In the Matter of National Security Emergency Preparedness
Telecommunications Service Priority System

GEN. Docket No. 87-505

November 17, 1988 Released; Adopted October 27, 1988

By the Commission

1. INTRODUCTION

1. By our Notice of Proposed Rule Making (NPRM) in Gen. Docket No. 87-505, 2 FCC Rcd 7124 (1987), we proposed revisions to Sections 64.401 and 64.402 (and Appendices A and B thereto) of the Commission's Rules and Regulations, 47 C.F.R. @@ 64.401, 64.402, which dictate the procedures for the restoration of vital private line services during emergency situations and establish a "Precedence System for Public Correspondence Services." The proceeding was initiated by the Secretary of Defense in his capacity as the Executive Agent for the national Communications System (NCS).[1] By its petition, NCS proposed to replace the existing Restoration Priority rules with a new National Security Emergency Preparedness (NSEP) Telecommunications Service Priority (TSP) System, which has a broader scope and applicability. NCS argued that adoption of the rules is necessary to "(1) authorize and require telecommunications service vendors to provide priority treatment to NSEP telecommunication services, (2) ensure such vendors are not in violation of the Communications Act of 1934 when doing so (i.e., not engaging in any unlawful discrimination or undue preference), and (3) override any existing contractual provisions inconsistent with the rules promulgated." The appendix to our NPRM essentially reflected the proposal submitted by NCS.[2] Twenty five parties filed comments and fourteen parties submitted replies.[3]

II. BACKGROUND

2. In 1967, the Commission, in conjunction with the Director of Telecommunications Management, Office of Telecommunications Policy [now merged with the Office of Science and Technology Policy], adopted rules establishing a system of priorities applicable to leased intercity private line services.[4] These rules, contained in Part 64 of the Commission's Rules and known as the Restoration Priority (RP) System, were promulgated to ensure that services "vital to the national interest [would] be maintained, to the maximum extent possible, during emergency service." The rules are effective until superseded by the President's powers under Section 706 of the Communications [5] The general purpose of the RP System is to give private lines vital to the national security a designation to signify that those lines should be given priority restoration when a failure occurs. When lines carrying an RP designation fail, carriers are authorized and required to interrupt either lower or non-priority private line services or public switched network services to restore lines with the RP designation if spare circuits are unavailable. To obtain an RP designation, a user must submit a request to the NCS or the FCC.[6] When the NCS receives a request, it recommends an RP designation to the FCC for final approval. Carriers are directed to treat the NCS designation as an interim FCC certification prior to formal FCC approval. As a general matter, RP designations are valid for three years. Under the RP System, there are four priority categories for private lines. The highest level is reserved for federal and foreign government services used to support national survival if

attack occurs. The second level, applicable to the same entities as the first level, is for services that are essential when attack threatens. These would be used, for example, to enhance the preparedness of U.S. military forces or the ability to conduct diplomatic efforts to reduce the threat of war. The third level is applicable to government and non-government services needed to maintain vital defense and diplomatic, and health and safety functions during a major disaster or other emergency. The last priority is applicable to lines needed to continue or reestablish important financial, economic, health and safety activities during emergencies.

III. THE PETITION

3. In its petition, NCS stated that the RP System does not fully address today's needs for priority treatment of NSEP telecommunications service and that a new TSP System is necessary. It offered three reasons. First, it noted that the RP System does not cover the expedited provisioning of new NSEP service.[7] Second, it argued that the RP System, which applies only to the restoration of intercity private lines, cannot provide as much support to NSEP needs as the TSP System which covers all NSEP private lines and includes the capacity and ubiquity of the public switched network. In this regard it explained that a key element of national security strategy is ensuring a survivable telecommunications infrastructure and that such a structure must include intracity private lines and the vast resources of the public switched telecommunications networks. It also noted that the federal government continually has been expanding its reliance upon public switched networks to meet NSEP needs.[8] Finally, it stated that the management of the RP System has been flawed and that the TSP System has been designed to remedy the current problems. NCS noted, for example, that there are "insurmountable discrepancies" in the NCS, FCC and carrier data bases of RP circuits. Another problem it discussed related to a lack of specific guidelines limiting the number of circuits that qualify for each priority category. This, it said, has resulted in a concentration of circuits in the higher priority categories. NCS concluded that such a concentration results in a less meaningful priority system. To correct these problems the TSP System it proposed would include procedures to ensure an accurate data base (e.g., periodic audits, revalidation of all priorities every three years) and establishment of percentage guidelines on the number of NSEP services that may qualify for each of the restoration priority levels so that only a relatively small number of services will receive "top priority" treatment.[9]

