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FCC 87–363

****1** In the Matter of
Amendment of Part 69 of the Commission's Rules Relating to Private Networks and Private Line Users of the Local Exchange

CC Docket No. 87–530

NOTICE OF PROPOSED RULE MAKING

Adopted: November 24, 1987; Released: December 18, 1987

***7441** By the Commission:

TABLE OF CONTENTS

Paragraphs

I. INTRODUCTION

1. In a series of orders in CC Docket No. 78–72, we adopted a comprehensive "access charge" plan for the recovery by local exchange carriers (LECs) of the costs associated with the origination and termination of interstate and international telecommunications.[FN1] That plan was designed in part to reduce or eliminate discrimination or preferences in charges for telecommunications services. Accordingly, our plan applied switched access charges to most interstate services that use local exchange switches and common line facilities for access,[FN2] including MTS, WATS and MTS/WATS—equivalent services, as well as certain services that combine private lines with those facilities, like Foreign Exchange (FX), Common Controlled Switching Arrangement (CCSA), and equivalent services.[FN3]

2. At the time we adopted our access charge plan, we confronted an obstacle to full implementation of any plan to assess switched access charges for all interstate traffic that uses local exchange switches and common lines: the "leaky PBX" phenomenon. This phenomenon arises because most private line users who terminate their lines in private branch exchanges (PBXs) can interconnect those lines to local exchange subscriber lines to route interstate calls through the local exchange switch to another subscriber line. Because these calls patched from an interstate private line through a PBX and into the local exchange appeared to the LEC as local calls, the LEC was unable to identify the interstate calls for

purposes of applying access charges.[FN4] This "leakage" phenomenon, we concluded, was not limited to PBXs, but applied to any device that could interconnect private lines with local exchange subscriber lines, including Centrex equipment.[FN5]

****2** 3. In the First Reconsideration Order, we concluded that immediate application of our access charge plan to certain providers of interstate services that use local exchange switches and common lines might unduly burden their operations and cause disruptions in their provision of service to the public. Therefore, we granted temporary exemptions from payment of switched access charges to certain classes of exchange access users, including resellers, enhanced service providers, and sharers.[FN6] Recently, we eliminated the exemption for resale carriers.[FN7] And on July 17, 1987, we released a Notice of Proposed Rule Making to consider whether switched access charges should be assessed on enhanced service providers.[FN8]

4. Although we did not apply the switched access charges to leaked PBX interstate traffic and other exempt traffic, we elected to develop a surrogate charge—the special access surcharge—to be applied to all special access lines that terminate in a PBX or any other device that can interconnect special access lines with subscriber lines and that does not fall within certain specified exceptions.[FN9] We recognized at the time, however, that there were significant limitations on the surcharge as an effective substitute for switched access charges, and we expressed our expectation that superior methods of addressing the leaky PBX problem, whether based on actual measurement or otherwise, would be developed.

5. There have been significant developments in switch technology and increasing competition in the private line and private network market since we established the special access surcharge. The more sophisticated digital and analog electronic switches available today, at least in some instances, enable the LEC and/or PBX user to identify and measure "leaked" interstate calls from private networks and other private lines. Moreover, as a result of both ***7442** technological and marketplace developments, there is increased competition in the private network and private line market, with functionally similar private network switching services being provided by CCSA, Centrex–ETS, and sophisticated ETS-like PBX switches.[FN10]

6. For a number of reasons, we think it is important for us to reexamine our access charge rules affecting private networks and private lines in light of these changed circumstances. First, in their present form, our rules create a substantial dichotomy in the charges applied to private networks and private lines depending on whether they access the local exchange facilities via CCSA–like or PBX–like switching services. Accordingly, off-network traffic[FN11] that uses the local exchange switch and common lines for origination or termination is subject to full switched access charges if the switching service employed by the private network is CCSA–like, while the same traffic is treated as interstate "leakage" and subject to a combination of local business rates, business end user common line charges, and the special access surcharge if the switching service is considered PBX–like. While our orders include Centrex in the PBX–like category, they do not define CCSA–equivalent services, nor do they mention Centrex–ETS or PBX–ETS.

****3** 7. We have today, in a companion Order,[FN12] concluded that while Centrex–ETS is something of a "hybrid" service in terms of the categories in our present rules, combining both CCSA–like and PBX–like characteristics, it is functionally and competitively so similar to CCSA service that, under the approach taken in those rules, it should be subject to the same access charge treatment as CCSA. However, we recognize that this result raises potential concerns about discrimination, efficiency, and enforcement in that it treats private networks switched by Centrex–ETS systems differently from those switched by PBX–ETS, conventional Centrex, and conventional PBX systems.

Accordingly, we think it appropriate to examine our present access charge rules to determine whether, in light of recent developments, a more technically and economically rational approach to the assessment of charges for private network access that better promotes the four goals of our access charge plan is now possible.

8. Second, if, as is probable, the obstacles to applying access charges to all off-net or leaked interstate traffic still cannot be overcome, we think it is now necessary to reexamine the surrogate charge we currently apply to special access lines that interconnect with the public switched network. As indicated, in adopting the special access surcharge, we explicitly acknowledged its limitations, described it as an interim approach, and expressed the expectation that an improvement would soon be made. Such improvements, however, have thus far proved elusive for both the industry and this Commission. Nevertheless, the technical, economic, and regulatory developments affecting access charges and private networks since the adoption of the surcharge may have made certain refinements now feasible and desirable. We think it appropriate to consider these issues in the context of the reexamination of our access charge rules as applied to private networks that we are undertaking in this proceeding.

9. We are, therefore, issuing this Notice of Proposed Rule Making to consider the appropriate access charge treatment of all private networks and private line users of the local exchange. Specifically, we will consider whether switched access charges should be applied to private networks and private lines to the extent they access the local exchange switch and common lines to originate and terminate interstate telecommunications. If we determine, for policy or technical reasons, that switched access charges should not be applied to some private lines or networks, we will then consider whether the special access surcharge (or some revised form of it) ought to continue to apply to those private lines and networks as a surrogate for switched access charges.

10. As such, we incorporate in this Rule Making the pleadings filed in connection with the Bell Atlantic Petition for Declartory Ruling relating to the access charge treatment of Centrex–ETS service; the Comments filed in response to our earlier Notice of Proposed Rule Making, which invited proposals to replace or modify the private line surcharge [FN13]; and, finally, the pleadings filed in connection with the MCI Telecommunications Corporation Petition for Clarification,[FN14] concerning the switched access charge exemption for entities that share private lines and private systems.

II. ACCESS CHARGE ORDERS AND RULES REGARDING PRIVATE NETWORKS AND PRIVATE LINE USERS OF EXCHANGE ACCESS

****4** 11. In developing our access charge plan, we sought to achieve a proper balance among four primary goals: (1) elimination of unreasonable discrimination and undue preferences among rates for interstate services; (2) efficient use of the local network; (3) prevention of uneconomic bypass; and (4) preservation of universal service.[FN15] The ENFIA proceedings, highlighted a fundamental problem with the then-existing compensation scheme: customers of FX and CCSA services were assessed very different rates for their use of the local exchange facilities in originating and terminating their interstate calls than customers of MTS and WATS paid through divisions of revenues and settlements, despite the fact that both sets of services employ local exchange facilities in a similar fashion and are frequently used by customers to satisfy the same telecommunications needs.[FN16]

12. In the access charge plan, we attempted to eliminate the unreasonable discrimination among interstate FX and CCSA and equivalent customers, and interstate MTS/WATS and MTS/WATS-equivalent customers who use the local network.[FN17] Thus, our access charge orders subject the open end of FX, CCSA, and CCSA-equivalent services to the

switched access charges paid by MTS/WATS equivalent services.[FN18]

13. Unfortunately, we encountered two obstacles to achieving our goal of establishing the same charge for all users of the same local exchange facilities: rate shock and the "leaky PBX" phenomenon. Our concern for rate shock related to the fact that certain resellers, enhanced service providers, and sharers had been paying local business service rates for their interstate access, rather than the higher amounts that MTS and WATS had been paying. We decided that the immediate imposition of interstate access charges on these parties would increase their costs dramatically, and could affect their ability to provide service during the time that they were adjusting to the new access charge rules. Consequently, we granted certain resellers, enhanced service providers, and sharers a temporary exemption from the payment of the interstate switched access charges.[FN19]

***7443** 14. Recently, we eliminated the switched access charge exemption for resellers. In doing so, we held that the concerns about rate shock justified a temporary, rather than a permanent, exemption, and that elimination of the exemption would result in a more economically rational and equitable pricing scheme.[FN20] Subsequently, on July 17, 1987, we issued a Notice of Proposed Rule Making to consider whether the exemption from switched access charges for enhanced service providers should also be eliminated.[FN21] In proposing to eliminate this exemption, we stated our concern that the charges currently paid by enhanced service providers did not reflect the costs of the exchange access facilities they use in offering services to the public. Moreover, we expressed concern that, to the extent enhanced service providers are exempt from switched access charges, other users of exchange access are left with a disproportionate share of the costs of the local exchange that access charges are designed to cover.

****5** 15. These concerns apply equally to private line/leaky PBX users. The leaky PBX phenomenon, applicable to private networks and other private line users of the local exchange, including sharers, was first discussed in the Second Supplemental Notice in this docket.[FN22] We stated that:

> Private lines can be used to access local exchanges for the purpose of originating or completing long distance calls. Although private lines are generally described as dedicated, unswitched, point-to-point fcilities, they frequently (perhaps even typically) originate or terminate at a private branch exchange (PBX) facility controlled by the subscriber. With the PBX, the private line subscriber has the capability to "patch" an interstate call to off-network destinations in the local exchange. At the local exchange such a call is indistinguishable from a local call, even though the call originated in another state. The off-network connection through the subscriber's PBX utilizes the telephone operating company's local exchange facilities in a manner similar to switched services.... [FN23]

16. We believed that such interstate off-net use of the local exchange by private lines was substantial.[FN24] However, because the interstate calls carried over those private lines and patched through a PBX appear to the LEC to be the same as local calls that are placed over subscriber lines that connect the PBX to the local exchange switch, we concluded that the LEC was unable to distinguish the patched interstate calls from local calls. Moreover, we concluded that the LEC had no way of measuring the frequency and duration of those interstate calls in order to assess these private line users access charges to contribute to the costs of the local facilities they use in attaining this off-net local access.[FN25]

17. The private line/leaky PBX problem, thus, presented us with a dilemma in designing our access charge plan: consistent with our principle of nondiscrimination, we believed leaked interstate traffic should be assessed switched access charges, but the inability to distinguish such traffic from or-

dinary local exchange traffic made this approach highly problematic. As a result, we were led to consider alternative approaches that would result in the leaked interstate traffic making some contribution to interstate exchange access costs. In the original Access Charge Order, we decided to refrain from assessing private line/leaky PBX users an interstate switched access charge for their use of the local exchange because we believed that, as a practical matter, private line/leaky PBX traffic would diminish as the implementation of flat-rate subscriber line charges led to lower MTS rates (by lowering the carrier common line (CCL) charges) and hence reduced the incentive to substitute private line services and off-net local access for MTS.[FN26]

