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I.R.A. DOCKET ROOM

June 3, 2004

Honorable Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: *Petition for Arbitration of Cellco Partnership d/b/a Verizon Wireless*

Petition for Arbitration of BellSouth Mobility LLC; BellSouth Personal Communications, LLC; Chattanooga MSA Limited Partnership; Collectively d/b/a Cingular Wireless

Petition for Arbitration of AT&T Wireless, LLC d/b/a AT&T Wireless

Petition for Arbitration of T-Mobile USA, Inc.

Petition for Arbitration of T-Mobile Spectrum L P. d/b/a T-Mobile

Docket No. 03-00585

Dear Chairman Tate:

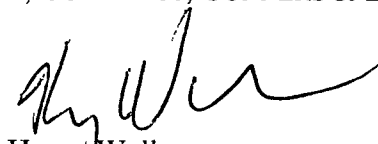
Enclosed for filing is the original and 13 copies of the Direct Testimony for Suzanne K. Nieman on behalf of AT&T Wireless PCS, LLC.

If you have any question, please contact me.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By.


Henry Walker

HW/pp
Enc.

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100981-121
6/3/2004

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1 **BEFORE THE TENNESSEE REGULATORY AUTHORITY**

2 IN THE MATTER OF:) **CONSOLIDATED DOCKET**
3)
4 PETITION FOR ARBITRATION OF) No. 03-00585
5 CELLCO PARTNERSHIP)
6 D/B/A VERIZON WIRELESS)
7)
8 PETITION FOR ARBITRATION OF) No 03-00586
9 BELLSOUTH MOBILITY LLC,)
10 BELLSOUTH PERSONAL)
11 COMMUNICATIONS, LLC,)
12 CHATTANOOGA MSA LIMITED)
13 PARTNERSHIP, COLLECTIVELY)
14 D/B/A CINGULAR WIRELESS)
15)
16 PETITION FOR ARBITRATION OF) No: 03-00587
17 AT&T WIRELESS PCS, LLC D/B/A)
18 AT&T WIRELESS)
19) No 03-00588
20 PETITION FOR ARBITRATION OF)
21 T-MOBILE USA, INC.)
22) No: 03-00589
23 PETITION FOR ARBITRATION OF
24 SPRINT SPECTRUM L P. D/B/A
25 SPRINT PCS
26
27
28

17 **DIRECT TESTIMONY**
18 **OF SUZANNE K. NIEMAN**
19 **ON BEHALF OF AT&T WIRELESS PCS, LLC.**

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June 3, 2004

DIRECT TESTIMONY OF SUZANNE K. NIEMAN

Q *Please state your name for the record*

A. My name is Suzanne K. Nieman

Q. *Please describe by whom you are employed and in what capacity.*

A. I am employed by AT&T Wireless Services, Inc., ("AWS") as Manager – Carrier Relations in the Wireless Network Services Industry Relations Group. AWS was spun off by AT&T in 2001, and is now an entirely independent company listed on the New York Stock Exchange under the symbol AWE

I. PURPOSE OF TESTIMONY

Q. *What is the purpose of your testimony?*

A. The purpose of my testimony is to provide to the Tennessee Regulatory Authority ("TRA") information about AWS and its operations, both nationally and here in Tennessee; AWS' relationship and experience with Independent Local Exchange Carriers ("Independent LECs" or "Rural LECs") generally and the Rural Coalition of small LECs and Cooperatives in Tennessee ("ICOs"), and certain of the issues in dispute in this arbitration proceeding. In order to avoid repetition and expedite the arbitration process, AWS, Verizon Wireless, Cingular Wireless, T-Mobile and Sprint PCS (collectively the "CMRS Providers") have each assumed primary responsibility for certain designated issues in the arbitration in their testimony. My testimony will address the following areas and related issues:

Area	Issue No.
• AWS' service generally and in Tennessee	Background
• AWS' interconnection with the ICOs and transiting agreement with BellSouth	Background
• The AWS affiliates seeking interconnection	ICO 4
• AWS' numbering resources	
• The role of the Intermediary Provider in the interconnection agreement	3, 4, ICO 1, ICO 3, ICO 9
• The scope of the interconnection agreement	13, 14, 15, ICO 5, ICO 8
• Generic contract issues, including termination provisions	16, ICO 10, 17

1 To the extent not otherwise addressed by specific testimony submitted by me, for the
2 limited purposes of this consolidated arbitration, AWS generally concurs with the
3 testimony submitted by another CMRS Provider regarding those areas for which that
4 CMRS Provider has assumed primary responsibility and submitted testimony.

5 **II. WITNESS BACKGROUND & EXPERIENCE**

6 Q. *Please describe your education and work experience.*

7 A. I received a Bachelor of Arts degree from the University of California, Davis, in 1993.
8 Since graduation I have been continuously employed by AWS, or by the North American
9 Cellular Network, a formerly wholly-owned subsidiary of AWS. In my present position, I
10 negotiate interconnection agreements with local exchange companies, SS7 service
11 agreements with various hub providers, and I have primary responsibility for contractual
12 relationships as they relate to the area of local number portability. I have worked in a
13 number of other substantive areas, including customer services and billing.

14 Q. *Have you ever testified before any state commission?*

15 A. Yes, I testified before the Corporation Commission of the State of Oklahoma in 2002
16 That proceeding, like the instant proceeding, was a consolidated arbitration proceeding
17 between a coalition of CMRS Providers and Rural LECs under Section 252 of the Federal
18 Telecommunications Act of 1996 ("Act").

19 **III. AWS' SERVICE**

20 A. **Generally**

21 Q. *Please give us a general description of the service AWS provides.*

22 A. AWS provides commercial mobile radio service ("CMRS"). The end user customer has a
23 handset that is both a receiver and transmitter on a series of radio frequencies licensed to
24 each CMRS provider by the Federal Communications Commission ("FCC"). Each of our
25 cell sites is connected to one of our Mobile Switching Centers, or MSCs. The MSCs
26 perform essentially the same functions as do the local exchange companies' tandem
27 switches. MSCs direct incoming calls to the cell site serving the customer, and, for calls
28 traveling in the mobile to land direction, collect and concentrate those calls for forwarding

1 to the public switched telephone network. They also record traffic data for billing both our
2 own customers and for intercarrier compensation. These switches in turn are
3 interconnected by landline trunks with the public switched telephone network..

4 *Q. How are CMRS Providers licensed and regulated?*

5 A. CMRS Providers hold licenses issued by the federal government for specific frequencies
6 and territories. These licenses authorize the holder to provide facilities-based CMRS
7 service in those areas. CMRS carriers are regulated primarily by the FCC with state
8 commissions having limited jurisdiction over the terms and conditions of service.

9 **B. AWS' Network in Tennessee**

10 *Q. Briefly describe the operations of AWS in Tennessee*

11 A. AWS owns and operates FCC licenses in the following markets in Tennessee. Atlanta
12 Metropolitan Trading Area ("MTA"), Chattanooga Basic Trading Area ("BTA"),
13 Cleveland BTA, Jackson BTA, Memphis MTA and BTA, and Dyersburg BTA. AWS
14 serves these markets from MSCs located in Knoxville, Nashville, Memphis, Birmingham,
15 and Norcross, Georgia.

16 *Q. How is AWS interconnected to the public switched telephone network in Tennessee?*

17 A. AWS is connected to BellSouth's access tandems in Memphis, Nashville, Knoxville and
18 Chattanooga. We are connected to Citizens Telecommunications Company of Tennessee
19 LLC ("Citizens") in Nashville and Knoxville.

20 *Q. How long has AWS provided service in Tennessee?*

21 A. AWS began providing service in Tennessee on February 15, 2002 when it concluded its
22 acquisition of Telecorp Communications, Inc.