4. By NCS' proposal, the Commission's rules would be applicable in all circumstances except when the President invokes the war emergency powers contained in Section 706 of the Communications Act, 47 U.S.C. @ 706. The Commission's rules, together with regulations adopted by the EOP, are intended to establish a uniform system of priorities for provisioning and restoration of NSEP telecommunications services both before and after invocation of the President's war emergency powers. The proposal included for the first time a definition of "NSEP Telecommunications", and set forth services eligible for priority treatment. See NPRM at paras. 12-17.

IV. DISCUSSION

5. The NRPM itself sought comment on three focal issues: (1) the applicability of the proposed rules to intrastate services and their underlying facilities and the applicability of the rules to switched services, (2) the extent to which the proposal over-delegates authority from the FCC to the EOP in

the process of priority application and assignment, and (3) the means by which carriers may recover their TSP-related expenses. A broad range of additional issues were also raised in the NRPM, and the commenting parties offered suggestions and views on these and other matters. The Appendix to the NRPM contains the Commission's proposals in response to NCS' petition, and the Appendix to this document reflects our final resolution on each of the matters discussed below.

6. Jurisdiction. As noted in the NPRM, the Commission is charged with promoting the safety of life and property and with ensuring effective communications for "the purpose of the national defense." 47 U.S.C. @ 151. We also noted that all provisions of the Act must be read in light of that statement of purpose, and that we have often been required to consider national security issues in our orders, e.g., AT&T (Divestiture Order), 98 F.C.C. 2d 141 (1983). We stated that we have consistently sought to balance the needs of NSEP interests with the needs of the general public in ensuring efficient service at a reasonable cost. We also stated that "national security" should be the basis for giving priority treatment to one segment of telecommunications users over another only when absolutely necessary, and that our policy under the RP System has been that prior to preempting any public switched network services to restore a private line service carriers should "insure that a sufficient number of public switched network services will remain available for public use." NPRM at para. 19. With these concerns in mind, we sought comment on the applicability of the proposed rules to intrastate services and their underlying facilities, and the applicability of the rules to switched services. We will first address the matter of the Commission's jurisdiction over intrastate services under TSP.

7. We stated in the NPRM that notwithstanding Section 2(b) of the Act, 47 U.S.C. @ 152(b), our national security responsibilities under Section 1 of the Act gives this Commission the authority to include intrastate services that have an NSEP function in the TSP rules. We noted that, in any case, this Commission has jurisdiction over physically intrastate lines that carry interstate traffic.[10] We sought comment on whether we also have jurisdiction based solely on a national defense analysis and asked whether, for example, the fact that such services are necessary for national security purposes as demonstrated by their role in national defense and in promoting the safety of life and property -- a purpose for which this Commission was created [47 U.S.C. @ 151] -- gives us jurisdiction to preempt conflicting state restoration and provisioning programs. We also requested parties to comment on any practical problems they foresee with the inclusion or exclusion of intrastate services and their underlying facilities in the implementation of the TSP System.

8. AAR states that any practical problems with inclusion of intrastate services and their underlying facilities in TSP would be minimal when compared to the advantages of having a single set of rules on a national basis. AICC interprets Section 1 of the Act as giving authority to the FCC to include intrastate services that have an NSEP function in the TSP rules. Centel concludes simply that it is incumbent on the FCC to take preemptive action over intrastate facilities. For its part, GTE urges that intrastate services be included in TSP. However, it argues that TSP should not involve restoration of intrastate switched services, only their provisioning. It notes that Section 1 of the Act supports FCC jurisdiction over intrastate services, especially in cases where it is not possible to separate the interstate and intrastate components. It states that 911 and other local systems can be