18. In our First Reconsideration Order, however, we modified the access charge plan to provide a more gradual transition for the implementation of subscriber line charges for residential and single-line business subscribers. As a consequence, CCL charges were higher than we initially expected, and would remain high for a longer period of time, compelling us to reexamine our decision not to impose a private line/leaky PBX charge. We concluded that:

> ****6** [F]ailure on our part to include leaky PBX users in the access charge plan might actually prompt customers to rely even more on leaky PBX configurations to avoid message service rates which incorporate full access costs. Since our intention in this proceeding is to have all interstate users of exchange access pay the same charge for the same service, we must develop a strategy to address the leaky PBX situation commensurate with this goal.[FN27]

19. However, the identification and measurement problem remained. Therefore, we determined that the most reasonable interim approach to reducing the discrimination in rates between MTS users and private line/leaky PBX users was to impose a surcharge on all jurisdictionally interstate special access lines that do not fall within specifically enumerated exceptions.[FN28] A surcharge, rather than actual usage measurements, was adopted because of the perceived costs and difficulties involved in developing measurement procedures.[FN29] We did not reject usage measurements as a long-term solution, however. We simply concluded that, based on the record at that time, such measurements could not be implemented without undue cost and difficulty.[FN30] We set the original surcharge at $25 per month for each voice-grade special access or private line as a reasonable estimate of the appropriate amount.[FN31]

20. The Second Reconsideration Order made clear that the private line/leaky PBX problem—and the special access surcharge—applies not only to private lines that terminate in a PBX, but to private lines that terminate in any device that can interconnect those lines with the local exchange, including Centrex equipment or an enhanced service provider's node, since each was capable of leaking interstate traffic.[FN32] Centrex and PBX switches were thus treated similarly—that is, they were both subject to the special access surcharge rather than switched access charges.

III. RELATED PROCEEDINGS

A. NPRM to Reexamine the Special Access Surcharge

1. The Notice

21. In 1983, when we adopted the special access surcharge, we characterized it as a short-term solution to a significant problem in implementing our access charge ***7444** plan, and we expressed the hope that "as operational problems are overcome and innovative ratemaking procedures can be introduced, [the surcharge will be eliminated and] all exchange access users will be charged on the same basis."[FN33] In our Second Reconsideration Order, we again acknowledged that "further refinements" of the special access surcharge would be desirable, but concluded that we should obtain further comments before revising the surcharge approach.[FN34] Subsequently, we issued an NPRM to consider, inter alia, whether to " 'fine-tune,' increase, decrease, alter substantially, replace, or eliminate

the surcharge approach to addressing the leaky PBX problem." [FN35] Specifically, we requested data on the expenses associated with administering the current surcharge rule, and comments on the efficacy of requiring that a surcharge be assessed on private lines that do not use telephone company provided special access lines. We also asked for suggestions on mechanisms for phasing out the surcharge, or some portion thereof, as subscriber line charges are increased. We noted that comments had previously been submitted regarding the possibility of actual measurement of leakage, and we sought additional comments focusing on proposals and techniques for actual measurement. Finally, we sought comments on the development of a "sliding scale" that would impose surcharges based on the subscriber's usage pattern.[FN36]

****7** 2. The Comments

22. Parties responding to the Special Access Surcharge Notice [FN37] generally expressed dissatisfaction with the existing surcharge mechanism and proposed various alternatives. However, no alternative received the support of a majority of the commenters. Many observed that our initial estimates of surcharge revenue have proven to be inflated. Bell Atlantic and SNET both blamed overlybroad exemptions for the relatively small amount of revenue received from the surcharge, claiming that they recover the surcharge from less than half of their private line circuits. In a similar vein, a number of parties complained that the cost of administering the current system outweighed the benefits obtained in actual revenues.[FN38] Some commenters argued that we should eliminate the existing surcharge and recover the lost revenues elsewhere, maintaining that the costs of refining the existing mechanism outweigh the benefits. A number of the BOCs and others urged that the present system increased employment of private bypass facilities and argued that a broader solution addressing the entire non— traffic-sensitive (NTS) cost recovery issue is necessary.

23. Addressing the specific proposals in the Special Access Surcharge Notice, a number of commenters agreed that the surcharge ought to be reduced as the subscriber line charge is increased and the CCL charge is reduced. However, those commenters did not agree upon the mechanism for such reductions or the amount of the surcharge reduction that would reflect reductions in the CCL charge resulting from the introduction of subscriber line charges.[FN39] Moreover, there was disagreement on the proper amount of the present or future surcharge.[FN40] In addition, some commenters urged assessment of the surcharge on facilities provided by entities other than LECs, while others claimed that such a proposal was arbitrary and argued that it would constitute an unlawful bypass tax.

24. Commenters rejected a leakage surcharge based on actual measurement, noting that this approach would be "fraught with difficulty" and an "administrative nightmare." They argued that measurement capability was not presently available and would be too costly to install. AT & T also contended that measurement would lead to accuracy disputes, disagreements over sampling techniques, and claims of invasion of privacy. Ad Hoc maintained that the practical impossibility of measuring leakage demonstrates that we should eliminate the surcharge altogether. Pacific Bell argued that if measurement were required, it should be done at the customer's PBX or equivalent device, although only the more sophisticated PBXs are capable of such measurement. The alternative—a measurement device at the central office—has many shortcomings, according to Pacific Bell, including the fact that only voice-frequency circuits can be measured, and total bypass circuits cannot be measured.

25. Most parties that addressed the proposal for a usage-based sliding-scale approach to the leaky PBX problem said that there is no useful correlation between the amount of leakage and the volume of total traffic, number of special access terminations, or any other characteristic of private line networks. ITT and Southwestern Bell noted that a sliding scale based on total private network traffic would

also require measurement, with all of its attendant problems. Online contended that such an approach would place a greater burden on legitimate uses of private lines, and GTE claimed that it would result in "massive confusion."

****8** 26. Certain LECs—BellSouth, NYNEX, and US West—proposed that we eliminate the existing surcharge and grant carriers the flexibility to recover the surcharge revenues from a contribution generated by pricing special access lines based on market conditions. NYNEX suggested that the special access services "rated for contribution" should be those, like high— capacity services, that can be used for service bypass, with the amount of the charge initially set at $25. A number of parties objected to this "strategic pricing" proposal: Ad Hoc maintained that this approach "does not bear even a scant relationship to cost-based pricing." ARINC argued that it would violate the MFJ, while ADAPSO expressed concern that such a grant of flexibility would give the LECs too free a rein in service pricing.

27. Both Ameritech and Pacific Bell proposed that the surcharge be replaced with a flat charge on all special access lines. AT & T argued that such an approach would be inconsistent with Commission policy, and TRT strongly opposed this proposal, arguing that it would result in too broad an assignment of NTS costs. Ad Hoc faulted Pacific Bell's universal surcharge approach as economically inefficient in that it would be contrary to the principles of cost causation and would encourage facilities bypass, by making all special access services more costly. ARINC argued that the elimination of existing exemptions (which, it asserted, is essentially what Pacific Bell is proposing) might violate the constitutional prohibition against exercise of the taxation power by this Commission.

28. RCA suggested transferring a portion of the LECs' revenue requirements from interexchange carrier private line services to subscriber line outside plant used jointly for exchange and toll service. Under this approach, instead of assessing the surcharge on interstate private lines, the surcharge would be assessed on the trunk lines connecting a leaky PBX or a leaky Centrex switch to the local exchange***7445** network. Such a charge could be collected directly from end users on a usage-sensitive or flat-rated basis, which, RCA asserted, would probably cut administrative costs in half. AT & T stated that assessing a surcharge on the local business lines or PBX trunks, which are the ultimate carriers of leaked traffic, might have been an acceptable approach at the outset, but concluded that the costs of changing the surcharge methodology at this point, and the added confusion, outweigh the benefits of this approach. ARINC argued that RCA's proposal would still require an exemption mechanism. As another alternative, Ad Hoc suggested that the existing surcharge be applied to the number of non-exempt private lines or the number of local lines terminating at the PBX, whichever is lower. Such a modification, in its view, would recognize the fact that the amount of potential leakage through any single PBX is a function of the number of local lines, as well as the number of special access lines, terminating at the PBX.[FN41]

****9** B. MCI Petition for Clarification

1. The Petition

29. As noted in a companion Order adopted today,[FN42] MCI, on September 26, 1986, filed a Petition for Clarification of our Second Report and Order in CC Docket No. 86–1, which eliminated the switched access charge exemption previously available to certain resellers.[FN43] MCI asked us to clarify whether we "intended to remove any exemption from switched access charges available to shared systems and other private users,[FN44] except enhanced service providers."[FN45] Although the companion Order concludes that the amendments adopted in CC Docket No. 86–1 do not effect sharers, that decision does not respond to MCI's contention that the sharer exemption should be eliminated.

30. The petition claims that elimination of the sharer exemption is consistent with sound policy

considerations. Assuming that entities that share private lines make use of the local exchange in the same way as do private line resellers, which MCI claims they do, there is no basis for subjecting sharers to different access charges simply because of their status as sharers. The fact that one entity is engaged in a for-profit undertaking and the other is not should be irrelevant to the question of the appropriate access charges they pay. Moreover, the fact that in 1983 both entities were exempt from the payment of switched access charges confirms that we thought similar access charge treatment was appropriate for both. Since we have removed the exemption for resellers, we should eliminate the exemption for shared systems and other private systems as well, MCI claims.

2. The Comments

31. Five parties filed Comments supporting MCI's position,[FN46] while nine opposed it.[FN47] Commenters who support MCI's position argue that the only basis for exempting sharers from application of switched access charges has been that resellers were exempt, and it would have been too difficult to draw distinctions between sharers and resellers. Now that the exemption for resellers has been eliminated, they argue, the same reasoning compels the conclusion that whatever exemption existed for sharers has been, or should now be, eliminated as well.

32. Commenters who oppose elimination of the switched access charge exemption for sharers claim that sharers are exempt from paying switched access charges for several distinct reasons.[FN48] First, some contend that under our rules switched access charges only apply to carriers, including resellers. While some of these commenters acknowledge that certain end users—e.g., FX, CCSA, and EPSCS users—are also subject to switched access charges, they claim that these are exceptions to the general rule that end users, including sharers, pay special rather than switched access charges. Moreover, the special access surcharge was adopted for end users in 1982 because their interstate usage of the local exchange was not readily identifiable or measurable. Nothing has changed in the interim with respect to measurability, these commenters contend, to warrant a change in treatment of end users now.[FN49] Other parties argue that, for the most part, sharers obtain interstate communications services from underlying carriers, which already pay access charges. Therefore, LECs would receive a double recovery if sharers were required to pay access charges as well.[FN50]

****10** 33. MCI argues in its reply that our access charge rules were not limited to carriers, but in fact apply to all interstate users of the local exchange. It states that the fact that FX, ONAL, and CCSA end users, as well as carriers, are subject to switched access charges is consistent with this general rule—not an exception to it. MCI contends that other interstate private users and private systems, including sharers, who access the local exchange through leaky PBX and Centrex switches have been exempt from paying switched access charges—and are instead subject to the special access surcharge—because their interstate usage was thought to be incapable of being measured, not because of their status as sharers. MCI admits that when the access charge rules were adopted in 1982, much, if not all, the traffic that leaked into the local exchange via PBXs or similar devices was incapable of being measured, and thus was legitimately exempt from paying switched access charges. However, according to MCI, changes in technology have occurred in the interim such that at least some of that leakage can be measured. It asserts, for example, that Centrex switches are capable of performing interstate usage measurements. In light of these changed circumstances, MCI urges us to reexamine the issue of application of switched access charges to sharers. It also asks us to reexamine the application of switched access charges to other private users.