23 **C. AWS' Interconnection with the ICOs**

24 *Q. Is AWS currently exchanging traffic with the ICOs?*

25 A. Yes. Our records show that we are terminating traffic from all of the ICOs in amounts
26 ranging from approximately one thousand to hundreds of thousands of minutes per month.
27 We are also sending the ICOs CMRS-originated traffic to terminate on their networks.

28 *Q. Can AWS measure the volume of traffic it receives from the ICOs (land to mobile traffic)?*

1 A. Yes, AWS has the ability to measure traffic that it receives from the ICOs.

2 Q. *How is AWS interconnected to the networks of ICOs?*

3 A. The Act contemplates that carriers can interconnect their networks directly or indirectly.
4 47 U.S.C. § 251(a)(1). Currently, AWS has chosen to interconnect indirectly with the
5 ICOs, using the transit services of an intermediary provider, BellSouth
6 Telecommunications, Inc (“BellSouth”) However, depending on a variety of factors
7 including traffic volumes and facilities costs, AWS may seek to interconnect with one or
8 more of the ICOs directly

9 Q. *Can you describe generally the terms of the AWS transit agreement with BellSouth?*

10 A. AWS’ interconnection agreement with BellSouth includes provisions for the transmission
11 of what BellSouth calls “Intermediary Traffic ” The interconnection agreement provides
12 that if AWS uses BellSouth to deliver traffic to the network of non-party
13 telecommunications carrier BellSouth will bill AWS \$.002 per minute for the transiting
14 function. See Section V.D. of the Interconnection Agreement between BellSouth
15 Telecommunications, Inc and AT&T Wireless Services, Inc., effective June 14, 2001
16 (“AWS/BellSouth Agreement”). The AWS/BellSouth interconnection agreement also
17 includes provisions relating to the exchange of billing data and call records for traffic
18 transiting BellSouth’s network, the so called “Meet Point Billing” provision.

19 Q. *Did AWS provide the necessary information to BellSouth to participate in Meet Point*
20 *Billing (“MPB”) ? If so, when?*

21 A. Yes. AWS provided the BellSouth the necessary information to participate in MPB and
22 has participated in MPB since August 4, 2003

23 Q. *Does AWS have interconnection agreements with the ICOs or any other independent LECs*
24 *in Tennessee?*

25 A. AWS does not have any interconnection agreements with the ICOs but it recently executed
26 an interconnection agreement with another Tennessee Independent LEC, Citizens This
27 agreement is in the process of being filed with the TRA. AWS’ agreement with Citizens
28 covers all traffic exchanged between the carriers, including traffic exchanged on both a

1 direct and indirect basis. The agreement also provides for a reciprocal compensation rate
2 of \$0.011 per minute.

3 *Q. Why doesn't AWS have any interconnection agreements with the ICOs?*

4 A Prior to February 15, 2002, when AWS acquired Telecorp and Tritel, AWS did not provide
5 service in Tennessee and I cannot speak to that timeframe. After that date and prior to the
6 MPB conversion on August 4, 2003, AWS and its predecessors in interest Telecorp and
7 Tritel were contractually obligated to pay to BellSouth any additional charges it was
8 obligated to pay to "Non-Party" carriers like the ICOs (See, e.g., Section VI.D,
9 Agreement between BellSouth and Telecorp, effective July 21, 2000) Moreover, until
10 recently none of the ICOs expressed any interest in entering into interconnection
11 agreements with AWS. In fact, at least one of the ICOs with which AWS has
12 interconnection agreements in other states (TDS Telecommunications Corporation) refused
13 to extend those interconnection agreements to Tennessee.

14 *Q. Which of AWS' affiliates will be the contracting entity with the ICOs for the purposes of*
15 *the interconnection agreement adopted as a result of this arbitration? (ICO 4)*

16 A AWS, by and on behalf of all of its affiliates and subsidiaries, is providing CMRS in the
17 State of Tennessee.

18 **D. Numbering Resources**

19 *Q. Does AWS have telephone numbers in Tennessee?*

20 A. AWS is currently has numbers rated in thirty four (34) rate centers throughout Tennessee.
21 AWS expects that landline-originated calls to its numbers will be afforded the same
22 treatment as landline-originated calls to landline numbers rated at the same rate centers

23 **IV. ARBITRATION ISSUES**

24 **A. Generally**

25 *Q Can you summarize the principal areas of disagreement?*

26 A. Yes. The largest and most significant areas of disagreement are as follows:
27
28

- The applicability of section 251 and related FCC rules to traffic exchanged indirectly (including, in particular, applicability of the reciprocal compensation obligation and need for cost-based rates)
- Whether the intermediary provider (specifically BellSouth) has to be a party to the interconnection agreement between the CMRS Providers and the ICOs and made responsible for compensating the ICOs.
- Whether the scope of the interconnection agreement will cover traffic exchanged directly as well as indirect traffic transited by providers other than BellSouth.
- The ICOs' obligation to compensate CMRS Providers for all ICO-originated traffic the CMRS Providers terminate.
- The ICOs' obligation to continue to provide service after the interconnection agreement is terminated
- The ICOs' obligation to provide dialing and end user rate parity for CMRS telephone numbers that are associated with rate centers within the ICOs' local calling areas or areas that are within EAS areas.

Q. Will you address all of the areas of disagreement in your testimony?

A. No. As I explained earlier, for efficiency reasons the CMRS Providers have divided responsibility for the major issues in the arbitration. As a result, my testimony will focus on three of the areas described above:

- The role of intermediary providers in the interconnection agreement
- The scope of the agreement.
- The ICOs' post-termination obligations.

In addition, I will review and discuss the major areas of disagreement in the generic contract provisions

B. The Intermediary Provider's Role in the Interconnection Agreement

Q. Throughout the negotiation and arbitration process, the ICO's have consistently asserted that when the CMRS Providers choose to interconnect indirectly, the transit provider must

1 *be a party to the interconnection agreement (Issue 3, ICO Issue 3) and bear responsibility*
2 *for compensating the terminating carrier (Issue 4, ICO Issue 1). Do you agree?*

3 A. No. Neither federal law nor state law contemplates three-party interconnection
4 agreements. Federal law clearly establishes that it is the originating carrier that has the
5 compensation obligation, not the intermediary provider. *See* 47 C.F.R. Section 51.703 (a
6 LEC may not assess charges on any other telecommunications carrier for
7 telecommunications traffic that originates on the LEC's network). Moreover, I believe that
8 the issues relating specifically to BellSouth's role in the interconnection agreement have
9 been effectively resolved in this proceeding by the Order Denying Motion adopted by
10 Hearing Officer Beals on April 12, 2004 (April 12 Order). Finally, requiring either a three-
11 party agreement, or conditioning this agreement on the establishment of an agreement
12 between the ICO and an intermediary provider in the manner proposed by the ICOs is both
13 impracticable and unreasonable. For this reason, the Tennessee Regulatory Authority
14 ("TRA") should adopt the CMRS Providers' positions on Issue 3, Issue 4, ICO Issue 1 and
15 ICO Issue 3.

16 Q. *How does the intermediary providers' elimination from the negotiation and arbitration*
17 *process affect the proposed interconnection agreements?*

18 A. As an initial matter, if the intermediary provider is not a party, the TRA should reject the
19 Multi-Party Agreement attached as Exhibit 1 to the ICO's Response to the Petition for
20 Arbitration ("ICO Response"). The Multi-Party Agreement was specifically designed to
21 be an agreement between BellSouth, a CMRS Provider and an ICO. In addition, the TRA
22 should reject any provisions in the ICO's two-party agreement that attempt to condition the
23 effectiveness of the agreement between the CMRS Providers and the ICOs on the
24 establishment of a particular agreement or particular arrangements between the ICO and
25 the Intermediary Provider.