handled under the federal priority system. McCaw also supports FCC action preempting conflicting state priority systems. Otherwise, it says, up to 51 conflicting priority systems may exist. It too believes Section 1 of the Act supports exercise of jurisdiction by the Commission. Pacific Bell states that Congress has declared that national defense is one of the purposes of the Act so that the FCC should set national priorities for NSEP services. Southwestern Bell states that there is no need to confront the intrastate issue because the practicalities of restoration will show that nobody benefits from litigating the jurisdictional issue. It believes that the potential problem is one of the volume of requests that will be submitted, though it suggests that if NCS cannot handle the large number of facilities included under TSP the states will proceed independently or FEMA [Federal Emergency Management Agency] and others will help. Telocator supports FCC jurisdiction over intrastate services, based on promotion of safety of life and property and national defense arguments. The FCC must preempt conflicting state priority provisioning and/or restoration programs that could potentially affect those lines; otherwise, transition to wartime or response to disasters would be difficult. Like McCaw, it views separate state NSEP programs as precluding the effective implementation of the federal TSP System. Similarly, USTA states that two systems, state and federal, would be inherently less effective than one. It urges that no state plan should be permitted to conflict with the TSP System. Teltec supports preemption based on traditional jurisdiction over intrastate lines that carry interstate traffic.

9. UTC favors preemption of intrastate services to which priority levels are assigned under TSP rules. It supports Section 1 as the appropriate source of authority. Citing Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 131, 143-44 (1963), Northern States Power Co. v. State of Minnesota, 447 F.2d 1143 (8th Cir. 1971), and Louisiana Public Service Comm'n v FCC, 106 S.Ct. 1890, 1898 (1987), [476 U.S. 355] UTC states that it is a well-established principle that federal preemption of state regulation is appropriate where the nature of the subject matter regulated is one which demands exclusive federal regulation in order to achieve uniformity vital to national interest or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress. It urges that Section 2(b) of the Act does not preclude the FCC from preempting conflicting state restoration programs and claims that Section 2(b) was enacted "to restrain the Commission from interfering with those essentially local incidents and practices of common carriage by wire that do not substantially encroach upon the administration and development of the interstate telephone network." North Carolina Utilities Commission v FCC, (NCUC) 537 F.2d 787, 794, n.6 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976). It also notes that Section 202(b) of the Act authorizes FCC jurisdiction where there are inconsistent state restoration programs or where there are facilities connected to radio facilities. Capital City Telephone, 3 FCC 189, 194 (1936).

10. In contrast, MCI argues that Section 1 of the Act does not constitute an independent ground for agency authority, that Section 2 of the Act gives the FCC jurisdiction over intrastate facilities only to the extent they are used for interstate communications. It cites Sierra Club v Lynn, 501 F.2d 43, 55 (5th Cir. 1974), cert. denied, 421 U.S. 994 (1975), and Louisiana PSC, supra, for support of the argument that statements of purpose, e.g., in the preamble of a statute, "operate only as guideposts to informed [agency] discretion." It urges the Commission to cooperate with states in adopting a program comparable to TSP. NARUC states that the national defense cannot be used as the justification

for FCC jurisdiction over intrastate services and underlying facilities, though it agrees that dual regulation of TSP is not well advised. It suggests a federal-state board under Section 410(c) of the act to assure uniform nationwide implementation, or, as an alternative, subjecting the TSP to triennial review by a board of state commissioners. For its part, NTCA notes that Section 1 of the Act does not provide a basis for ignoring specific limits on the FCC's authority under Section 2(b)(2), citing Louisiana PSC, supra. It urges that where there is a mixed inter-intrastate facility, the FCC should seek appropriate legislation and the issue must be resolved before implementing the TSP System.

11. NCS asserts that FCC jurisdiction extends to all intrastate facilities "affecting" interstate communications, based solely on its power to regulate interstate commerce. It states that jurisdiction must extend to wholly intrastate services to ensure that services vital to NSEP receive the appropriate priority treatment. As proposed, TSP will preempt any conflicting priority systems including any state or local priority systems, i.e., systems of telecommunications priorities equal to or greater than the lowest NSEP TSP System priorities authorized.

12. In reply, CBT urges that the FCC and states work together to arrive at an agreed priority system. It asserts that local exchange carriers should not be required to administer separate interstate and intrastate plans, especially if they are in conflict with each other. MCI states that Section 1 of the Act does not confer jurisdiction on the FCC; it is a guide for how the agency should exercise the jurisdiction expressly granted by other provisions of the Act. It says that all commenters agree on the need to have a uniform set of NSEP instructions and it favors NARUC's suggestion to convene a joint board to review proposed rules. NCS, for its part, states that intrastate telecommunications service to which priority levels are assigned pursuant to TSP rules should remain under federal jurisdiction. It agrees with the majority view that FCC jurisdiction must be asserted. NCS disagrees with NARUC's position with regard to limited FCC jurisdiction and the need for a federal-state board. It notes that the states are among members of the TSP System Oversight Committee and suggests that if a board of state commissioners is established its review be submitted to that Committee. In any case, it opposes establishing a federal-state joint board for reviewing proposed TSP rules because the NCS Council of Representatives and NSTAC Task Force have already done so and have been subject to public review and comments. Finally, USTA supports only federal preemption necessary to implementation TSP.