C. Bell Atlantic's Petition for Declaratory Ruling

1. The Petition and Supplementary Filings

34. As noted in another companion Order adopted

today,[FN51] Bell Atlantic, on December 23, 1986, filed a Petition for Declaratory Ruling concerning the application of this Commission's access charge rules to off— net termination of interstate calls in the local exchange through the Centrex–ETS arrangement employed by Bell Atlantic for private telecommunications systems, such as the federal government's (GSA) Federal Telephone System (FTS) network.[FN52] Although we have resolved the immediate controversy with respect to the status of the Bell Atlantic Centrex–ETS offering under existing access charge rules, the pleadings in that declaratory ruling proceeding present information and arguments that warrant consideration in any reevaluation of switched access and special access surcharge rules. The various notices, orders and pleadings ***7446** in CC Docket No. 78–72 apparently do not discuss the existence of a Centrex–ETS that performs functions that were not part of the traditional Centrex service.[FN53] Access for Centrex–ETS became controversial when US West offered Centrex–ETS service to GSA as a substitute for AT & T's CCSA service.[FN54]

35. In a letter dated January 8, 1987, the Chief of the Common Carrier Bureau (the Bureau) requested Bell Atlantic to supplement its petition to include, inter alia, a detailed description of the Centrex–ETS configuration that it contemplated using to provide the off-net switching services for GSA at issue in the petition. The description provided by Bell Atlantic on January 20, 1987, indicates that, unlike the US West configuration, Bell Atlantic's Centrex–ETS would be an integral part of the switch providing coventional Centrex service. Thus, use of one Centrex switch to provide both conventional Centrex and ETS functions—not two as in the US West case—is apparently contemplated.

****11** 36. Subsequently, and also in response to the Bureau's request, Bell Atlantic informally submitted information to this Commission regarding the ability of Bell Atlantic's Centrex–ETS switches to separate and measure interstate off-net calls from local exchange calls. It indicated that all its digital switches (e.g., No. 5 ESS and DMS–100 switches) have the ability to identify calls coming in over special access lines and to provide for separate FGA and local tariff charges. However, older analog electronic Centrex switches (e.g., the No. 1 and 1A ESS and No. 2 and 2B ESS), which apparently constitute the majority of Bell Atlantic's switches offering Centrex–ETS service, are, it claims, not presently capable of identifying and separating such calls for billing purposes. Moreover, it claims that upgrading those switches, where technically possible, would be costly.[FN55]

2. The Comments

37. Eleven parties filed Comments and Reply Comments on the Bell Atlantic petition.[FN56] Ameritech notes, that not all Centrex–ETS switches are configured in a way that is functionally identical to AT & T's CCSA. Yet, even when configured differently, Ameritech acknowledges, at least some of these Centrex–ETS switches are technically capable of identifying and measuring the terminating off-net exchange access traffic. Ameritech commits to reconfiguring its Centrex–ETS switches where possible to separate and measure off-net traffic and to charge FGA rates in such cases. In the case of switches that can be used to provide Centrex–ETS service, but cannot, as a practical matter, be retrofitted, Ameritech urges us to permit the use of the special access surcharge as the appropriate way to recoup interstate carrier common line costs from exchange traffic terminated through those particular Centrex–ETS arrangements.

38. DOJ contends that because the CCSA and Centrex–ETS services compete with each other, equalizing the charges will end price discrimination prohibited by the MFJ and the Communications Act.[FN57] It asserts that such a course will also eliminate possible claims of conflict between this Commission's rules and the MFJ nondiscrimination provisions, and will promote effective competition in the provision of important telecommunications services to the federal government

and other large users.[FN58]

39. DOJ argues that, contrary to the assertions or implications of some parties, there is no conflict between the Commission's access charge rules and the MFJ requirements in that both require equal rates for CCSA and Centrex–ETS services. These services are functionally equivalent in the manner in which they route off-net calls from remote private network locations into the local exchange network, DOJ asserts, and the Commission has recognized that services that are equivalent to CCSA should be subject to the same access charge treatment as CCSA.[FN59]

40. DOJ contends that the underlying rationale for including Centrex switches in the category of leaky PBXs—the inability to measure actual usage on some PBX or Centrex systems and the desire to avoid giving PBXs an anticompetitive advantage over Centrex systems with which they compete—do not apply to Centrex–ETS systems that replace CCSA switching nodes. DOJ acknowledges that treating Centrex–ETS as a CCSA-equivalent service could result in a discrimination in favor of private network customers that use PBX switches over those that use CCSA or equivalent services, including Centrex–ETS, and could provide significant incentives for customers to structure their networks in an inefficient manner so as to minimize access charges. DOJ argues, however, that the differences in access charges between customer premises switching and central office switching are much less likely to be harmful to competition than a distinction that favors users of Centrex–ETS switching service over users of AT & T's CCSA switching service. In any event, DOJ argues, if the LECs can demonstrate to this Commission that their Centrex–ETS services are disadvantaged by the difference between FGA and the special access surcharge option available for PBXs, we could further modify our rules.

****12** 41. MCI argues that Centrex switches—ETS or conventional—should not be considered "leaky PBXs" for purposes of our access charge rules, and the special access surcharge simply should not apply to them. The surcharge, MCI notes, which represents a rough approximation of the amount of interstate usage of exchange access, was adopted to provide some measure of recovery for LECs for interstate traffic terminating or originating in the local exchange that cannot accurately be identified or measured by the LEC. Those difficulties do not exist in LEC-provided Centrex services, MCI claims. Centrex services enable customers to originate and terminate communications using LEC-operated central office equipment. With that service, MCI claims, the Centrex provider can directly measure the jurisdictional nature of each call made and its duration. Thus, as with AT & T's CCSA service, switched access charges can correctly be applied, and there is no reason to rely on a less exact measure, such as that represented by the surrogate special access surcharge.

42. Bell Atlantic disputes the claim that any Centrex switch can directly measure the jurisdictional nature of all calls that it completes, and notes that when a call is completed through a private line connected to a Centrex, the Centrex system has no way of determining where the call originated.

***7447** IV. DISCUSSION

A. Introduction and Summary

43. As noted above, our access charge orders and rules create a dichotomy between interstate telecommunications that access the local exchange switch in the same manner. That dichotomy applies to private networks and private lines depending on whether they access local exchange facilities via CCSA-like or PBX-like switching services. The CCSA-like private network services are subject to FGA switched access charges, while the PBX-like private line services are subject to local business rates, business subscriber line charges, and the $25 special access surcharge.[FN60] While our orders and rules explicitly include Centrex in the PBX-like category, they do not define CCSA-like services, nor do they specifically mention Centrex–ETS or PBX–ETS.[FN61]

44. The rationale underlying the difference in treatment of off— net CCSA and CCSA-equivalent traffic and leaky PBX traffic was twofold: first, we were concerned that there were substantial measurement problems with applying access charges to interstate traffic switched into the local exchange via PBX switches. This concern reflected our understanding that while PBX switches could, and no doubt in many cases did, leak interstate traffic into the local exchange, they also switch substantial amounts of local traffic. Indeed, it appeared that, in most cases, local calling rather than interstate leakage was the predominant use of local exchange lines connected to PBX switches. In light of the technical capabilities of PBX switches in use in 1982, we believed it might be too costly and difficult for those switches to identify and measure the leaked interstate usage from the local traffic, and that it might be difficult for LECs to verify usage that could be measured in an end user's PBX. CCSA and EPSCS— type switching services, on the other hand, served primarily interstate private networks and performed little, if any, local switching. Thus, the traffic switched into or out of the local exchange via CCSA or EPSCS could reasonably be presumed to be interstate and could be readily identified and measured at the LEC's local exchange switch. The decision to apply the surcharge to Centrex leakage as well as PBX leakage may have been based upon the assumption that Centrex leakage would also be difficult to measure. It was probably also based upon a recognition that Centrex and PBX switches competed directly with one another. CCSA and EPSCS-type switches, on the other hand, served different functions and did not appear to compete with PBX equipment or Centrex services.[FN62]

****13** 45. Based on the information now before us, however, we have tentatively concluded the technical and competitive distinctions which may have justified the different access charge treatment between CCSA and EPSCS-type services and customers, on the one hand, and conventional Centrex do not apply to Centrex–ETS services. The Bell Atlantic petition and underlying US West case illustrates this point: as noted, in 1986, US West's Centrex–ETS service competed directly with AT & T for four GSA switching locations previously served exclusively by CCSA. Moreover, other RBOCs have indicated that they will compete with AT & T for additional GSA switching locations, proposing to replace AT & T's CCSA switching service with Centrex–ETS switching service.[FN63]

46. In addition, the technological developments in switches and competition in the private network market have made customer premises equipment (CPE)—i.e., sophisticated ETS-type PBX switches—an increasingly viable option for customers with interstate private networks. Moreover, recent filings with this Commission indicate that private networks being designed now are combining customer premises—and carrier-based switching devices to meet unique customer needs.[FN64]

47. Thus, CCSA, EPSCS, Centrex–ETS, and PBX–ETS switching services apparently are increasingly being used to provide similar switching functions for customers with nationwide private communications networks. The switching services appear to be directly competitive, one being substituted for the other in customized, hybrid private networks. In addition, it appears likely that at least some Centrex and PBX switches offering the ETS feature have been, or can be, modified to have the capability to identify and measure interstate usage of the local exchange. If, in fact, these private network switching services are functionally interchangeable and competitive, and the interstate traffic originating or terminating off-net is capable of identification and measurement that can be verified without undue cost or disruption, the original justifications for distinguishing among the private network switching services for access charge purposes—applying switched access charges to some and the special access surcharge to others—may no longer be applicable. Instead, it may be possible, and desirable in furtherance of the goals of our ac-

cess charge plan, to require applications of switched access charges to all private network interstate calls originating or terminating off-net in the local exchange, regardless of whether the switching service employed is CCSA, EPSCS, Centrex–ETS, or PBX–ETS.[FN65]

48. While less clear, it appears, on the other hand, that conventional Centrex and PBX switches continue to serve different functions that do not compete directly with CCSA and similar services. Moreover, the customers they serve may be largely local. If this is the case, the amount of interstate traffic—originating or terminating—leaked into the local exchange via these switches is presumably significantly less than that leaked via a Centrex–ETS, PBX–ETS, or CCSA-type switching service whose primary function is to serve nationwide private networks by switching interstate traffic both on-net and off-net. In any event, the obviously different functions of conventional Centrex and PBX switches may continue to justify unique access charge treatment. The cost of modifying these switches and/or measuring interstate traffic "leaked" into the local exchange via these switches is not obvious. In addition, we are not certain that conventional Centrex and PBX switchers now have, or could be modified to have, a measurment capability without undue cost and difficulty. Moreover, the competitive relationship between conventional Centrex and conventional PBX may justify a switched access exemption for Centrex if further inquiry reveals that Centrex leakage can be measured and PBX leakage either cannot be measured or measurements cannot be verified with reasonable effort.