26 Q. *What do you mean?*

27 A. The ICOs assert that even in the two-party agreement between the ICOs and CMRS
28 Providers (see CMRS-LEC Agreement attached as Exhibit 2 to the ICO Response ("ICO

Agreement”)) cannot be effective unless and until the intermediary carrier has an “authorizing interconnection agreement in place with the ICO that is compatible and consistent with the separate terms of the ICO-CMRS Provider agreement.” No less than fourteen (14) provisions in the ICO Agreement are marked with a qualifier to the effect that the provision is “subject to change of the resolution of terms and conditions with Intermediary Carrier between and among CMRS Carrier and Rural ILEC.” The provisions include. (i) Sections 3.3.2, 3.3.4 and 3.3.5 Scope of Intermediary Traffic; (ii) Sections 4.4.1, 4.4.2 Service Arrangement-Intermediary Traffic; (iii) Sections 4.5.1, 4.5.2 Compensation for Intermediary Traffic; (iv) Section 4.7 Billing; (v) Section 7.2 Termination; (vi) Section 7.5 Cure Period; (vii) Section 7.6 Default; (viii) Section 7.3 Post-Termination Obligations; (ix) Section 8 Dispute Resolution; and (x) Section 9 Third Party Beneficiaries. In addition, there are a number of specific terms in the ICO Agreement itself where the ICOs attempt to condition the applicability of the Agreement or their obligations under the Agreement on certain actions of the Intermediary Provider. (*See, e.g.,* ICO Agreement Sections 3.3.5 and 4.4.1)

C. Scope of the Agreement

Q. What should the agreement cover?

A. The agreement should cover all traffic exchanged between the parties, regardless of where the traffic originates, or who carries it. To the extent that different types of traffic require different types of treatment (e.g. different pricing or physical arrangement), that should be addressed in the terms of the interconnection agreement.

Defining the scope of the interconnection agreement broadly serves the public interest. It reduces the number of amendments that must be adopted if circumstances change and is efficient for both of the parties to the agreement and the regulators who approve and administer the agreements. Moreover, it is standard practice for interconnection agreements to cover all traffic exchanged between the parties. For this reason, the CMRS Agreement includes a very simple paragraph defining the scope of the agreement as

1 covering the interconnection and reciprocal compensation arrangements between the
2 parties (See Section I of the Interconnection and Reciprocal Compensation Agreement,
3 attached as Exhibit 2 to various CMRS Providers Arbitration Petitions (CMRS
4 Agreement).)

5 Q. Do the ICOs agree with this approach?

6 A. No. Through the course of the negotiations they have insisted that the scope of the
7 agreement be very narrow. In contrast to the single "Scope" paragraph in the CMRS
8 Agreement, the ICO Agreement contains more than *sixteen paragraphs* that seek to limit
9 and define the scope of the agreement (See ICO Agreement, Sections 3.1-3.3 5.)

10 Q. Please explain how the ICOs seek to limit the scope of the interconnection agreement and
11 why such limitations are problematic.

12 A. The ICOs seek to limit the scope of the agreement in a number of ways. Among the most
13 problematic is the ICOs' attempt to limit the applicability of the agreement to only a
14 certain subset of the traffic. Specifically, the ICOs seek to limit the interconnection
15 agreement to (i) indirect traffic, (ii) transited by BellSouth, (iii) which originates from a
16 limited geographic area on the CMRS Provider's system and (iv) for which the ICOs
17 receive accurate and complete billing records. I will address each of these attempted
18 limitations on scope below.

19 Q. Please explain why the ICOs' attempt to limit the scope of the interconnection agreement
20 to indirect traffic is problematic. (Issue 15)

21 A. The ICOs' position that the scope of the interconnection agreement should be limited to
22 traffic that is exchanged *indirectly* though an intermediary provider is contrary to the
23 provisions of the Act, extremely short-sighted and inefficient. Moreover the ICOs'
24 position on this issue is significantly undercut by the fact that the agreement the ICOs
25 propose in this arbitration *includes* provisions relating to direct as well as indirect traffic.
26 (See ICO Agreement, Sections 4.2 and 4.3) The TRA should adopt an agreement that
27 covers both direct and indirect traffic for the following reasons:
28

- First, the Act clearly allows parties to choose to interconnect on either a direct basis or an indirect basis (47 U.S.C. Section 251(a)(1)) and to enter into a contract that includes both types of traffic.
- Second, many of AWS' interconnection agreements with independent LECs include provisions and rates for both types of interconnection. There is no reason why the interconnection agreement established as a result of this arbitration should not afford the CMRS Providers the same flexibility with all of the ICOs.
- Third, there is a reasonable likelihood that one or more of the CMRS providers in Tennessee would avail themselves of a direct connection opportunity. Although AWS has no direct connections with ICOs in Tennessee today, it does have direct connections with rural ICOs in a number of other states, including Alabama.
- Finally, it would be incredibly wasteful of the TRA's and the parties' resources to spend all of this time and effort on this arbitration process to adopt an interconnection agreement that is limited to indirect traffic.

Q. Please explain why the ICOs' attempt to limit the scope of the interconnection agreement to indirect traffic transited by BellSouth is problematic (Issue 14)

A The ICOs' attempt to limit scope of the interconnection agreement to traffic transited by BellSouth is equally problematic. Again, nothing in the Act or FCC regulations require that the specific transiting provider be listed in the interconnection agreement. CMRS Providers are free to use any carrier they wish to transit traffic and, under the Act, the ICOs are obligated to provide interconnection to and accept traffic from any transiting carrier. 47 U.S.C. § 251(c)(2).

As a practical matter, the ICOs will know who is delivering traffic to them because any transiting provider would have to approach the ICO in order to install facilities. Moreover, as long as the Agreement provides that the ICOs are to be compensated for all CMRS Provider originated traffic that terminates on their network, it should not matter which carrier performs the transiting function. Moreover, imposing such a requirement would

1 limit the CMRS Providers' flexibility to send the traffic to the provider of choice since
2 each change in transit provider would require an amendment to the Interconnection
3 Agreement to be negotiated (or perhaps even arbitrated) filed and approved.

4 *Q. Why is the ICOs' attempt to limit the scope of the Agreement to traffic originating from a*
5 *pre-defined, limited geographic area problematic? (ICO Issue 5)*

6 A. Section 3.1.4 of the ICO Agreement would require each CMRS Provider to provide a list
7 of counties from which CMRS traffic could originate and would limit the scope of the
8 agreement to traffic originated from those listed counties. The reason that the ICOs have
9 provided for this limitation is that where a call originates from is a key factor in
10 determining the extent of the interMTA traffic. (ICO Position on ICO Issue 5, Joint Issues
11 Matrix.) AWS agrees that the originating point of the call is a key factor in determining
12 whether a call is interMTA or intraMTA and the appropriate compensation mechanism that
13 would apply. However, AWS does not agree that this fact supports limiting the scope of
14 the agreement to traffic originating in a pre-determined, specified area. All traffic
15 exchanged by the parties should be included within the scope of the agreement – regardless
16 of where it originates.

17 *Q: Please explain the ICOs' proposal to limit the scope of the agreement vis-à-vis accurate*
18 *billing records. (Issue 13)*

19 A. In Section 3.3.5 of the ICO Agreement, the ICOs propose to limit the scope of the
20 agreement to intermediary traffic for which the intermediary provider provides accurate
21 and complete billing records. AWS supports the goal of exchanging accurate billing
22 records. However, billing errors should not exempt certain segments of traffic from the
23 scope of the agreement. Instead, billing errors should be addressed pursuant to the
24 agreement's dispute resolution provisions. (See, e.g. CMRS Agreement, Section VIII).
25 Again, the agreement should cover all traffic.