13. Discussion. The proposed scope of TSP rules, Section 4(a)(1)(b), states that domestic NSEP services include intrastate telecommunication services that are inseparable from interstate or foreign telecommunication services, and intrastate telecommunication services to which priority levels are assigned. As noted in the NPRM, we have jurisdiction over physically intrastate lines that carry interstate service. NARUC v. FCC, supra note 10. Moreover, it is well established that we may preempt state regulation when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation. Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 375 (1987) at n. 4. We also have a strong national security mandate from Congress, expressed in Section 1 of the Act. These principles permit us to preempt state priorities as needed, as we describe below. The intent of TSP is to establish a national security emergency preparedness priority system that is effective and responsive. It is NCS' position, and we agree, that the TSP System cannot be an

effective mechanism for achieving national security emergency preparedness absent universal applicability. The Act requires that the FCC promote the safety of life and property and ensure effective communications for the purpose of the national defense. To the extent the goals of universality and national security -- seminal features of responsive telecommunications used for the national defense -- require preemption of state priority systems, we believe the Act is clear.

14. As a practical matter, we are not taking any preemptive action now. The preemption of a state telecommunications priority would occur only in those cases where there is a direct conflict between national and state priorities for the use of the same intrastate facility or service. If a state assigned a lower priority than did NCS to an intrastate service or facility and refused to recognize the higher national priority, the conflicting priorities for that inseverable service or facility and refused to recognize the higher national priority, the conflicting priorities for that inseverable service or facility would confuse and impede the administration of an orderly, responsive national TSP System. The resulting adverse direct and indirect impact on the effective implementation of TSP by such conflict could be significant. Unless preempted by the national TSP System, the existence of conflicting state priority systems would undermine the goal of TSP and the intent of Congress through Section 1 of the Act to promote the national defense. We therefore find that inclusion of intrastate services under Section 4(a)(1)(b) of the TSP rules represents a reasonable and necessary exercise of federal jurisdiction under Section 1 of the Act.

15. We note that the local and state emergency services such as 911 can be accommodated within TSP, negating the need to include them under state systems. TSP, however, will continue to permit state systems to include these services -- unless there is a conflict. As discussed above, in the event of a conflict it would not be feasible to separate the operation of the federal TSP system from that of the state system. The federal system must prevail,[11] and we would preempt. NCUC I, NCUC II, cf. Louisiana PSC, supra at n. 4.

16. Switched, cellular, other services. The rules offered for comment in the NRPM included switched services, though the TSP System's applicability to the public switched network (PSN) would be "limited to: (a) provisioning of such services . . . and (b) restoration of cellular services." In view of NCS' explanation that the defense community's current need for restoration priority of switched services only extends to a few cellular systems, we sought comment on the practical effects of this limitation, viz., does the limitation have an effect upon the balance between the needs of NSEP interests with the needs of the general public in ensuring efficient service at reasonable cost? We also sought comment on the technical problems associated with restoration priorities for switched services, which might also apply to cellular systems. In addition, we asked what practical problems would follow eliminating the limitation entirely, and whether there is any basis for concern that extension of the TSP System to the PSN would result in carriers claiming priority treatment for all circuits because of the inability to identify which circuit might carry the NSEP service. NPRM at para. 22. Finally, we asked interested parties to comment on the appropriateness of including additional services, such as air-to-ground service, in TSP.