****14** 49. Therefore, in light of the changed circumstances relating to the technical and competitive characteristics of private network switching services and their use of local public, switched networks, we believe it is time to reconsider our access charge rules relating to interstate private lines using CCSA, Centrex, and PBX switching devices. Accordingly, we are issuing this Notice first, to gather further information on these technical and competitive characteristics. Specifically, we request information on the types of private networks and private line users that interconnect***7448** with the public switched network, the size and functions of such networks, the configurations of such private networks and particularly the manner in which they interconnect with the local exchange, the types of electronic tandem switches employed, the amount and nature of the off-net traffic originating and terminating in the local exchange, and the growth rate of such traffic. Second, we are issuing this Notice to solicit comment on alternative approaches, described below, that we might take to address these problems.

50. We recognize that we may conclude, based on the record in this proceeding, that it continues to be infeasible, because of costs and other difficulties, to require usage measurements and switched access charges for some or all private lines interconnected with exchange access facilities. We may determine that a surrogate charge continues to be the best way of ensuring some contribution by some or all private line users to the costs of exchange access. In view of that possibility, we believe it is appropriate to reconsider the special access surcharge in this docket and to evaluate various ways of revising it so that it might more effectively meet our goal of ensuring that the costs of exchange access are distributed in a fair and reasonable manner among all users of exchange access service.[FN66]

51. In view of our decision to reconsider application of our access charge plan to all private networks and other private line users of the local exchange to ensure that the costs of such usage are distributed in a reasonable, efficient, and nondiscriminatory fashion, and in view of our pending NPRM concerning enhanced services, we believe also it is appropriate to consider here the proper treatment of entities that share private systems to determine whether we should continue the exemption from switched access charges for this group, or instead subject shared private systems to the

switched charges that are applicable to FX–CCSA open end access and to resellers that use line side connections.

B. Centrex and PBX

1. Centrex Service

a. Centrex–ETS

52. It appears that Centrex–ETS service, whether provided by a stand-alone switch, as in the US West case, or as an integral part of a conventional Centrex switch, as in the Bell Atlantic proposal to GSA, can be functionally equivalent to CCSA and EPSCS-type services. Like CCSA and EPSCS, Centrex–ETS apparently provides interstate private networks with identical on— and off-net switching functions and may be directly substituted for CCSA-type service.[FN67] The fact that Centrex–ETS and CCSA switching services are presently competing for GSA's FTS switching business is further evidence that these services are functionally equivalent. Furthermore, it appears that private network traffic switched off-net by a Centrex–ETS, like that switched by a CCSA, is generally identifiable and measurable.[FN68] We invite comment on these conclusions.

****15** 53. Under these circumstances, we would be very reluctant to modify our rules to treat Centrex–ETS access lines as PBX-like and thus subject to the special access surcharge, while continuing to subject CCSA and EPSCS-type services to FGA switched access charges. Such a course of action would appear to be inconsistent with our ultimate goal, expressed in the access charge orders, "to have all interstate users of exchange access pay the same charge for the same service...." [FN69] The Communications Act prohibits "unjust or unreasonable discrimination in charges ... in connection with like communications services." [FN70] If a LEC were to subject an IXC to FGA rates for access to the local exchange via a CCSA and a Centrex–ETS customer to only a special access surcharge for similar service, such action would create discrimination among carriers as well as end users. Such different treatment of apparently like services would necessarily have an adverse impact on competition in the private network switching market. [FN71] Even if LECs cannot implement rules that eliminate all discrimination among end users, we tentatively conclude that LECs should be required to make every reasonable effort to eliminate discrimination that also produces significant anticompetitive effects.

54. Additional enforcement and efficiency problems may arise if we continue to treat Centrex–ETS as CCSA-like, and conclude that we should continue to exempt conventional Centrex from access charges. Specifically, we seek comment on definitional problems that might arise in distinguishing between conventional and Centrex–ETS services. Moreover, to the extent such definitional problems are significant, we invite comment on whether LECs would be more or less likely to employ separate switches to provide Centrex–ETS and conventional Centrex service, and whether such a development would result in substantial inefficiencies.

b. Conventional Centrex Service

55. It is our tentative conclusion that conventional Centrex service is functionally distinct from Centrex–ETS and CCSA-type services. We seek comment on that tentative conclusion and on whether that distinction should affect the treatment of conventional Centrex service under our access charge rules.

56. As noted, conventional Centrex service arguably should be included in the same category as PBX devices for two reasons. First, as with "leaky PBX" traffic, there may be certain technological problems with identifying and measuring "leaky Centrex" traffic. Second, even if some or all Centrex switches are capable or could be capable of measuring such leakage, the imposition of switched access charges in such cases might make Centrex service no longer competitive with PBX switches. [FN72]

57. Information in the record suggests that, since we first adopted our access charge plan, improve-

ments in conventional Centrex switch technology may have made measurement of interstate "leakage" possible on a more widespread basis. We request information on the extent of such measurement capability in current Centrex switches. Specifically, we ask parties to address the following questions:

****16** a. What types of switches are now used, and in the future will be used, for conventional Centrex service? How extensively are the various switches used in providing conventional Centrex service? To what extent is or will measurement of interstate originating and terminating traffic be possible with such switches? How can such measurement be accomplished?

***7449** b. If modification of some or all conventional Centrex switches would be required to accomplish usage measurement, what would be the nature and cost of such modifications?

c. Are there certain switches, types of customers, and/or types of traffic that should be excluded from any general measurement requirement? What would be the basis for and duration of any such proposed exclusions from a measurement requirement.

58. Assuming that interstate usage measurement can be performed by most, if not all, conventional Centrex switches, the question arises whether conventional Centrex service ought to be moved out of the PBX-like category and made subject to switched access charges. We recognize that application of FGA rates to Centrex service without applying similar charges to conventional PBX switches may affect the competitive balance between the two types of switching. We seek comment on the likely effects of changing the access charge rules in this way on the competitiveness of conventional Centrex vis a vis conventional PBX switches. Specifically, we ask parties to address the following questions: What action could or should this Commission adopt to mitigate any potential adverse effect on competition between the two services if we decide to impose FGA rates on conventional Centrex service, but not on conventional PBX service? Are there factors other than our access charge rules—e.g., whether local business rates are measured or flat—that might affect the relative competitiveness of Centrex service?

59. As a general matter, should this Commission, in furtherance of our ultimate goal to have all interstate users of local exchange switches pay comparable interstate access charges, require application of switched access charges whenever measurement becomes possible?

2. PBX—ETS

60. As we have noted, there is substantial evidence suggesting that PBX–ETS service, like Centrex–ETS service, can be functionally equivalent to CCSA and EPSCS-type services and even now is being used interchangeably with these other switching services in large, nationwide private networks. Moreover, the evidence suggests that such usage may increase in the future as large users who previously were exclusive customers of AT & T's CCSA and EPSCS services consider the increasingly available alternative of customized networks that combine many switching services and transmission modes. Commenters are encouraged to provide information on the size and growth of the private network market and of the various switching devices and configurations that are part of it. We also seek information on whether, in fact, PBX–ETS and Centrex–ETS switches are replacing and will continue to replace CCSA and EPSCS-type services, and whether, as a consequence, the amount of interstate traffic originating and terminating in the local exchange via such private network switches will also increase. Further, we seek comment on ways in which the growth of private networks might be affected by changes in our rules that would equalize the access charges for all electronic tandem switching devices employed in private networks—e.g., CCSA, EPSCS, Centrex–ETS, PBX–ETS, etc.—, regardless of how they are designated.

****17** 61. Since PBX–ETS, like Centrex–ETS, ap-

pears to be functionally equivalent to CCSA and EPSCS-type services, we are reluctant to include interstate traffic switched off-net by a PBX–ETS in the leaky PBX category and thus not subject to interstate switched access charges. Thus, if we were to find that PBX–ETS devices, either as stand-alone switches or as part of conventional PBX switches, can identify and measure the interstate traffic "leaked" into the local exchange without undue cost or difficulty, it is likely that we would prefer to include PBX–ETS interstate traffic in the category that is subject to switched access charges.

62. However, application of such charges to traffic from PBX switches may be far more difficult than application of such charges to Centrex–ETS switches. The Centrex switch, after all, is part of the central office on the LEC's premises, and thus, if measurement is possible, it could be done by the LEC itself. PBX devices, on the other hand, are located on the customer's premises and are subject to control by the user—not the LEC. We believe LECs may, under certain circumstances, now be capable of measuring at the central office some or all of the interstate traffic leaked into the local exchange via a PBX device on the customer premises. We ask comment on whether and, if so, to what extent such a capability exists, and how it operates.

63. For example, regardless of whether the LEC can measure all leaked interstate traffic from a PBX, a LEC might be able to apply switched access charges, if the PBX–ETS private network employed dedicated ONALs that were used exclusively (or at least predominantly) for off-net access and not for local calling. In that case, usage charges for switched access could be applied to the traffic on such lines and not to the traffic on the local lines served by the conventional PBX function. We ask comment on whether PBX–ETS private networks are configured in this way, and, if so, on the feasibility of such a rule change. We also ask whether we should consider requiring that off-net access for PBX–ETS private networks be achieved exclusively through such dedicated ONALs.

64. Assuming that the LECs have no, or only a limited, capability of measuring any PBX leakage at the central office, it would seem that implementation of any requirement that PBX users pay switched access charges for interstate traffic leaked into the exchange would depend on the PBX user's ability and willingness to measure and report accurately that usage to the LEC. We are concerned that users may not (1) be able accurately to measure such usage, and (2) in any event, may not accurately report such information. We request comment on these concerns and on proposals for implementing such a requirement. Specifically, we ask parties to address the following questions: If we establish a user reporting requirement, shoudl PBX users be required to provide back-up data to the LEC to verify their reports and, if so, what form should these back-up data take? Would such reporting involve sensitive or proprietary information, and if so, how could it be protected from misuse by the LEC? What other implementation problems could arise in applying switched access charges to PBX users and what possible approaches could be used to resolve these problems? Are there alternative ways to implement the application of switched access charges to PBX–ETS users?

