona, Accipiter believes that such regulations should be augmented as follows:

- each carrier intending to utilize PPAs should file a copy of each PPA and a general tariff that sets forth the requirements contained in the North Carolina Rule and;
- the regulation should also include a prohibition against any carrier entering into a PPA or other agreement with exclusivity provisions relating directly or indirectly to restricting competing carriers from physical access;
- with respect to each development in which the provider intends to enter into a PPA, a notice should be filed with the Commission at least 90 days prior to the effective date of the PPA. The notice would

contain information similar to the North Carolina requirements. If the Commission does not act to deny or suspend the filing within 120 days, the PPA may take effect; and

- at the time the notice is filed with the Commission, a CLEC should be required to notify the ILEC of its intention to enter into a PPA by providing a copy of the Commission notice to the ILEC.

7. Conclusion and Request for Procedural Conference.

Accipiter believes that through the promulgation and adoption of regulations governing the use of PPAs, consumers will be assured of the opportunity for choice of telecommunications providers, technologies, services and tariffs. It will also allow the Commission to assess the impacts of such agreements on consumers and on competition in the telecommunications market in Arizona. Such regulations should "level the playing field" by ensuring that all carriers offering a competing service have the opportunity to serve thus giving the public the benefits of choice.

Accipiter respectfully requests that the Commission promptly schedule a procedural conference to discuss the best procedural avenue to move the Generic Docket forward and for the implementation of the reforms described herein.

RESPECTFULLY SUBMITTED this 22nd day of March 2007.

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ATTACHMENT A

NCUC RULES TABLE OF CONTENTS

Last Updated 01/13/06

Rules and Regulations of the North Carolina Utilities Commission

Chapter 20. Regulations Concerning the Marketing of Telecommunications Services

Rule R20-1. Slamming, cramming and related abuses in the marketing of telecommunications services.
Rule R20-2. Fair Competition Among Local Telecommunications Service Providers

Rule R20-1. Slamming, cramming and related abuses in the marketing of telecommunications services.

(a) No telecommunications provider shall submit, or cause to be submitted, a change order for preferred intraLATA interexchange carrier, interLATA interexchange carrier or local exchange carrier to any telecommunications company unless and until the submitting provider has obtained express authorization from the customer or the customer's representative for each change.

(b) If the Commission determines that a telecommunications provider has submitted, or caused to be submitted, a change order and cannot demonstrate that it has complied with subsection (a), the Commission:

(1) Shall make available to the customer the remedies authorized by the regulations of the Federal Communications Commission, with respect to both interstate and intrastate service, and for this purpose the customer's authorized carrier may be made a party to the proceeding;

(2) With respect to intrastate service, may require the unauthorized provider to make any additional payments, beyond those required by the regulations of the Federal Communications Commission, that are necessary to ensure that the customer is fully reimbursed for all payments made to the unauthorized provider and any other charges imposed by a telecommunications utility because of the unauthorized change in carrier; and

(3) With respect to intrastate service, may require the unauthorized provider to pay a penalty in accordance with G.S. 62-310 for each day the provider continues to make an unauthorized service available to the customer, even if the customer does not actively make use of the service.

(c) Upon request of the customer or the customer's representative, any offer to provide telecommunications services shall be sent to the customer in written form describing the rates, terms and conditions of service. Such request shall not be deemed to be acceptance of an offer to provide telecommunications services.

(d) No telecommunications provider shall provide any service to any customer for

compensation, or submit or authorize any billing, unless and until the customer or the customer's representative has clearly, expressly and affirmatively agreed to purchase the service; provided, however, with respect to dial-around charges or per-use charges associated with vertical feature offerings of local providers and subject to forgiveness policies relating to the billing of charges, use of such services by an employee of the customer or by a member or guest of the customer's household shall be deemed to have been made under the authority of the customer. For purposes of this subsection, each day the provider continues to make the service available to the customer for compensation constitutes a separate violation, even if the customer does not actively make use of the service.