26 **V. GENERIC CONTRACT PROVISIONS (Issue 16; ICO Issue 10)**

27 *Q What do you mean by generic contract provisions?*
28

1 A. By that term, I refer to standard contractual terms and conditions covering issues such as
2 indemnification, limitation of liability, definitions, the term of the contract and termination.
3 Although a number of the generic provisions are substantially the same in the ICO
4 Agreement and the CMRS Agreement, there are some important differences.

5 Q. *What are the differences in the generic contract provisions proposed by the CMRS*
6 *Agreement and the ICO Agreement?*

7 A. The most significant difference is in the agreements' provisions that relate to the
8 termination of the contract (*compare* CMRS Agreement, Section VII *with* ICO
9 Agreement, Section 7) which I will discuss in detail below. There are also more minor, but
10 still substantive, differences in a number of other provisions between the CMRS and ICO
11 draft agreements. In order to facilitate a comparison of these provisions, I have inserted
12 the text of the relevant contract terms from each of the proposed agreements into a chart
13 that is attached to my testimony as Exhibit A. The chart highlights the key differences in
14 language and explains why the CMRS provision is preferable (The chart does not include
15 other generic provisions where the language between the ICO and CMRS versions is fairly
16 similar.)

17 Q *What are the differences between the CMRS and ICO drafts with regard to the termination*
18 *provisions?*

19 A. There are a number of differences between the termination terms, some of which are
20 explained in the Chart attached as Exhibit A. The most significant differences are in the
21 provisions relating to (i) the grounds for termination and (ii) post-termination obligations.

22 Q *Explain the difference between the CMRS and ICO contract provisions as they relate to*
23 *grounds for termination.*

24 A. The ICO Agreement would permit termination of the agreement for default for any number
25 of reasons including (i) any material breach of any of the material terms; (ii) if any aspect
26 of the party's operations or action is determined to be unlawful or not authorized by a court
27 or the TRA (ICO Agreement, Section 7.6) or (iii) if the Intermediary Provider and ICO
28 terminate their network connection (ICO Agreement, Section 7.2). These provisions are

1 incredibly broad and would allow unilateral termination by ICO in a wide variety of
2 circumstances – several of which are beyond the control of the CMRS Provider and/or may
3 have little if anything to do with the interconnection at issue.

4 The CMRS Providers' provisions regarding grounds for termination are much narrower
5 and less subject to abuse. We would limit termination to default solely for non-payment of
6 undisputed amounts that continues for sixty (60) days after written notice thereof, and
7 would only allow termination by written notice, *provided the other Party has provided the*
8 *defaulting Party and the appropriate federal and/or state regulatory agencies with written*
9 *notice at least twenty-five (25) days prior to termination of service.* (CMRS Agreement,
10 Section VII.D). Limiting termination of an agreement to cases of non-payment of
11 undisputed amounts prevents parties from terminating the agreement unreasonably and
12 based on subjective interpretations of whether a "material breach" of the agreement has
13 occurred. The notice provisions to the other party and to federal or state regulatory
14 agencies ensure that the alleged defaulting Party is provided sufficient notice to cure the
15 default, reduces the possibility for service interruptions to customers, and provides an
16 additional safeguard against a party acting unreasonably and unilaterally to terminate an
17 agreement.

18 Q. What is the difference between the ICO Agreement and the CMRS Agreement regarding
19 post-termination obligations?

20 A. The parties' provisions regarding post-termination obligations also diverge substantially.
21 The CMRS Providers propose that except in cases of default involving non-payment, the
22 terms of the Agreement remain in effect after termination until a successor agreement is
23 adopted. (CMRS Agreement, Section VII.C). In contrast, the ICO Agreement appears to
24 allow existing interconnection arrangements to continue, at best, for a maximum of twelve
25 months after termination of the Agreement (ICO Agreement, Section 7.3). Worse yet, in
26 the case of a "default," the ICO Agreement allows traffic to be blocked. (ICO Agreement,
27 Section 7.6)

28

1 As an initial matter, the 12 month interval for continued service in non-default
2 circumstances proposed by the ICOs is entirely too short. As this proceeding has well-
3 demonstrated, it is quite likely that it could take longer than twelve months to establish the
4 terms of a replacement interconnection arrangement – especially if an arbitration is
5 required.

6
7 The ICOs' provisions regarding post-termination obligations in the case of default are even
8 more problematic. These provisions would allow the ICO to take action to block the
9 termination of any additional traffic in the case of "default", which as I discussed in detail
10 above is broadly defined.¹ (ICO Agreement, Section 7.6). Blocking traffic is completely
11 contrary to the public interest and harmful to consumers. Except in the most extreme of
12 circumstances, traffic should continue to be exchanged under the terms of the existing
13 agreement until replacement terms are adopted and/or any disputes are worked out.
14 Customers should never have to pay the price of not being able to call friends, family and
15 business associates because of an intercarrier dispute. The ICOs' contract provisions
16 regarding post-termination obligations are entirely unreasonable and should be rejected.

17 *Q Does this conclude your testimony?*

18 *A. Yes it does.*
19
20
21
22
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25

26
27 ¹ It is unclear from the Agreement whether the traffic blocking option applies only in the case of default for
28 nonpayment or in all cases of default. Compare ICO Agreement Section 7.3 (excluding the applicability of the post
termination continuation of service obligation to any terminations as a result of default) with ICO Agreement, Section
7.6 (which seems to limit the blocking remedy to cases where the CMRS Provider defaults by failure to comply with
the compensation terms of the Agreement.)

1
2 CERTIFICATE OF MAILING

3 I hereby certify that on the 3rd of June 2004 a true and correct copy of the above and
4 foregoing was mailed electronically and by United States mail, postage prepaid, to:

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EXHIBIT A

EXHIBIT A TO NIEMAN TESTIMONY

GENERIC CONTRACT TERMS IN DISPUTE TRA DOCKET NO. 03-0058

CMRS PROPOSED TERMS ¹	ICO PROPOSED TERMS ²	CMRS POSITION
II. Definitions NONE	I. Definitions I.x “Central Office Switch” “Tandem Office Switches” which are used to connect and switch trunk circuits between and among other End Office Switches, an End Office Switch and another Tandem Office Switch, or two Tandem Office Switches.	Although CMRS Providers have no objection this definition per se, it is important to note that for reciprocal compensation purposes wireless switches (MSCs) have been found to be comparable to tandem switches
NONE	I.x “Direct Traffic” is Telecommunications traffic within the scope of this Agreement that either Party delivers to the other Party at the Interconnection Point(s)	The highlighted term is vague, unclear and unnecessary. Further, the ICOs have improperly attempted to narrow the “scope of this Agreement” to such a degree as to render this definition exceedingly narrow.
“Interconnection” is the linking of two networks for the mutual exchange of Traffic. This term does not include the Transport and Termination of Traffic	I.x “Interconnection” for purposes of this Agreement is the linking of the CMRS Carrier and Rural LEC networks at the Interconnection Point for the mutual exchange of Direct Traffic.	The ICO definition is problematic because it limits the definition of “interconnection” to direct traffic in contravention of the Act. 47 U.S.C

¹ The CMRS Proposed Terms were excerpted from the Interconnection and Reciprocal Compensation Agreement attached as Exhibit 2 to the various CMRS Providers’ Petitions for Arbitration. See e.g. *Petition for Arbitration of AT&T Wireless PCS, LLC d/b/a AT&T Wireless*, filed November 6, 2003, Docket No. 03-00587

² The ICO Proposed Terms were excerpted from the CMRS-LEC Agreement the ICOs attached as Exhibit 2 to the *Response of the Rural Coalition of Small LECs and Cooperatives*, filed November 28, 2003, Consolidated Docket No. 03-00585