****18 *7450** 65. Additional enforcement and efficiency problems may arise if we apply the switched access charges to PBX–ETS, and, because of measurement difficulties, conclude that we should continue to exempt conventional PBX from switched access charges. Specifically, we seek comment on whether, and, if so, what kinds of definitional problems might arise in distinguishing between conventional PBX and PBX–ETS switching functions. Moreover, to the extent such definitional problems are significant, we invite comment on whether private network users would be more or less likely to employ separate switches to provide PBX–ETS and conventional PBX switching, and whether such a development would result in substantial inefficiencies.[FN73]

b. Conventional PBX Service

66. It is our tentative conclusion that conventional PBX service, like conventional Centrex service, is functionally distinct from PBX–ETS, Centrex–ETS, and CCSA-type interstate private network switching services. We seek comment on that conclusion.

67. Moreover, we believe that, as with Centrex, improvements in PBX switch technology may have made measurement of leaked interstate traffic possible on a more widespread basis. We seek comment on the types of switches that are now being, and in the foreseeable future will be used for conventional PBX service, and the extent to which these various switches are or will be capable of identifying and measuring originating and terminating traffic leaked into the local exchange. We also ask parties to address whether certain switches, types of customers, and/or types of traffic should be excluded from any general measurement requirement and, if so, to explain the basis for and duration of any such proposed exclusion from a measurement requirement.

68. If we were to find that measurement of interstate usage is now possible with conventional PBX switches, the question arises whether conventional PBX service ought to be subject to switched access charges for interstate traffic leaked into the local exchange. We request comment on whether and, if so, the extent to which LECs are now or may be capable of measuring interstate PBX leakage at the central office. If that is not possible, it would seem that implementation of a measurement requirement would be difficult since we would be forced, as with the PBX–ETS, to rely upon the accurate reporting of the PBX user in the first instance. We seek comment on this approach and on alternative ways of implementing application of switched access charges to conventional PBX users.

C. Special Access Surcharge

69. It may continue to be infeasible, because of costs and other difficulties, to require some (or all) of the switching services and devices described above—i.e., Centrex–ETS, PBX–ETS, conventional Centrex, and conventional PBX—to perform actual usage measurements to determine the amount of interstate private line traffic switched into or out of the local exchange for access charge purposes. In those cases, we may conclude that a surrogate charge—like the special access surcharge—continues to be the most appropriate way of ensuring that private line users contribute to the costs of the local exchange facilities they use in originating or terminating interstate calls through the public switched network.

****19** 70. We recognize, however, that the special access surcharge has not proved as effective as we had anticipated in recovering the costs of local exchange networks from those private line users who, we believed, were using such networks for their interstate calling. Indeed, the parties filing comments and reply comments in our special access surcharge Rule Making proceeding identified numerous flaws and urged us to revise the surcharge in various ways or even eliminate it entirely. We have reviewed the suggestions and proposals made by the parties in that proceeding and have considered the effects of changes in switch technology since 1983. Based on this review, we invite comment on several alternative revisions to the special access surcharge.

71. First, we seek comment on whether we should continue the surcharge in its present form, but revise the "self-certification" exemption to the surcharge.[FN74] One possible approach would be to amend the rule so as to reverse the outcome of the ARINC Clarification Order,[FN75] in which we interpreted the exemption as extending to private line subscribers who certify that they have implemented hardware or software restrictions so as to disable their PBX or similar device from leaking. As many of the commenters assert, it appears that this exemption has been and continues to be abused by some, and may contribute to the low level of actual revenues collected by the surcharge. We note that our estimate of the extent of leakage from PBX-like devices in 1983 was substantially higher than that reflected in the actual surcharge revenues collected by the LECs. In addition, we note that the present

certification exemption is extremely difficult for the LECs to enforce since there does not appear to be any simple, non-intrusive way for the LEC to verify that a PBX or similar device on a customer's premises that is generally capable of leakage has been rendered incapable of leakage as a result of software or hardware restrictions.

72. On the other hand, we recognize that the present exemption has certain advantages and that the smaller amount of reported leakage may not reflect miscertification at all, but an inflated original leakage estimate or the effective operation of the rule. Specifically, the certification exemption may have provided an incentive to would-be leakers to restrict their equipment—through hardware or software modifications—so that it is incapable of leaking, and thereby avoid paying the surcharge. Thus, the certification exemption may have had the desired effect of actually decreasing the amount of leakage. Conversely, elimination of the certification exemption could have the opposite and negative effect of increasing leakage, since users who might otherwise restrict their equipment to avoid paying the surcharge would no longer have an incentive to do so since they would be paying the surcharge in any event. In addition, eliminating the certification exemption may provide incentives for facilities bypass, since there would be no way for a user to avoid paying the surcharge on any LEC-provided private line connected to a PBX or similar device. [FN76]

****20** 73. As noted, one of our goals in developing the special access surcharge has been and continues to be to ensure that "those responsible for leaky PBX traffic bear some share of the interstate access costs." [FN77] We seek comment on whether elimination of the certification exemption, as outlined above, would assist us in achieving this goal.

74. Second, many commenting parties argued that the special access surcharge should be reduced as subscriber line charges are lowered and the CCL charge is reduced.
***7451** However, it might not be appropriate to decrease the surcharge in direct proportion to the decrease in the CCL charge resulting from the introduction of subscriber line charges. The present surcharge was computed as a surrogate for both end office access charges and CCL charges assessed IXCs and others for interstate use of the local exchange. Nevertheless, CCL costs were a major concern that led to the adoption of the surcharge. All surcharge revenues have been credited to the common line revenue requirement, and unidentified leakage arguably does not impose a cost burden upon other interstate services because it is being counted as intrastate usage for separations purposes. We invite specific proposals for a mechanism that would, in applying the existing surcharge formula, reduce the surcharge amount by some factor to reflect decreases in the CCL charge, or adjust the surcharge amount to take account of other factors. [FN78]

75. Third, we invite comment on the following proposal to replace the present surcharge amount with one based on a modified measurement approach. Under such an approach, each LEC could be required to develop a measurement-based charge, involving either actual measurement or a representative sampling of leakage through conventional Centrex equipment. [FN79] That charge would then be applied to special access lines connected to all conventional Centrex and PBX switches that are subject to the surcharge. Such a revision would have the advantage of moving the surcharge in the direction of actual measurement. It would also enable this Commission, LECs, and users to avoid involvement in what might prove to be a quagmire of implementing and overseeing the reporting by PBX users of measured interstate usage.

76. To the extent leakage through a Centrex–ETS or PBX–ETS can reasonably be expected to be greter than leakage through conventional Centrex and PBX switches, and assuming we do not apply FGA charges to that traffic, a "sampling based" charge might first have to be adjusted upward to reflect this difference in usage patterns. We seek

comment on whether such an adjustment would be desirable and, if so, how it might be implemented. Alternatively, a separate measurement-based charge could be developed applying the same procedures to Centrex–ETS switches only, which would be assessed on and applied to special access lines connected to Centrex–ETS and PBX–ETS devices.

77. The approach described might produce a surcharge amount that more accurately reflects actual leakage than the present $25 charge. We invite parties to address the utility of this approach and how it might best be implemented. Parties are also asked to suggest variations or possible improvements. In addition, we seek comment on whether and how frequently such a surrogate charge should be updated, and whether, if this approach were to be adopted, the present exemptions should remain in effect. We also invite comment on whether this surrogate charge should create in effect a rebuttable presumption. That is, should these users be permitted to demonstrate that in fact their actual interstate leakage into the local exchange is less than that assumed by the surrogate charge? If desirable, how could such a plan be implemented?

****21** 78. Fourth, as yet another possible approach, we invite commenters to consider whether we should simply maintain the existing surcharge of $25 with the present exemptions for some or all of the private lines to which it presently applies. It appears that the $25 surcharge is producing some contribution toward the interstate share of local exchange costs from private lines capable of leaking interstate traffic into the local exchange. In light of the problems that may exist with some or all of the approaches to the leaky PBX problem discussed above, it is perhaps the case that no other surcharge mechanism or amount would prove as effective or would better serve the public interest.

D. Access Charge Treatment of Entities that Share Private Networks and Private Lines

79. As noted above, our access charge orders exempt certain users of exchange access from paying switched access charges because of concerns about rate shock. Among those users exempted were certain resellers, enhanced service providers, and sharers.[FN80] Subsequently, we eliminated the exemption for resellers and recently issued an NPRM to consider whether we should eliminate the exemption for enhanced service providers.[FN81] However, neither proceeding eliminated or proposed to eliminate the exemption for sharers. Thus, in an Order accompanying this NPRM,[FN82] we have denied MCI's Petition for Clarification to the extent that it seeks a ruling that the switched access charge exemption for entities that share private lines and networks has been eliminated.

80. Nevertheless, we believe that, consistent both with the actions we have taken in other dockets with respect to resellers and enhanced service providers, and with the proposals we are considering in this docket for private users, it is no longer appropriate to maintain a switched access charge exemption for entities that share private lines and private networks to the extent they use the local network in the same way as resellers, other private networks and private line services. We tentatively conclude, therefore, that switched access charges should apply to such private line sharers and shared systems.[FN83] We invite parties to comment on this tentative conclusion. We also ask parties to provide information on the network configurations typically used in private line sharing arrangements, and whether the usage measurements necessary to implement our tentative conclusion could be accomplished without undue cost and difficulties. Parties who believe such usage measurement would not be feasible, are asked to evaluate alternatives, including the application of the current (or revised) special access surcharge, as second best solutions.

V. PAPERWORK REDUCTION ACT

81. We have analyzed the proposals contained in this Notice with respect to the Paperwork Reduction Act of 1980 and have tentatively concluded that they will, if adopted, impose new or modified information collection requirements on the public. Therefore, implementation of the proposed require-

ments may be subject to approval by the Office of Management and Budget as prescribed by the Act. [FN84]

VI. PROCEDURAL MATTERS

****22** 82. Pursuant to 47 U.S.C. §§ 154(i), 154(j), 201–05, 218, and 403, and 5 U.S.C. § 553, NOTICE IS HEREBY GIVEN of the proposed adoption of new or modified rules in accordance with the discussion and delineation of ***7452** issues in the Notice of Proposed Rule Making and on the basis of previous notices and petitions incorporated into this proceeding.

83. All interested persons MAY FILE comments on the issues and proposals discussed herein not later than February 29, 1988 and replies may be filed not later than March 30, 1988. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, an original and five copies of all statements, briefs, comments, or replies shall be filed with the Secretary, Federal Communications Commission, Washington, D.C., 20554 and all such filings will be available for public inspection in the Docket Reference Room at the Commission's Washington, D.C. Office. In addition, two copies of each pleading should be filed with the Policy and Program Planning Division, Room 544, Common Carrier Bureau, 1919 M Street, N.W., Washington, D.C. 20554. A copy of all filings should also be sent to the Commission's contractor for public records duplication, International Transcription Service, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857–3800. In reaching its decision, the Commission may consider information and ideas not contained in filings, provided that such information is reduced to writing and placed in the public file, and provided that the fact of the Commission's reliance on any such information or ideas is noted in the order.