(e) Any telecommunications provider's telemarketing, direct mail or other forms of solicitation to change a customer's preferred local exchange carrier, intraLATA interexchange carrier, or interLATA interexchange carrier shall include the following disclosures:

(1) Identification of the telecommunications provider soliciting the change in the preferred local exchange, intraLATA long distance or interLATA long distance carrier;

(2) That the purpose of the call or direct mail or other solicitation is to solicit a change of the customer's preferred carrier of local exchange, intraLATA long distance or interLATA long distance service (or, if applicable, that the outcome of the call or direct mail or other solicitation will be a change of the customer's preferred carrier of local exchange, intraLATA long distance or interLATA long distance service);

(3) That the customer's preferred local exchange, intraLATA long distance or interLATA long distance carrier may not be changed unless and until the requested change is confirmed in accordance with this section and the regulations of the Federal Communications Commission; however, no specific citation to this rule or the regulations of the Federal Communications Commission is required; and

(4) Notice to the customer that a charge may be imposed upon the customer for processing the change in the customer's preferred local exchange carrier, intraLATA interexchange carrier or interLATA interexchange carrier.

(f) As used in this section:

(1) "Express authorization" means an express, affirmative act by the customer or the customer's representative clearly agreeing to the change in preferred intraLATA interexchange carrier, interLATA interexchange carrier or local exchange carrier, in a manner consistent with this section and the regulations of the Federal Communications Commission.

(2) "Customer" means the party in whose name the telecommunications service is provided.

(3) "Customer's representative" means any adult person authorized by the customer to change telecommunications services, or contractually or otherwise lawfully authorized to represent the customer.

(4) "Telecommunications provider" means any public utility that provides telecommunications service.

(NCUC Docket No. P-100, Sub 148, 07/12/01.)

Rule R20-2. Fair Competition Among Local Telecommunications Service Providers.

(a) For purposes of this rule, the following definitions shall apply:

(1) "Development" means a residential subdivision, office park, shopping center or other area with clearly defined boundaries being developed as a unified entity by one or more landlords or developers.

(2) "Electing provider" means a preferred provider that has chosen to make subloops available to competitors pursuant to subsections (f) and (h) of this rule.

(3) "Exclusive access provisions" are provisions of a preferred provider contract that prohibit the developer, manager, owner or other party controlling access to a development from allowing competitors of the preferred provider to enter upon the development premises or easements and rights-of-way appurtenant thereto, or provisions of a preferred provider contract that require the developer, manager, owner or other party controlling access to a development to impose restrictions or requirements on such third party access which are not imposed on the preferred provider and which are anticompetitive in nature.

(4) "Exclusive provisioning provisions" are provisions of a preferred provider contract that prohibit the developer, manager, owner or other party controlling access to a development from allowing competitors of the preferred provider to provide services in a development or provisions of a preferred provider contract that require the developer, manager, owner or other party controlling access to a development to impose restrictions or requirements on the provisioning of such third party service which are not imposed on the preferred provider and which are anticompetitive in nature.

(5) "Exempted provider" means a preferred provider that is a local exchange company and is not required under federal law to make subloops available to its competitors, or a preferred provider that is a competing local provider and would not, if it were a local exchange company, be required to make subloops available to its competitors.

(6) "Local service provider" includes any competing local provider, as defined in G.S. 62-3(7a), and any local exchange company, as defined in G.S. 62 3(16a).

(7) "Preferred provider" means a local service provider that has entered into a preferred provider contract.

(8) "Preferred provider contract" means a contract between a particular local service provider and the owner or developer of a development, giving the preferred provider special status or rights not available to other local service providers.

(9) "Weighted commission provisions" are provisions of a preferred provider contract providing for the payment of commissions to an owner or developer that (A) are based on the number of customers in the development who purchase service from the preferred provider, or (B) are based on a percentage of the revenues received by the preferred provider from customers in the development, or (C) otherwise provide a financial incentive for the owner or developer to exclude competitors of the preferred provider from the development.