CMRS PROPOSED TERMS ¹	ICO PROPOSED TERMS ²	CMRS POSITION
		Section 251(a)(1). This issue is addressed in more detail in the testimony of Sprint PCS.
“Termination” means the switching of IntraMTA Traffic at the terminating Party’s end-office switch, or equivalent facility, and the delivery of such IntraMTA Traffic to the called Party.	I.x “Termination” means, for CMRS Carrier and Rural LEC, the switching of Telecommunications Traffic at the terminating end-office switch, or equivalent facility, and the delivery of such Telecommunications Traffic to the called Party	The ICO definition is problematic, to the extent that the definition of “telecommunications traffic” is problematic (as discussed below).
NONE	I.x “Telecommunications Traffic,” for purposes of this Agreement, includes Direct Traffic and Intermediary Traffic between an end user of one Party and an end user of the other Party.	The ICO definition of “telecommunications traffic” is not consistent with the definition of “telecommunications traffic” in the Act and the FCC regulations.
III. Interpretation/Construction	24.0 Changes In Law	
The terms and conditions of this Agreement shall be subject to any and all applicable laws, rules, regulations or guidelines that subsequently may be prescribed by federal or state government authority. To the extent required by any such subsequently prescribed law, rule, regulation or guideline, the Parties agree to negotiate in good faith toward an agreement to modify, in writing, any affected term and condition of this Agreement to bring them into compliance with such law, rule, regulation or guideline. . . . In the event that any <u>effective</u> legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of the Parties to perform any material terms of this	Notwithstanding any provision in this Agreement to the contrary, if any legislative, regulatory, judicial or other governmental decision, order, determination or action, or any change in applicable law (collectively “Change in Law”) materially affects any material provision of this Agreement, the rights or obligations of a Party hereunder, or the ability of a Party to perform any material provision of this Agreement, the Parties shall promptly renegotiate in good faith and amend in writing this Agreement in order to make such mutually acceptable revisions to this Agreement as may be required in order to conform the Agreement to Applicable Law. Notwithstanding anything in this Agreement to the contrary, if as a result of any Change in Law, Rural LEC is not required by applicable law to provide to CMRS	The highlighted language in the ICO proposal is problematic because it would allow the ICOs to discontinue providing any service payment or benefit under a “change of law”, with only 60 days written notice. This gives the ICO too much unilateral power to terminate a service and should be rejected for the same reasons as the ICO’s general termination provisions should be rejected. <i>See</i> discussion re Section 7 below.

CMRS PROPOSED TERMS ¹	ICO PROPOSED TERMS ²	CMRS POSITION
“Termination” means the switching of IntraMTA Traffic at the terminating Party’s end-office switch, or equivalent facility, and the delivery of such IntraMTA Traffic to the called Party. NONE	I.x “Termination” means, for CMRS Carrier and Rural LEC, the switching of Telecommunications Traffic at the terminating end-office switch, or equivalent facility, and the delivery of such Telecommunications Traffic to the called Party. I.x “Telecommunications Traffic,” for purposes of this Agreement, includes Direct Traffic and Intermediary Traffic between an end user of one Party and an end user of the other Party.	Section 251(a)(1). This issue is addressed in more detail in the testimony of Sprint PCS. The ICO definition is problematic, to the extent that the definition of “telecommunications traffic” is problematic (as discussed below) The ICO definition of “telecommunications traffic” is not consistent with the definition of “telecommunications traffic” in the Act and the FCC regulations.
III. Interpretation/Construction The terms and conditions of this Agreement shall be subject to any and all applicable laws, rules, regulations or guidelines that subsequently may be prescribed by federal or state government authority. To the extent required by any such subsequently prescribed law, rule, regulation or guideline, the Parties agree to negotiate in good faith toward an agreement to modify, in writing, any affected term and condition of this Agreement to bring them into compliance with such law, rule, regulation or guideline. . . In the event that any <u>effective</u> legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of the Parties to perform any material terms of this	24.0 Changes In Law Notwithstanding any provision in this Agreement to the contrary, if any legislative, regulatory, judicial or other governmental decision, order, determination or action, or any change in applicable law (collectively “Change in Law”) materially affects any material provision of this Agreement, the rights or obligations of a Party hereunder, or the ability of a Party to perform any material provision of this Agreement, the Parties shall promptly renegotiate in good faith and amend in writing this Agreement in order to make such mutually acceptable revisions to this Agreement as may be required in order to conform the Agreement to Applicable Law. Notwithstanding anything in this Agreement to the contrary, if as a result of any Change in Law, Rural LEC is not required by applicable law to provide to CMRS	The highlighted language in the ICO proposal is problematic because it would allow the ICOs to discontinue providing any service payment or benefit under a “change of law”, with only 60 days written notice. This gives the ICO too much unilateral power to terminate a service and should be rejected for the same reasons as the ICO’s general termination provisions should be rejected. <i>See</i> discussion re Section 7 below

CMRS PROPOSED TERMS ¹	ICO PROPOSED TERMS ²	CMRS POSITION
Agreement, either Party may, on thirty (30) days' written notice, require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute may be referred to the Dispute Resolution procedure set forth herein.	Carrier a service, arrangement, payment, or benefit otherwise required to be provided hereunder, then Rural LEC may discontinue the provision of any such service, payment or benefit, provided that if Rural LEC intends to terminate its provision of any service under this Agreement, Rural LEC will provide sixty (60) days prior written notice to CMRS Carrier of any such discontinuance of a service unless a different notice period or different conditions are required by applicable law for termination of such service, in which event such specified period and/or conditions shall apply. Changes in Law will not affect retroactively any payments previously made between the Parties pursuant to this Agreement unless the Change in Law explicitly requires retroactive adjustment.	
IV.C/Appendix A Billing	4.7 Billing	
IV.C Each Party shall bill the other for calls which the billing Party terminates to its own customers and which were originated by the billed Party. Rates and billing procedures are set forth on the attached Appendix A, which is incorporated by reference. The billed Party shall pay the billing Party for all undisputed charges properly listed on the bill. Such payments are to be received within forty-five (45) days from the effective date of the statement. The billed Party shall pay a late charge on the unpaid undisputed amounts that have been billed that are greater than thirty (30) days old. The rate of the late charge shall be the lesser of 1.5% per month or the	4.7 [Subject to resolution of terms and conditions with Intermediary Carrier between and among CMRS Carrier and Rural LEC] Rural LEC and CMRS Carrier shall bill the other pursuant to the compensation terms set forth in this Agreement. The billing Party will issue an invoice on a monthly basis to the billed Party for Traffic subject to the terms of this Agreement. The billed Party shall pay such invoice, in immediately available U.S. funds, within thirty (30) days of the invoice date. The billed Party shall pay a late charge on the unpaid amounts that have been billed that are greater than thirty (30) days old. The rate of the late charge shall be the	The CMRS version provides for 45 days for the payment of bills versus the ICO version's 30 days. The CMRS version is preferable because it provides a reasonable interval for the payment of such bills and builds in time for delivery of the bill by mail. Because the ICOs propose to count the 30 days from the invoice date, effectively that would provide the billed party with only approximately 20 days to review, process, and pay the bills