84. For purposes of this non-restricted notice and comment rule- making proceeding, members of the public are advised that ex parte presentations are permitted except during the Sunshine Agenda period. See generally section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, ex parte or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

85. In general, an ex parte presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written ex parte presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral ex parte presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commission or staff member involved) which summarizes the data and arguments. Each ex parte presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

****23** FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico

Secretary

FN1 Third Report and Order, MTS and WATS Market Structure, CC Docket No. 78–72, 93 FCC2d 241 (1983) (hereinafter Access Charge Order), modified on reconsideration, 97 FCC2d 682 (1983) (hereinafter First Reconsideration Order), modified on reconsideration, 97 FCC2d 834 (1984) (hereinafter Second Reconsideration Order), aff'd in principal part and remanded in part, National Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095 (D.C.Cir.1984), cert. denied, 105 S.Ct. 1224, 1225 (1985), modified on further reconsideration, 99 FCC2d 708 (1984), 101 FCC2d 1222 (1985), aff'd on further reconsideration, 102 FCC2d 849 (1985), petitions for review pending, People of California v. FCC, No. 84–1124 (D.C.Cir., petition filed Apr. 2, 1984), and AT & T v. FCC, No. 84–1148 (D.C.Cir., petition filed Apr. 16, 1984).

FN2 Local exchange switches are sometimes described as end office switches. Common lines are sometimes described as subscriber lines or local exchange subscriber lines. Usage charges for the carrier common line and end office access elements are sometimes described as switched access charges.

FN3 First Reconsideration Order, 97 FCC2d at 718, para. 86; Second Reconsideration Order, 97 FCC2d at 864 n. 45, para. 97. FX is a service that consists of a private line terminating at one end at the FX subscriber's premises (the “closed end) and at the other end in a local switched exchange network (the “open end). This service enables a subscriber to place calls to telephones in the “foreign” exchange without paying MTS charges, and enables persons in the “foreign” exchange to place calls to the FX subscriber in a distant city by calling a local number without paying MTS charges or using operator assistance to make a collect call. FX is, in certain respects, an exchange-specific WATS (for calls to the foreign exchange) or 800 (for calls from the foreign exchange) service. CCSA, which was introduced in the 1950's, is a service offered by AT & T for large customers with extensive interstate communications needs. It uses dedicated transmission lines and switches to create nationwide, private telecommunications networks. The CCSA switches not only connect private lines and networks, but also interconnect those lines and networks with the telephone companies' local exchange, and switch calls that originate or terminate over such local exchanges on and off CCSA private networks. Since the AT & T divestiture, and except for shared network facilities arrangements (SNFA), CCSA switches have been located at AT & T's facilities (its “point of presence” or “POP) and perform at most only incidental local and intrastate switching. Prior to divestiture and in SNFA situations now, the CCSA switch was, or is, on occasion a leased portion of the LEC's end office switch. All off-network traffic terminating in the local exchange via a CCSA private network switching service, located at an AT & T POP or obtained under SNFA, is reported to be interstate for access charge purposes, and is subject to switched access charges. AT & T's Enhanced Private Switched Communications Service (EPSCS) is an equivalent, albeit more sophisticated and newer, private network switching service. EPSCS offers improved transmission quality for voice and data and additional user control, accounting, and administrative features.

FN4 For a more complete description of the “leaky PBX” phenomenon, see MTS and WATS Market Structure, Second Supplemental Notice of Inquiry and Proposed Rule Making, 77 FCC2d 224, 241, para. 63 (1980) (hereinafter Second Supplemental Notice).

FN5 Second Reconsideration Order, 97 FCC2d at 874, para. 127 and n. 57. There are two kinds of Centrex service, conventional and ETS (electronic tandem switching arrangement). Conventional Centrex is a service that LECs have offered their business customers for many years. The central office equipment used to provide the service is an integral part of the local exchange switch. It consists of dial switching equipment located on the LEC's premises, which is interconnected with customer-

provided stations on the customer's premises. This is used to provide intercommunication among the stations, and station access via common lines to the exchange network. Centrex switches also route traffic onto interstate access lines, including those used for interstate switched services (such as MTS, WATS, and their equivalent) and private line services. More than a hundred station/system functions are available on conventional Centrex, including, inter alia, direct inward and outward dialing from Centrex stations, touch tone, three-way conference transfer, automatic callback calling, call waiting, call forwarding, call hold, and hunting. Conventional Centrex service thus basically provides local exchange switching functions. Centrex–ETS, when combined with conventional Centrex service, provides those local switching functions as well as "toll-type switching functions—that is, it can be used to interconnect interexchange trunks and switch traffic between those trunks that neither originates nor terminates in the exchange where the Centrex–ETS switch is located. Centrex–ETS also provides a LATA-wide point of concentration for traffic to be directed to an interexchange carrier (IXC) and/or a Centrex–ETS private network. Furthermore, it offers certain private network management features, such as uniform numbering plans, automatic alternate routing (AAR), automatic route selection (ARS), and station management detail recording (SMDR).

FN6 First Reconsideration Order, 97 FCC2d at 715, para. 83.

FN7 See WATS–Related and Other Amendments of Part 69 of the Commission's Rules, Report and Order, CC Docket No. 86–1, FCC 86–115 (released Mar. 21, 1986) (First Report and Order); WATS–Related and Other Amendments of Part 69 of the Commission's Rules, Second Report and Order, CC Docket No. 86–1,FCC 86–377 (released Aug. 26, 1986) (Second Report and Order). Following the release of the Second Report and Order, MCI Telecommunications Corp. (MCI) filed a Petition for Clarification, requesting that we clarify that by eliminating the switched access charge exemption for certain private line resellers, we also intended to eliminate the exemption for other private networks and private line users of the local exchange, including entities that share those private lines and networks. While our orders in that proceeding were in fact limited to certain private line resellers and did not consider the appropriate access charge treatment of entities that share interstate private lines, see WATS–Related and Other Amendments of Part 69 of the Commission's Rules, Memorandum Order and Opinion, CC Docket No. 86–1, FCC 87–362 (released Dec. 18, 1987) (MCI Order), this Notice proposes to eliminate the access charge exemption for sharers of interstate private lines.

FN8 Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rule Making, CC Docket No. 87–215,FCC 87–208 (released July 17, 1987) (hereinafter Enhanced Services NPRM).

FN9 First Reconsideration Order, 97 FCC2d at 714–15, para. 82. Such other devices can include, inter alia, a sharer's switch or an enhanced service provider node, as well as a Centrex switch.

FN10 A PBX–ETS is an electronic tandem switching node located at the customer's premises that provides both traditional PBX functions as well as on— and off-net switching and routing capabilities for an interstate private network. These technological and competitive changes in the private network and private line switching market have been highlighted by a Petition for Declaratory Ruling, filed by Bell Atlantic Telephone Companies (Bell Atlantic) on December 23, 1986, concerning application of our access charge rules to Centrex–ETS service. The petition was filed in response to a decision of the AT & T divestiture court, which held that the US West Companies (US West) must provide exchange access for their Centrex–ETS customers at the same rates that they charge AT & T for such access for its CCSA service, since the two private line switching services provide the

same switching functions. United States v. Western Electric Co., No. 82–0192, slip op. (D.D.C. Nov. 26, 1986) (hereinafter November 26 Memorandum). See Bell Atlantic Petition for Declaratory Ruling Concerning Application of the Commission's Access Charge Rules to Private Telecommunications Systems, FCC 87–361 (released Dec. 18, 1987) (hereinafter Bell Atlantic Order).

FN11 In this context, an off-network, or off-net, originating call describes a call made from a telephone or terminal that is not part of the private network to a telephone or terminal on the private network. An off— net terminating call describes a call made from a telephone or terminal on the private network to a telephone or terminal that is not part of that network. Thus, a local exchange carrier's public switched network is used to complete off-net originating and terminating calls. An on-network, or on-net, call, on the other hand, describes a call made from one telephone or terminal on the private network to another telephone or terminal on that network. Since the call remains within the private network, the local exchange carrier's public switched network is not used in completing the call.

FN12 Bell Atlantic Order, FCC 87–361.

FN13 MTS and WATS Market Structure, Notice of Proposed Rule Making, 49 Fed.Reg. 50,413 (1984) (hereinafter Special Access Surcharge Notice).

FN14 MCI Telecommunications Corporation Petition for Clarification, WATS–Related and Other Amendments of Part 69 of the Commission's Rules, CC Docket No. 86–1 (filed Sept. 26, 1986).

FN15 First Reconsideration Order, 97 FCC2d at 683, para. 3.

FN16 Exchange Network Facilities for Interstate Access, 71 FCC2d 440, 444, 456–57, paras. 12, 43–44 (1979); Second Supplemental Notice, 77 FCC2d at 230–31, para. 31; Access Charge Order, 93 FCC2d at 248–49, paras. 19–21.

FN17 Second Supplemental Notice, 77 FCC2d at 230–31, para. 31; Access Charge Order, 93 FCC2d at 247–49, 257–58, paras. 19–21, 51. Thus, we stated:

> Indeed, the current methods of recovering costs of jointly used non-traffic sensitive subscriber plant for MTS, open end FX, CCSA and WATS services and the ENFIA services are totally different and produce widely differing results even though each service uses the same plant in the same manner. The FX and CCSA services pay local exchange rates for open end access, the MTS/WATS equivalent services must pay the higher ENFIA rates, and MTS and WATS pay even higher access compensation through the settlements and divisions of revenue process. The level of the ENFIA charge has been negotiated to reflect a discount from the MTS access compensation. It was also designed to produce a rate that is higher than the local exchange rate paid by FX and CCSA customers. Since no one has attempted to justify the disparate rates charged for like access services in this proceeding, we must find them to be unlawfully discriminatory. Access Charge Order, 93 FCC2d at 258, para. 51.

FN18 First Reconsideration Order, 97 FCC2d at 717–718, para. 86; Second Reconsideration Order, 97 FCC2d at 864 n. 45, para. 97; 47 C.F.R. §§ 69.5(c), 69.115(e)(1). The switched access charges for MTS/WATS equivalent services include some discounts to reflect differences between access arrangements used by MTS and those that were used by MTS/WATS equivalent services. Those differences have diminished in significance with the introduction of equal access.

FN19 First Reconsideration Order, 97 FCC2d at 712–716, paras. 80–84; Second Reconsideration Order, 97 FCC2d at 874–877, paras. 127–136; 47 C.F.R. §§ 69.5(b), 69.115.

FN20 See First Report and Order, CC Docket No. 86–1, FCC 86–115; Second Report and Order, CC Docket No. 86–1,FCC 86–377. In the First Report and Order, this Commission amended Section

69.5(b) of the rules to subject resellers of interstate WATS service to switched access charges and to require resellers of MTS and certain other common carrier MTS-type services that are assessed carrier common line charges to pay all the traffic-sensitive elements of switched access charges (thereby "exempting them only from payment of the carrier common line element). In the Second Report and Order, we removed the exemption that had been applicable to entities that resell "privaate line service to offer services which are not MTS/WATS type service" (principally, data and telex carriers).