(b) Exclusive provisioning provisions in preferred provider contracts are anticompetitive and void.

(c) Exclusive access provisions in preferred provider contracts are anticompetitive and void.

(d) Weighted commission provisions in preferred provider contracts are contrary to public policy and void, except as provided in subsections (f) and (g) below.

(e) Every preferred provider shall file with the Commission a Preferred Provider Notice. There shall be a single notice for each preferred provider, rather than separate notices for each development where a preferred provider contract exists. The notice shall comply with the following requirements:

(1) For each development where the provider has entered into, or will enter into, a preferred provider contract, the Preferred Provider Notice shall provide the following information:

(A) The name and location of the development.

(B) The identity of the parties to the contract.

(C) The identity of the local exchange company, if any, in whose franchise area the development is located.

(D) Whether the contract includes exclusive provisioning provisions.

(E) Whether the contract includes exclusive access provisions.

(F) Whether the contract includes weighted commission provisions, and if so, whether the provider is filing an Electing Provider Attachment under subsection (f) of this rule or an Exempted Provider Attachment under subsection (g) of this rule.

(2) The Preferred Provider Notice shall be filed within 21 days after the effective date of this rule, if the provider is a party to any existing preferred provider contract. Before entering into any new preferred provider contract, a local service provider shall file an updated Preferred Provider Notice (or a new notice, if it has not filed such a notice previously) containing the information provided in subdivision (1) above with respect to the new preferred provider contract. Before amending any preferred provider contract in a manner that affects the information in the Preferred Provider Notice, a local service provider shall file an updated Preferred Provider Notice.

(f) A preferred provider may become an electing provider by filing with the Commission an Electing Provider Attachment that meets the requirements of subdivisions (1) through (3) below. An electing provider, within the developments specified in its Electing Provider Attachment, may enter into preferred provider contracts containing weighted commission provisions and may continue to enforce existing preferred provider contracts containing such provisions.

(1) The Electing Provider Attachment shall be attached to the electing provider's Preferred Provider Notice. It shall identify the name and location of each development to which it is applicable.

(2) The Electing Provider Attachment shall state that within the developments to which it applies, the electing provider will make unbundled subloops available to its competitors pursuant to this rule. It shall specify the basic terms under which subloops will be offered, and such terms shall be consistent with this rule and any applicable orders of the Commission.

(3) The Electing Provider Attachment may be updated to specify additional developments to which it is applicable. Any such update shall be filed before the electing provider enters into any preferred provider contract with weighted commission provisions relating to any of the additional developments.

(g) A preferred provider may become an exempted provider by filing with the Commission an Exempted Provider Attachment that meets the requirements of subdivisions (1) through (3) below. An exempted provider, within the developments specified in its Exempted Provider Attachment, may enter into preferred provider contracts containing weighted commission provisions and may continue to enforce existing preferred provider contracts containing such provisions.

(1) The Exempted Provider Attachment shall be attached to the exempted provider's Preferred Provider Notice. It shall identify the name and location of each development to which it is applicable.

(2) The Exempted Provider Attachment shall state either (A) that the exempted provider is a local exchange company and is not required by federal law to make subloops available to competitors in any of the developments to which the attachment is applicable, or (B) that the exempted provider is a competing local provider, and if it were a local exchange company, it would not be required by federal law to make subloops available to competitors in any of the developments to which the attachment is applicable.

(3) The Exempted Provider Attachment may be updated to specify additional developments to which it is applicable. Any such update shall be filed before the exempted provider enters into any preferred provider contract with weighted commission provisions relating to any of the additional developments. For each development for which exemption is asserted in an initial or updated Exempted Provider Attachment, the provider shall submit an affidavit, signed by an engineer with direct personal knowledge of the facilities serving the development, that specifies with particularity the provider's factual and legal basis for asserting the exemption.