CMRS PROPOSED TERMS ¹	ICO PROPOSED TERMS ²	CMRS POSITION
maximum amount allowed by law. The billed Party shall pay the billing Party the reasonable amount of the billing Party's expenses related to collection of overdue bills, such amounts to include reasonable attorney's fees. Neither Party shall bill the other for Traffic that is more than one hundred and eighty (180) days old. (See also more specific billing provisions in Appendix A)	lesser of 1.5% per month or the maximum amount allowed by law. Although it is the intent of Rural LEC and CMRS Carrier to submit timely and accurate statements of charges, failure by either Rural LEC or CMRS Carrier to present statements to the other Party on a timely basis shall not constitute a waiver of the right to payment of the incurred charges. Neither Party shall bill the other Party for Traffic that is more than one hundred and eighty (180) days old. [OPEN ISSUE: How can CMRS Carrier and Rural LEC agree to bilaterally to be obligated to provide compensation to each other when that obligation depends directly on obligations and actions of a third party that is not a party to this Agreement?]	
Appendix A ILEC may measure, or obtain either Category 1101 records or a monthly traffic distribution report ("Tandem Records") from the tandem operator summarizing Traffic originated by CMRS Carrier and terminating to ILEC. This information shall be used by ILEC for billing CMRS Carrier for Traffic terminating to ILEC. CMRS Carrier may measure, or obtain either Category 1101 records or a monthly traffic distribution report from the tandem operator summarizing Traffic originated by ILEC and terminated to CMRS Carrier. This information may be used by CMRS Carrier for invoicing ILEC for terminating Traffic to CMRS Carrier.	4.7 <i>continued</i> For Intermediary Traffic, CMRS Carrier agrees to accept the Intermediary Provider's measurement of minutes of use of Intermediary Traffic based on industry standard 110101 format message, call detail, and billing records created by Intermediary Providers (the format as mutually agreed to by Rural LEC and Intermediary Provider or some other form of data as may be mutually agreed to by the Intermediary Provider and Rural LEC) and provided to both Rural LEC and CMRS Carrier.	The ICO contract term is problematic because it erroneously assumes that only the CMRS Carrier will pay the ICO for terminating traffic that is sent through an Intermediary Provider, and that the Rural LEC will not pay the CMRS Carrier for the termination of traffic submitted through an Intermediary Carrier. The CMRS Agreement correctly establishes mutual arrangements.

CMRS PROPOSED TERMS¹	ICO PROPOSED TERMS²	CMRS POSITION
Either Party may perform an audit of the other Party's billing information related to terminating minutes of use of the billed Party. The Parties agree that such audits shall be performed no more than one time per calendar year. Each Party shall bear its own expenses associated with such audit. The audits shall be conducted on the premises of the audited Party during normal business hours.		
VI.A Indemnification Each Party shall indemnify and defend the other Party against any claims or actions arising from the indemnifying Party's use of the service provided under this Agreement, except to the extent of damages caused by the negligence of the indemnified Party.	6.1 / 18.1-3 Indemnification 6.1 .. Each Party shall indemnify and defend the other Party against any claims or actions arising from the indemnifying Party's participation in the arrangements set forth in this Agreement, except to the extent of damages caused by the negligence or willful misconduct of an indemnified Party. 18.1 Each Party agrees to release, indemnify, defend and hold harmless the other Party from and against all losses, claims, demands, damages, expenses, suits or other actions, or any liability whatsoever related to the subject matter of this Agreement, including, but not limited to, costs and attorney's fees (collectively, a "Loss"), (a) whether suffered, made, instituted or asserted by the other party or person, relating to personal injury to or death of any person, defamation or for loss, damage to or destruction of real and/or personal property, whether or not owned by others, arising during the term of this Agreement and to the extent proximately caused by the acts or omissions of the indemnifying Party,	The ICOs have two provisions relating to indemnification: ICO Section 6.1 and ICO Section 18. As is explained below, the TRA should adopt the CMRS Providers' indemnification provision (CMRS Section IV.A) which is very similar to the ICO Section 6.1 and reject the longer and more problematic ICO provision in Sections 18.1-18.3. Like the CMRS indemnification provision (VI.A), ICO Section 6.1 is a fairly standard, straightforward indemnification provision. It would require each Party to indemnify the other against all claims arising out of use of the service except to the extent of damages caused by gross negligence or willful misconduct of the indemnified Party. In contrast ICO

CMRS PROPOSED TERMS ¹	ICO PROPOSED TERMS ²	CMRS POSITION
	regardless of the form of action, or (b) suffered, made, instituted or asserted by its own customer(s) against the other Party arising out of the other Party's provision of services to the indemnifying Party under this Agreement. Notwithstanding the foregoing indemnification, nothing in this Section 18.0 shall affect or limit any claims, remedies or other actions the indemnifying Party may have against the indemnified Party under this Agreement, any other contract, or any applicable Tariff(s) regulations or laws for the indemnified Party's provision of said services. 18.2 The indemnification provided herein shall be conditioned upon: (a) The indemnified Party shall promptly notify the indemnifying Party of any action taken against the indemnified Party relating to the indemnification. (b) The indemnifying Party shall have sole authority to defend any such action, including the selection of legal counsel, and the indemnified Party may engage separate legal counsel only at its sole cost and expense. (c) In no event shall the indemnifying Party settle or consent to any judgment pertaining to any such action without the prior written consent of the indemnified Party, which consent shall not unreasonably withheld.	Section 18 is a lengthy and convoluted indemnification provision which appears to be somewhat at odds with ICO Section 6.1 ICO Section 18.1 seems to essentially provide the same type of protection as ICO Section 6.1 (albeit in a provision four times the length) and should be stricken as duplicative. ICO Section 18.2 goes on to condition the indemnification in five separate ways. These provisions place too many restrictions and pre-conditions on a party's indemnification rights and should not be adopted. Finally, the ICO provision at Section 18.3 would require a Party to provide in its customer contracts the indemnification language set forth in the agreement. As an initial matter, this is impractical and it would be prohibitively costly for CMRS carriers to modify all customer contracts to include limitation of liability language regarding the ICO or its agents, contractors or others retained by such parties, with regard to losses suffered by its customers. Further, the interconnection agreement already includes indemnification and limitation

CMRS PROPOSED TERMS ¹	ICO PROPOSED TERMS ²	CMRS POSITION
	(d) The indemnified Party shall, in all cases, assert any and all provisions in its Tariffs or customer contracts that limit liability to third parties as a bar to any recovery by the third party claimant in excess of such limitation of liability. (e) The indemnified Party shall offer the indemnifying Party all reasonable cooperation and assistance in the defense of any such action. 18.3 In addition to its indemnity obligations under Section 18.1 and 18.2, each Party shall provide, in its Tariffs or customer contracts that relate to any Telecommunications Service or network services provided by one Party to the other Party under this Agreement, or contemplated under this Agreement, that in no case shall such Party or any of its agents, contractors or others retained by such parties be liable to any customer or third party for (i) any Loss relating to or arising out of this Agreement, whether in contract or tort, that exceeds the amount such Party would have charged the applicable customer for the service(s) or function(s) that gave rise to such Loss, or (ii) any consequential damages (as defined in Subsection 19.2, below).	of liability language provisions, and thus, this provision is unnecessary.
VII. Term A. Either Party may submit this Agreement for approval by the TRA. This Agreement <u>shall commence on the effective date stated on the first page, subject to its approval by the TRA</u> and shall <u>terminate two (2) years</u> after the effective date	7.1 Term The Parties will submit this Agreement to the TRA for approval. This Agreement shall be effective 30 days following TRA approval. This terms and conditions set forth in this Agreement do not apply to time periods prior to the effective date. With the	<u>Effective Date:</u> The CMRS Agreement provides that the Agreement shall be effective on date stated. ICOs propose that the effective date be 30 days following TRA approval. The CMRS