FN21 Enhanced Services NPRM, CC Docket No. 87–215,FCC 87–208.

FN22 Second Supplemental Notice, 77 FCC2d at 241, para. 63.

FN23 Id.

FN24 We said:

> While we believe that such off-net use of the local exchange plant by private lines is extensive, we are not aware of any statistics or measurements which would enable us to quantify such use or to assess the costs which should be attributed to private line service because of off-net local access. Id.

FN25 Id.

FN26 Access Charge Order, 93 FCC2d at 279–80, para. 127.

FN27 First Reconsideration Order, 97 FCC2d at 712, para. 80.

FN28 Id. at 715, para. 83. See 47 C.F.R. § 69.115(e). In the First Reconsideration Order, we adopted five exemptions to the surcharge for those lines that either cannot practically be used to access the local exchange switch or lines that are already subject to switched access charges. 97 FCC2d at 715–18, paras. 83–86; see 47 C.F.R. § 69.115(e)(1)–(5). In the Second Reconsideration Order, we added a sixth exemption that allows customers to be exempt from the surcharge if they certify to their exchange carriers that their private lines do not terminate in a PBX or other device capable of leaking interstate traffic into the local exchange. 97 FCC2d at 874–75, paras. 126–129; see § 47 C.F.R. 69.115(e)96). We subsequently clarified that this last exception applies when a subscriber certifies that its PBX or similar equipment has been rendered incapable of interconnecting with the local exchange due to either hardware or software restrictions. See Clarification of Sections 69.5 and 69.115, Memorandum Opinion and Order, 57 RR2d 1630 (1985) (ARINC Clarification Order), aff'd on recon., 59 RR2d 107 (1985), appeal pending sub nom.Ad Hoc Telecommunications Users Committee v. FCC, No. 85–1792.

FN29 As we explained:

> We were confronted with three choices when we adopted the surcharge concept. First, we could permit leaky PBX users to continue to obtain the same interstate access that MTS customers use without paying the same price. Second, we could direct telephone companies to perform usage measurements that could be costly and difficult in order to ensure that leaky PBX users pay precisely the same amount as the MTS users. Third, we could impose a surrogate charge based upon an estimate of average leaky PBX usage that is necessarily imprecise. We concluded that, at this time, the third alternative is more consistent with the goals of the Communications Act than the other two. The imposition of a modest surcharge that is not based upon actual usage measurements will reduce discrimination or preferences to the maximum extent possible without imposing costly and difficult measurement procedures. Second Reconsideration Order, 97 FCC2d at 870–71, para. 116.

FN30 Id. at 871, para. 117.

FN31 We arrived at the $25 amount by estimating the amount of private line traffic that leaks into the local exchange and applying the then applicable

non-premium access charges to such traffic. First Reconsideration Order, 97 FCC2d at 719–80, para. 88. We rejected requests for further refinements of the surcharge amount in the Second Reconsideration Order, determining that intervening changes (e.g., the fact that non-premium access charges were lower than the original estimate and the adoption of more liberal surcharge exemptions, which meant fewer private lines would be subject to the surcharge) had largely counterbalanced each other and an attempt at re-estimation would simply produce about the same result. However, we expressed our expectation that telephone companies would replace the $25 surcharge with a system more precisely reflecting actual leakage as soon as possible. Second Reconsideration Order, 97 FCC2d at 873, para. 124.

FN32 Second Reconsideration Order, 97 FCC2d at 874 n. 57, para. 127.

FN33 First Reconsideration Order, 97 FCC2d at 711, para. 77.

FN34 Second Reconsideration Order, 97 FCC2d at 873, para. 124.

FN35 Special Access Surcharge Notice, 49 Fed.Reg. 50,413 (1984), para. 15.

FN36 Id. at paras. 16–18.

FN37 Parties filing Comments are: NYNEX Telephone Companies (NYNEX); Ameritech Operating Companies (Ameritech); Association of Data Processing Service Organizations Inc. (ADAPSO); RCA Communications, Inc. (RCA); American Telegraph and Telephone (AT & T); American Satellite Company; Ad Hoc Telecommunications Users Committee (Ad Hoc); ITT Communications Services, Inc. (ITT); GTE Sprint Communications Corp. (GTE); Bell Atlantic Telephone Companies (Bell Atlantic); Bell–South Corporation (BellSouth); American Petroleum Institute and Utilities Telecommunications Council (Joint Comments); International Communications Association (ICA); Mountain States Telephone & Telegraph Company, Northwest Bell Telephone Company, and Pacific Northwest Bell Telephone Company (Mountain States); Online Computer Library Center (OCLC); Southern New England Telephone Company (SNET); Southwestern Bell Telephone Company (Southwestern Bell); United States Telephone Association (USTA); United Telephone System, Inc. (UTS); US Telcom, Inc. (US Telecom); Pacific Bell; and Aeronautical Radio, Inc. (ARINC). Parties filing Reply Comments are: Ad Hoc; AT & T; ARINC; Association of American Railroads; ADAPSO; Joint Comments; Dow Jones and Company, Inc. (Dow Jones); GTE; ICA; ITT; NYNEX; Satellite Business Systems (SBS); Tele–Communications Association; and TRT Telecommunications Corporation (TRT).

FN38 Thus, RCA claimed that it costs $1 in surcharge-related expenses to collect $3 in surcharge revenues. NYNEX maintained that it had received $25 million in surcharge revenues at a cost of $1.1 million, while SNET stated that it had spent $100,000 administering the surcharge program.

FN39 Thus, GTE and US Telcom contended that the surcharge should be reduced in proportion to the total NTS costs recovered through SLCs (e.g., if the proportion of NTS costs recovered from subscriber line charges increases 0–10%, then the surcharge should be reduced by 10%). Ad Hoc argued that the surcharge should be reduced to a conservative $12, maintaining that the estimate of monthly carrier usage charges for non-premium access which this Commission used to compute the $25 amount has declined substantially. ARINC argued that any recalculation should be based on LEC-provided data (even if we have to compel production of the data) and pointed to the fact that no LEC has sought an increase in the surcharge amount as evidence that the $25 surcharge amount is too high.

FN40 Pacific Bell advocated an increase in the surcharge to $67 as a result of the ARINC Clarification Order, 57 RR2d 1630 (among other developments). At the other end of the spectrum, US West

and Southwestern Bell argued for elimination of the surcharge, Southwestern Bell said that the revenues received, constituting only 2% of the CCL revenue requirement, could be recovered from subscriber line charges. If the surcharge amount were decreased, NYNEX said it should be $21–22, claiming that a surcharge of only $12–14, as suggested by some commenters, would exacerbate service bypass. Other LECs argued that the surcharge should be maintained at the existing level until this Commission develops a long-term timetable for deloading NTS costs from switched access charges.

FN41 Finally, some commenting parties addressed the question whether we should expand or reduce the number of existing surcharge exemptions. GTE and API argued that all subscribers that certify they do not actually leak should be exempt, even if their equipment is not blocked to prevent leakage (as the present rule requires), but NYNEX opposed this suggestion. SNET argued that the existing exemptions should not be expanded.

FN42 MCI Order, FCC 87–362.

FN43 Second Report and Order, FCC 86–377 (released Aug. 26, 1986). See paras. 5 and 14, supra.

FN44 In its petition, MCI fails to define “sharers” or “shared communications systems.” In its reply, however, MCI agrees with Multi Tenant Telecommunications Association (MTTA) Comments, at 2, that there is great diversity in the kinds of shared service arrangements that utilize the local exchange to originate or terminate interstate communications. It further agrees with MTTA that shared systems include the following network operations to the extent that they are shared among multiple unaffiliated noncarrier users: multinode, tandem corporate networks comprised of leased private line facilities and local business lines used as ONALS; shared AT & T EPSCS and CCSA networks also comprised of leased channels, and ONALS; multinode joint user Centrex networks; local cable or fiber bypass networks; private corporate and utility microwave systems, including those interconnecting with private carrier fiber or leased private line facilities; and private carrier fiber networks.

FN45 MCI Petition for Clarification at i.

FN46 Parties filing supporting Comments are: BellSouth Corp. (BellSouth), Southwestern Bell Telephone Co. (Southwestern Bell), Lufkin–Conroe Telephone Exchange, Inc. (Lufkin–Conroe), United Telephone Systems, Inc. (UTS), and Teltec Savings Communications Co. (Teltec).

FN47 Parties filing opposing Comments are Aeronautical Radio, Inc. (ARINC), Motorola, Inc. (Motorola), American Petroleum Institute (API), Utilities Telecommunications Council (UTC), Ad Hoc Telecommunications Users Committee (Ad Hoc), Citicorp, Multi–Tenant Telecommunications Assn. (MTTA), Shared Use Network Services, Inc. (S.U.N.S.), and the International Intelligent Building Assn. (IIBA).

FN48 See, e.g., Comments of Motorola, S.U.N.S., UTC, IIBA, Ad Hoc, and ARINC.

FN49 See, e.g., Comments of IIBA, Motorola, Ad Hoc, ARINC, and API.

FN50 See, e.g., Comments of S.U.N.S.

FN51 Bell Atlantic Order, FCC 87–361.

FN52 The FTS system, unlike some other private networks, permits only off– net terminating—and not originating—calls from its private network. Thus, an off-net call in this context is a call made from an FTS telephone or terminal to a telephone or terminal that is not part of the FTS system.

FN53 Conventional Centrex and Centrex–ETS service are described at n. 5, supra.

FN54 See Bell Atlantic Order, FCC 87–361, at paras. 2–4. As initially proposed, US West would have provided the ETS switching service as a part or feature of its conventional Centrex switching

service. However, because that proposal would have required substantial upgrading of the switch used to provide conventional Centrex, US West determined that it was more efficient and economical to simply use a separate DMS–100 digital switch to perform the ETS function and to connect that switch to its conventional Centrex switch with dedicated trunks. Thus, a one-switch, combined conventional and ETS Centrex switched plan evolved into a two switch plan.

FN55 Additional information regarding measurement of Centrex switches was submitted ex parte by other RBOCs and AT & T, and will be incorporated into the record in this proceeding. That information, although not entirely clear or consistent, indicates the following: the PBX switches in use and the switches used to provide conventional Centrex service in 1982 ranged from electro-mechanical crossbar switches to analog electronic switches. Centrex–ETS service was provided by various types of analog electronic switches. Measurement of interstate leaked traffic on some analog electronic switches may have been possible. However, measurement was not possible on the older crossbar and many electronic switches. Moreover, and regardless of the switch involved, the LEC was unable to measure the interstate traffic leaked over common lines from a PBX device on the customer's premise. Presently, the majority of switches offering conventional Centrex and Centrex–ETS service as well as PBXs are sophisticated analog electronic devices; the newer switches providing this service are generally digital. It appears that digital switches providing Centrex–ETS service are capable of distinguishing the called and calling numbers or the facilities over which the call originated, on a per call basis. Therefore, digital switches are able to determine whether a call to the Centrex–ETS node originated from within the LATA or from an external point. In addition, it appears that some of the analog electronic switches providing Centrex–ETS service can be modified to perform similar identification and measurement functions. The costs and difficulties associated with such modifications is not clear, however. In addition, it is not clear whether and, if so, to what extent switches providing only conventional Centrex service are capable of identifying and measuring interstate traffic "leaked" into the local exchange. Moreover, it is not clear whether the LEC is now able to measure the leaked interstate traffic to or from the more sophisticated PBX devices. It is clear, however, that the PBX digital switches used generally today as part of private interstate networks—i.e., PBX–ETS private network switches—can be modified to measure the interstate traffic leaked into the local exchange.