(4) A local service provider may challenge an Exempted Provider Attachment by filing a petition seeking review of such Attachment with the Commission. In the event of such a challenge, the Public Staff shall investigate such challenge and file its report and recommendations concerning the merits of such challenge within 30 days of the filing of the challenge. The party asserting exemption shall bear the burden of demonstrating entitlement to the exemption by clear and convincing evidence. Any such challenge shall, to the extent practicable, be given priority on the Commission's docket.

(h) No local service provider may maintain a preferred provider contract in effect in any development unless it has duly filed with the Commission a Preferred Provider Notice that makes reference to the development, together with any applicable Electing Provider Attachment or Exempted Provider Attachment.

(i) Preferred Provider Notices, Electing Provider Attachments and Exempted Provider Attachments shall be subject to the following filing requirements:

(1) Each preferred provider shall file its Preferred Provider Notice, together with any Attachments, in a docket to be designated by the Commission.

(2) The first Preferred Provider Notice filed by a particular preferred provider shall be labeled "Preferred Provider Notice – Version 1." The first updated Preferred Provider Notice filed by such provider shall be labeled "Preferred Provider Notice – Version 2," and subsequent updates shall be numbered sequentially.

(3) Whenever an Electing Provider Attachment or Exempted Provider Attachment is updated, the provider shall file an update of the entire Preferred Provider Notice, including the Attachments, with a new version number, even if the only changes are in one of the Attachments.

(j) When a competing local provider that is an electing provider receives a request from a competitor for subloops in a given development, the parties shall negotiate in good faith. If they are not able to reach agreement, the following requirements shall apply:

(1) The subloops shall be provisioned within the same time period that the local exchange company in whose franchise area the development is located makes subloops available. If no such period exists, such subloops shall be provisioned within seven days.

(2) At any point 60 or more days after the receipt of a bona fide request for subloop interconnection, either party may request the Commission to set a subloop rate for the electing provider.

(3) There is a rebuttable presumption that the appropriate rate for a subloop is the applicable subloop rate of the local exchange company in whose franchise area the development is located. If there is no such rate in existence, then the rebuttably presumptive subloop rate is BellSouth's Zone 1 subloop rate.

(4) The party seeking a departure from the rebuttably presumptive subloop rate shall have the burden of proof to demonstrate that such rate is not just and

reasonable.

(5) The Commission will fix the subloop rates for a competing local provider that is an electing provider on a company-wide basis in an initial contested proceeding. If the rate fixed by the Commission is different from the rate previously being paid by the subloop purchaser in the contested proceeding, a true-up shall be performed.

(k) Every preferred provider, within the development to which its preferred provider contract applies, shall make its service available to competitors for resale. If the preferred provider is a competing local provider, the following requirements shall apply:

(1) Unless the competing local provider and the reseller agree on a different rate, the wholesale discount percentage offered by the competing local provider shall be the same wholesale discount percentage offered by the local exchange company in whose franchise area the development is located. If no such wholesale discount percentage has been determined, the discount percentage established for BellSouth in Docket No. P-140, Sub 50 shall apply.

(2) If either party contends that the discount percentage provided for in subdivision (1) above is inappropriate, it may request the Commission to calculate the discount based specifically on the circumstances of the competing local provider. If the discount percentage fixed by the Commission is different from the percentage previously being paid by the reseller in the contested proceeding, a true-up shall be performed.

(l) In every development where a local service provider has entered into a preferred provider contract containing provisions that are void under subsections (b), (c) or (d) of this rule, the local service provider shall, within 21 days after the effective date of this rule, mail to each of the parties to the preferred provider contract a letter advising such party that certain portions of the contract have been determined to be void. The following materials shall be attached to the letter: a copy of the preferred provider contract, with the void provisions conspicuously marked; a copy of this rule; and a copy of the Commission's order adopting this rule.

(NCUC Docket No. P-100, Sub 152, 01/12/06)

CHAPTER 21
NCUC RULES TABLE OF CONTENTS
RETURN TO TOP

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