CMRS PROPOSED TERMS	ICO PROPOSED TERMS	CMRS POSITION
	exception of termination pursuant to Sections 7.2, 7.5, 7.6, and 7.7, the initial term of this Agreement shall be year(s) from the effective date.	provision is preferable because it provides certainty for the parties as to when an agreement becomes effective and likely would result in the agreement becoming effective sooner <u>Term:</u> The CMRS Providers propose a two year term for the Agreement. (CMRS Agreement, Section VII). The ICO Agreement is silent on this point. AWS believes that given the amount of time and energy invested in reaching this agreement, a two year period is reasonable
B This Agreement <u>shall renew automatically for successive one (1) year terms</u>, commencing on the termination date of the initial term or latest renewal term. The automatic renewal shall take effect without notice to either Party, except that either Party may elect not to renew and terminate by giving the other Party written notice of its intention not to renew at least <u>ninety (90) days</u> prior to each anniversary date.	With the exception of termination pursuant to Sections 7.2, 7.5, 7.6 and 7.7, this Agreement shall continue in force and effect after the initial term until (i) replaced by another Agreement mutually agreed to in writing by both Parties; or (ii) until terminated by either Party upon sixty (60) days written notice to the other Party.	<u>Renewal:</u> The CMRS Providers would allow the agreement to automatically renew for successive one year periods, unless either party gave 90 days notice. (CMRS Agreement, Section VII.B). The ICOs would not permit any renewals and instead would allow continuation of the agreement on a month to month basis until terminated on 60 days notice. (See ICO Agreement, Section 7). Automatic renewals are standard in interconnection agreements and better serve the public interest. With an automatic renewal provision once the renewal time period passes, both parties have certainty that the

CMRS PROPOSED TERMS ¹	ICO PROPOSED TERMS ²	CMRS POSITION
		agreement will continue for at least another year. In contrast under the ICOs' provision, there is no certainty about the duration of the contract, no ability to plan for and prepare for contract negotiations. Once the initial term is concluded the contract can be terminated at any time. The TRA should adopt the CMRS Providers' automatic renewal provision.
C. Either Party may request for this Agreement to be renegotiated upon the expiration of the initial two (2) year term or upon any termination of this Agreement. Not later than forty-five (45) days from the receipt of initial request for renegotiations, the Parties shall commence negotiation, which shall be conducted in good faith.	NONE	<u>Re-negotiation/Arbitration Provisions.</u> The ICO Agreement does not include such a provision. Given the difficulties CMRS providers have had in getting the ICOs to negotiate and arbitrate this agreement, a renegotiation provision should be included in the Agreement.
D. <u>If either Party defaults in the payment of any undisputed amount</u> due hereunder, and such default shall continue for <u>sixty (60) days</u> after written notice thereof, the other Party may terminate this Agreement and services hereunder by written notice <u>provided the other Party has provided the</u> defaulting Party and <u>the appropriate federal and/or state regulatory bodies with written notice</u> at least twenty-five (25) days prior to terminating service.	7.5 [OPEN ISSUE.- Cure Period - requiring further discussion.] In the event of Default by a Party, as defined below in this subsection, the non-defaulting Parties may terminate any and all terms and conditions of this Agreement provided that the non-defaulting Party seeking termination with respect to the defaulting Party notifies the defaulting Party and the other non-defaulting Party in writing of the Default and the defaulting Party does not cure the alleged Default within thirty (30) days after receipt of such written notice. With respect to a defaulting Party, Default is defined as: (a) that Party's material breach of any of the material terms of this	<u>Grounds for Termination – Default:</u> As is explained in detail in my accompanying testimony, the ICOs' provisions establishing grounds for default are entirely too broad. They would allow the ICOs to unilaterally terminate the agreement for a wide variety of reasons which in their subjective judgment qualify as a default. In contrast the CMRS default provisions are narrowly tailored to failure to pay <i>undisputed</i> amounts and require prior notice to the appropriate

CMRS PROPOSED TERMS	ICO PROPOSED TERMS	CMRS POSITION
	Agreement, including the compensation terms; or (b) any aspect of a Party's operations or actions are determined by a court with proper jurisdiction or the TRA to be unlawful or not authorized.	regulatory body. <u>Cure Period:</u> The ICOs' proposed 30 day cure period is too short. Depending on the nature of the default it may take 30 days to even investigate the alleged default, much less correct it. Given the nature and relative complexity of the service involved, a 60 day cure period is more reasonable.
NONE	7.2 Termination -- Arrangements with Third-Party Intermediary Provider [Subject to change and resolution of terms and conditions with Intermediary Carrier] Should an Intermediary Provider and Rural LEC terminate their network interconnection for Intermediary Traffic, Rural LEC will provide to CMRS Carrier written notice of termination of its arrangement with the Intermediary Provider with respect to Intermediary Traffic exchanged between the Parties. Subject to both written notice and the availability of the post-termination provisions of Section 7.3, the terms of this Agreement will no longer apply to Intermediary Traffic exchanged between the Parties via the Intermediary Provider that is terminating its Intermediary Traffic arrangement with Rural LEC. Should an Intermediary Provider and CMRS Carrier terminate their network interconnection for Intermediary Traffic, CMRS Carrier will provide to Rural LEC written notice of termination of its	<u>Grounds for Termination:</u> Termination of <u>Intermediary Arrangements:</u> As is explained in detail in my accompanying testimony, it would be unfair and completely unnecessary to allow the ICOs to terminate the agreement because of an event outside of the CMRS Providers' control.

CMRS PROPOSED TERMS ¹	ICO PROPOSED TERMS ²	CMRS POSITION
	arrangement with the Intermediary Provider with respect to Intermediary Traffic exchanged between the Parties. Subject to both written notice and the availability of the post-termination provisions of Section 7.3, the terms of this Agreement will no longer apply to Intermediary Traffic exchanged between the Parties via the Intermediary Provider that is terminating its Intermediary Traffic arrangement with CMRS Carrier	
<u>Except in cases in which this Agreement has been terminated for Default</u> pursuant to Section VI D., <u>the provisions of this Agreement shall remain in force</u> during the negotiation and <u>up to the time that a successor agreement is executed</u> by the Parties and, to the extent necessary, <u>approved</u> by the TRA.	7.3 [OPEN ISSUE requiring further discussion] Except in the case of termination as a result of a Party's default, the following post-termination provisions shall apply in the event of termination by Rural Carrier or CMRS Carrier: (1) for those service arrangements made available to CMRS Carrier or to Rural LEC under this Agreement and existing at the time of termination, those arrangements may continue without interruption for CMRS Carrier and/or for Rural LEC, provided that either Party requests such arrangements continue to be made available for its use; and (2) the continuing arrangements will be made available for a period of time to allow either Party to request and/or to replace the arrangements set forth in this Agreement with alternate arrangements, to the extent that alternative arrangements are necessary, [OPEN ISSUE] but in no case will the existing service arrangements continue for longer than 12 months following the date on which notice of termination is provided by either Rural LEC or CMRS Carrier. All of the obligations set forth in this Agreement will continue	<u>Post Termination Obligations</u> <u>Non-Default</u>: As is explained in detail in my accompanying testimony, the 12-month limit on continuing service is patently unreasonable.

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	to be in effect during the time the provisions of this Section 7.3 are applicable.	
	7.6 [OPEN ISSUE requiring further discussion, will depend on terms and conditions with Intermediary Provider and other terms and conditions of this Agreement. The following draft proposals are subject to change.] If CMRS Carrier defaults by failure to comply with the compensation terms of this Agreement for compensation between CMRS Carrier and Rural LEC, Rural LEC may terminate this Agreement with respect to CMRS Carrier. For Intermediary Traffic, if Rural LEC is unable to effectuate discontinuance of the termination of Intermediary Traffic at Rural LEC's network or end offices, and following written notice of at least thirty (30) days to both the Intermediary Provider(s) and CMRS Carrier, Rural LEC will direct the Intermediary Provider(s) to take the necessary steps within its network that will allow for the disconnection of the Intermediary Services arrangement and the discontinuation of the delivery of all Intermediary Traffic to the network of Rural LEC. If Rural LEC defaults by failure to comply with the compensation terms of this Agreement for compensation between Rural LEC and CMRS Carrier, CMRS Carrier may terminate this Agreement with respect to Rural LEC. For Intermediary Traffic, if CMRS Carrier is unable to effectuate discontinuance of the termination of Intermediary Traffic at CMRS Carrier's network or end offices, and following written notice of at least	<u>Post termination Obligations – Default:</u> As is discussed in detail in my accompanying testimony, blocking of traffic should never be an allowable form of relief.