FN56 The following parties filed Comments: Ad Hoc Telecommunications Users Committee (Ad Hoc Committee); American Telephone and Telegraph Company (AT & T); MCI Telecommunications Corp. (MCI); Pacific Bell and Nevada Bell (Pacific Companies); Telecommunications Committee of the American Petroleum Institute (API); and Utilities Telecommunications Council (UTC). The following parties filed Reply Comments: Ad Hoc Committee; Aeronautical Radio, Inc. (ARINC); Ameritech Operating Companies (Ameritech); Bell Atlantic; Department of Justice (DOJ); MCI; NYNEX Telephone Companies (NYNEX); the Pacific Companies; and Southwestern Bell Telephone Company (Southwestern Bell).

FN57 DOJ takes no position on whether the appropriate charge is the FGA switched access charge or the local exchange rate plus the special access surcharge. It simply contends that customers of both services must be required to pay the same rates.

FN58 DOJ notes that the market for private network services is substantial. It asserts that competition in such switching services would be impaired substantially if the Commission's regulations were interpreted as requiring that customers of CCSA or other private network switching services provided by IXCs pay FGA charges for terminating interstate calls into the local calling area, while permitting Centrex–ETS private network customers to obtain access at local business rates plus the special access

surcharge. The availability of the generally less expensive local rates and surcharge would make the BOC Centrex–ETS switching more attrative to a substantial number of customers than IXC' service for which the customers would have to pay FGA charges. This, DOJ concludes, would give the BOCs a substantial anticompetitive advantage in providing switching services.

FN59 48 C.F.R. § 69.115(e)(1); Second Reconsideration Order, 97 FCC2d at 864 n. 45, para. 98.

FN60 The surcharge applies to each interstate private line terminating in a PBX, Centrex, or equivalent device, and not falling within certain specifically enumerated exceptions. See n. 28, supra.

FN61 This omission probably reflects the fact that at the time the access charge rules were developed, these services were not provided in their present form. To be sure, in 1982, the BOCs were providing Centrex–ETS switching services, usually under the direction and control of AT & T, and PBX–ETS was in use in some private networks. It appears, however, that for the most part these switches served private networks that were smaller in size and geographic coverage than the private networks connected by CCSA switches. Thus, Centrex–ETS service was provided under the BOCs' local exchange Centrex tariffs and was not offered in federal tariffs. Based on the record compiled in response to the Bell Atlantic and MCI petitions, it does not appear that these services, in 1982, offered switching services to nationwide private networks, such as the FTS network, on a major scale and in direct competition with AT & T's CCSA and EPSCS services, as they apparently presently do.

FN62 Apparently, several state government customers had CCSA service and in those cases, the usage was interexchange, but intrastate.

FN63 See, e.g., Memorandum in Support of Motion for Clarification of Bell Atlantic's Obligations Under the Memorandum Opinion of November 26, 1986 and Request for a Stay, filed Dec. 23, 1986.

FN64 See, e.g., AT & T Communications Transmittal No. 895, filed Apr. 22, 1987 and AT & T Communications Transmittal No. 961, filed July 14, 1987 (Digital Tandem Switched Network Services); AT & T Communications Transmittal No. 1018, filed Sept. 22, 1987 (Virtual Telecommunications Network Service).

FN65 As noted, we recently released an NPRM proposing to eliminate the switched access charge exemption for enhanced service providers. Enhanced Services NPRM, CC Docket No. 87–215, FCC 87–208. Comments were filed in that proceeding on September 24, 1987. Several commenters who opposed the proposed rule change noted that private networks are not assessed such charges for traffic leaked into the local exchange. They argued that treating private networks differently from enhanced service providers would both be inequitable (because the two entities use the local exchange similarly), and create enforcement problems (because in some circumstances, it may be difficult to distinguish one from the other). Without addressing the merits of these arguments, we note that to the extent we change our rules with respect to interstate private networks and subject them to switched access charges for their use of the local exchange for originating or terminating off-net traffic, we will obviate some of the concerns raised in the enhanced services proceeding.

FN66 We began our reevaluation of the special access surcharge in 1984 in CC Docket No. 78–72. Special Access Surcharge Notice, 49 Fed.Reg. 50,413.

FN67 November 26 Memorandum; Bell Atlantic Order, FCC 87–361.

FN68 It is clear from the record in the Bell Atlantic Petition for Declaratory Ruling proceeding that if the ETS functions are provided by a stand-alone switch, interstate traffic originating or terminating in the local exchange can be identified and measured for purposes of application of switched access charges. It also appears that even when the two

functions (i.e., conventional Centrex and ETS) are combined in a single switch, interstate off-net traffic is generally also identifiable and measurable. Nevertheless, there are some indications in that record that, for some switches that combine conventional Centrex and ETS services, measurement may present more difficulties and costs. We invite comment on this measurement issue, and specifically on the types of switches in use and providing these services, their present measurement capabilities, the manner in which they could be modified to permit measurement, and the costs and difficulties involved in such modifications. We further seek comment on whether certain switches should be excluded from a measurement requirement, and the basis for the exclusion.

FN69 First Reconsideration Order, 97 FCC2d at 712, para. 80.

FN70 47 U.S.C. § 202(a).

FN71 We concluded, in the companion Order adopted today on the Bell Atlantic Petition for Declaratory Ruling, that under our present rules, FGA switched access charges apply to Centrex–ETS services. Bell Atlantic Order, FCC 87–361. In this Rule Making proceeding, we will consider whether we should amend our rules to provide a different result. Our tentative conclusion, as expressed in the text, is that we should not so amend our rules, but we wish to examine this issue in light of the complete record developed in response to this Notice, and in the context of the broader issues concerning the access charge treatment of off-net or "leaked" traffic from private networks and private lines generally.

FN72 When we adopted the special access surcharge, it appeared that PBX switches could not be effectively subject to a measurement requirement because PBX equipment, located on the customer's premises, was not capable of being measured by the LEC at the central office, although at least some PBX switches could measure their own leakage. Therefore, any measurement requirement would have had to rely upon PBX users measuring their leakage and reporting it to the LEC.

FN73 As noted above, we have defined a "PBX–ETS" as an electronic tandem switching node located at the customer's premises that, in addition to traditional PBX functions, provides on- and off-net switching and routing capabilities for an interstate private network. We ask comment on the utility of this definition as a way of distinguishing conventional PBX switching functions from PBX–ETS.

FN74 47 C.F.R. § 115(e)(6).

FN75 57 RR2d 1630

FN76 We note that while our rules permit carriers to develop a surcharge for non-LEC provided facilities—i.e., private by-pass facilities—none has done so. Moreover, parties that supported a mandatory surcharge on such facilities in their comments in response to the Special Access Surcharge Notice did not suggest any way to overcome the practical difficulties of identifying and tracking these lines. For these reasons, we tentatively conclude that the special access surcharge should not be modified so as to apply to non-LEC provided facilities. We invite comment on this conclusion.

FN77 First Reconsideration Order, 97 FCC2d at 712–13, para. 80.

FN78 The CCL charge has been reduced significantly over the past few years as a result of implementation of subscriber line charges, as well as the phase out of inside wiring and customer premises equipment from the interstate rate base, and a reduction in the LEC's allowed rate of return. Since 1984, when access charges first went into effect, CCL rates have dropped from 5.24 cents per minute of use on both originating and terminating minutes to current levels of 4.33 cents/minutes on terminating minutes, and 0.69 cents/minute on originating minutes. (In the recently filed access tariffs for calendar year 1988, the National Exchange Carriers

Association has proposed dropping the originating charge to 0.25 cents/minute.) In addition to suggestions on how the surcharge should reflect the amount of decrease in the CCL charge, we invite comment on how the surcharge could be adjusted to account for the bifurcated rate structure.

FN79 We are, of course, assuming here that some Centrex measurability is possible. We recognize that this requirement may present a problem for some LECs that have few or no relevant Centrex systems and thus little or no traffic to include in such a sample. We request comment on whether we should require such LECs to perform samples on PBXs at customer premises or use the measurement-based charge of another LEC whose characteristics match its own. We also seek comment on variations of this proposal and suggestions for their implementation.

FN80 Some parties argue in the comments submitted in the MCI Petition for Clarification proceeding in CC Docket No. 86–1 that under our current rules switched access charges only apply to carriers. According to these parties, all other persons who use the exchange for interstate access are exempt from such charges. This argument is incorrect. As we have demonstrated above, while our rules refer to switched access charges as "carrier's carrier charges," end users of FX, CCSA, and EPSCS services pay switched access charges directly in some circumstances. We ask parties to comment on whether we should amend the text of our Part 69 rules to clarify that switched access charges apply to all users of the local exchange, except as specifically exempted.

FN81 See para. 3, supra.

FN82 MCI Order, FCC 87–362.

FN83 For purposes of the NPRM, we define sharers and shared systems as did MCI and other commenters in the MCI Petition for Clarification proceeding. See n. 44, supra. We ask comment on this definition and seek descriptions of private line and network configurations involving sharers.

FN84 We hereby certify that the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (1982), is not applicable to this proceeding. We have previously determined that the formal provisions of the Regulatory Flexibility Act are not applicable to proceedings to adopt or revise access charge rules because local exchange carriers, the parties directly subject to the access charge rules, do not fall within the Act's definition of small entity. Id. § 601. See Mid–Tex Electric Cooperative, Inc. v. FERC, 773 F.2d 327 (D.C.Cir.1984); Notice at para. 33, n. 54; and Access Charge Order, 93 FCC2d at 241, paras. 358–62. While we have not applied the formal procedures of the Regulatory Flexibility Act in this proceeding, we have considered and will consider the effects of the rule changes on PBX users, some of which are small businesses, just as we considered the effects of rule changes on resellers in CC Docket No. 86–1. We will also consider the impact of rule changes upon small telephone companies. See WATS–Related and Other Amendments of Part 69, Memorandum Opinion and Order, para. 29, CC Docket No. 86–1 (released Jan. 15, 1987). In accordance with the provisions of section 605 of the Regulatory Flexibility Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of this NPRM in the Federal Register.

FCC

2 F.C.C.R. 7441, 2 FCC Rcd. 7441, 1987 WL 345431 (F.C.C.)

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