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	thirty (30) days to both the Intermediary Provider(s) and Rural LEC, CMRS Carrier will direct the Intermediary Provider(s) to take the necessary steps within its network that will allow for the disconnection of the Intermediary Services arrangement and the discontinuation of the delivery of all Intermediary Traffic to the network of CMRS Carrier.	
VII. Dispute Resolution <i>[Note- CMRS Section VIII A-B, and ICO Sections 8.1-8.2 are substantially similar]</i> C. At the written request of a Party, each Party will appoint a knowledgeable, responsible representative to meet and negotiate in good faith to resolve any dispute arising under this Agreement. <u>The Parties intend that these negotiations be conducted by non-lawyer, business representatives.</u> The location, format, frequency, duration and conclusion of these discussions will be left to the discretion of the representatives. Prior to arbitration described below, the representatives will utilize other alternative dispute resolution procedures such as mediation to assist in the negotiations. <u>Discussions and correspondence among the representatives for purposes of these negotiations will be treated as confidential information developed for purposes of settlement, exempt from discovery and production, which will not be admissible in the arbitration described below or in any lawsuit without the concurrence of all Parties. Documents</u>	8. Dispute Resolution 8.3. At the written request of a Party, the other Party will appoint a knowledgeable, responsible representative to meet and negotiate in good faith to resolve any dispute arising under this Agreement. The location, format, frequency, duration and conclusion of these discussions will be left to the discretion of the representatives. Prior to arbitration described below, and subject to agreement by all of the Parties, the representatives may utilize other alternative dispute resolution procedures such as mediation to assist in the negotiations	There are some substantive differences between the CMRS agreement, section VIII.C, and the ICO version, section 8.3. Specifically, the CMRS agreement establishes that negotiations would be conducted by non-lawyer, business representatives. However, the ICO draft strikes this provision. It is preferable to have non-lawyer business representatives engage in the initial negotiations because it is more efficient and less wasteful of resources. Often these disputes can be better resolved by business representatives. The CMRS draft also would establish confidentiality for negotiations and discussions under this provision, which is essential for the ability of parties to negotiate freely and ultimately reach a successful settlement. However, the ICO draft would omit this provision for

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<u>identified in or provided with such communications, which are not prepared for purposes of the negotiations, are not so exempted and may, if otherwise admissible, be admitted in evidence in the arbitration or lawsuit.</u>		confidentiality. It is consistent with state and federal law to permit settlement discussions to be confidential, and the Commission should accordingly adopt the CMRS provision.
XII. Entire Agreement This Agreement incorporates all terms of the Agreement between the Parties, and supersedes all prior oral or written agreements, representations, statements, negotiations, understandings, proposals, and undertakings with respect to the subject matter thereof. This Agreement may not be modified except in writing signed by both Parties, which modification shall become effective thirty (30) days after its execution, unless otherwise mutually agreed by the Parties. The undersigned signatories represent they have the authority to execute this Agreement on behalf of their respective companies. This Agreement can be executed in separate parts which together will constitute a single, integrated Agreement.	12. Entire Agreement This Agreement incorporates all terms of the Agreement between the Parties, and supersedes all prior oral or written agreements, representations, statements, negotiations, understandings, proposals, and undertakings with respect to the subject matter thereof. This Agreement may not be modified except in writing signed by all Parties, which modification shall become effective (30) thirty days after its execution, unless otherwise mutually agreed by the Parties. This Agreement is a result of a negotiation between the Parties, and it was jointly drafted by all Parties. (See also slightly different language in 23)	The ICOs continue to insist that the Agreement has been voluntarily negotiated by the Parties outside of the Section 252 process, which is inaccurate. The highlighted language should be deleted.
XIII. Notice Notices shall <u>be effective when received</u> via fax or direct delivery <u>or within three (3) business days of being sent via first class mail, whichever is sooner</u>, in the case of CMRS Carrier to: ...	13. Notice Notices given by one Party to another Party or to the other Parties under this Agreement shall be in writing and shall be (i) delivered personally, (ii) delivered by express delivery service, or (iii) mailed, certified mail or first class U.S. mail postage prepaid, return receipt requested to the following addresses of the Parties:	The CMRS version provides that notice may be provided by fax, in addition to the other methods specified in the ICO draft. The CMRS version also specifies exactly when notice has been received and becomes effective. Both these provisions are preferable to the ICO

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or to such other location as the receiving Party may direct in writing. Payments are to be sent to the address on the invoice.		draft, because (i) expanding the methods by which notice may be delivered (i.e., through fax) provides carriers flexibility; and (ii) establishing when receipt of notice has been accomplished is important for determining effective dates for certain actions.
XVI. Non-disclosure	16. Non-disclosure	
The Parties agree that it may be necessary to exchange certain confidential information during the term of this Agreement including, without limitation, technical and business plans, technical information, proposals, specifications, drawings, procedures, orders for services, usage information in any form, customer account data and Customer Proprietary Network Information ("CPNI") as that term is defined by the Communications Act of 1934, as amended, and the rules and regulations of the FCC and similar information ("Confidential Information"). Confidential Information shall include (i) all information delivered in written or electronic form and marked "confidential" or "proprietary" or bearing mark of similar import; or (ii) information derived by the Recipient from a Disclosing Party's usage of the Recipient's network including customer account data and CPNI. For purposes of this Section XVI, the Disclosing Party shall mean the owner of the Confidential Information, and the Recipient shall mean the Party to whom Confidential Information is disclosed. Information disclosed orally shall not be	[OPEN for further discussion] The Parties agree that it may be necessary to exchange certain confidential information during the term of this Agreement including, without limitation, technical and business plans, technical information, proposals, specifications, drawings, procedures, orders for services, usage information in any form, customer account data and Customer Proprietary Network Information ("CPNI") as that term is defined by the Communications Act of 1934, as amended, and the rules and regulations of the FCC and similar information ("Confidential Information"). Confidential Information shall include (i) all information delivered in written or electronic form and marked "confidential" or "proprietary" or bearing mark of similar import; or (ii) information derived by the Recipient from a Disclosing Party's usage of the Recipient's network including customer account data and CPNI. The Confidential Information is deemed proprietary to the Disclosing Party and it shall be protected by the Recipient as the Recipient	The provisions in the CMRS and the ICO drafts are essentially the same, except that the CMRS provision establishes that information disclosed orally does not constitute "confidential information" unless notice is provided in advance that the disclosure is confidential and that the disclosure reduced to writing within 72 hours. The pre-notice requirements helpful because it gives the party to whom the information is about to be disclosed the optic of refusing "delivery" of the confidential information. The writing requirement is critical because without a record of the information, it would be difficult to ensure the Confidential information was correctly identified and its confidentiality protected. Thus, the CMRS provision should be retained because it is more practical and easier to implement.

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disclosed. <u>Information disclosed orally shall not be considered Confidential Information unless Disclosing Party advises Recipient prior to disclosure that such information is Confidential Information and such information is reduced to writing by the Disclosing Party and delivered to the Recipient within seventy-two (72) hours of disclosure.</u> The Confidential Information is deemed proprietary to the Disclosing Party and it shall be protected by the Recipient as the Recipient would protect its own proprietary information. Confidential Information shall not be disclosed or used for any purpose other than to provide service as specified in this Agreement....	would protect its own proprietary information. Confidential Information shall not be disclosed or used for any purpose other than to provide service as specified in this Agreement. For purposes of this Section 16, the Disclosing Party shall mean the owner of the Confidential Information, and the Recipient shall mean the Party to whom Confidential Information is disclosed.....	to implement.