17. In AT&T's view, which is shared by Bellcore and most other commenting carriers, the proposed rules properly leave PSN restoration to the local exchange carriers because the routes calls take through the local exchange carrier's (LEC's) network cannot be identified by the interexchange carrier (IXC). AT&T would retain the parenthetical reference to cellular in Section 6(f)(2). For similar reasons, AT&T would limit applicability of restoration of cellular services to cell sites or dedicated trunking between cell sites and carriers' control centers. Again for reasons of inability to identify routing, AT&T and GTE ask that "virtual private line" be deleted from the definition of "Private NSEP telecommunication services," Section 3(k). AT&T explains that dedicated circuits are used to the LECs' central offices, like PSN lines, and then to the IXC point of presence (POP); beyond that point the call cannot be identified, it claims. Bell Atlantic also claims that restoration of the PSN is not practical because once the PSN is disrupted most of it will have to be restored before service can be provided to anyone. It proposes a new Section 6(f)(3) that would authorize telecommunications vendors to restore the PSN simultaneously with private line services which have been assigned restoration priorities. Bell Atlantic petition, pp. 10-11. Bell Atlantic would also limit cellular restoration to the facilities between mobile service switching offices and the first point of switching in the LEC office. Pacific Bell would leave restoration of the PSN to the Exchange Carriers Standards Association. Southwestern Bell adds that all control and orderwire facilities would have to be restored in order to effectively restore and operate any NSEP service which depended on the capacity and ubiquity of the PSN.

18. Bellcore proposes amending Section 4(a) to codify the limitations on TSP's applicability to the PSN. It also proposes to include services which use private fixed facilities in the definition of private NSEP under Section 3(k); and would specify switches, interoffice facilities and subscriber loops under the definition of public switched network facilities in Section 3(m). Finally, Bellcore and Pacific Bell would exclude custom calling features from priority provisioning. For its part, BellSouth opposes the language in the Note to Section 4(a)(1) that permits "unlimited expansion" of other types of public switched service to be authorized in the future. GTE adds that the ability to restore, provide priority service during stress conditions and keep track of individual B-1 (business) and R-1 (residential) lines is beyond the current needs of NCS and not cost-justified. GTE also asks that the reference to PSN in Section 13(c), Essential NSEP, be deleted because that section includes references to restoration.

19. CTIA states that inclusion of PSN and restoration of cellular in TSP will require certain technical arrangements between landline exchange carriers and cellular carriers. It asserts that the benefits of inclusion far exceed the costs of denying availability of cellular service to national defense and emergency personnel in time of crisis. It states that the cellular industry does not intend to force exchange carriers to restore an entire cellular system for the purpose of providing service to only a few NSEP users. McCaw and Telocator emphasize the technological developments forthcoming in cellular service that they say will eventually permit identification of trunks carrying NSEP services to facilitate LEC's response to cellular services qualifying for priority treatment. McCaw urges the FCC to include provisioning of all switched services and restoration priority treatment of cellular services at initial implementation. GTE seeks inclusion of air-to-ground service facilities to the LEC office to the extent needed to support NSEP communications needs. Southwestern Bell opposes inclusion of services such as air-to-ground

until additional experience is gained under TSP. Teltec opposes including non-cellular PSN services in TSP, noting that radio common carriers (RCCs) should not be included because there is no apparent need for beeper services during an emergency that would justify diversion of scarce resources away from restoration and provisioning of vital NSEP services. It nevertheless concludes that restoration of entire cellular systems is necessary. US West suggests that the cellular industry and government develop standards for distinguishing NSEP cellular users from other cellular users so that priority trunks and data services can be restored in emergency situations. Pacific Bell notes that mobile telephone switching offices are connected to local offices and to access tandems for IXC access via dedicated or PSN facilities. It asserts that where cellular communications utilize the PSN, priority restoral is not feasible. It urges that cellular priority restoration for cellular carriers should be limited to those that do not utilize the PSN.

20. Nynex states that cellular service is secondary and is used by a limited number of subscribers. Granting cellular TSP status, it argues, would result in cellular services being restored prior to basic telephone service upon which the public relies heavily in cases of an emergency or disaster. If cellular is included, it urges, TSP restoral should be limited to cellular systems deemed vital to national security and sponsored or endorsed by a federal government defense entity. Teltec agrees to inclusion of cellular but suggests that other PSN services would be counterproductive. It would include entire cellular systems because cellular trunk groups are uniquely identified by the LEC, but PSN shared trunk group carriers cannot identify NSEP traffic and this would lead to carriers claiming priority treatment for all circuits, Teltec asserts.

21. NCS states that NSEP TSP assignments are only a small percentage of all PSN circuits so that a resource conflict between restoration of PSN and private lines supporting NSEP services will be rare. If that does happen, it states, the NSEP requirements are of higher priority. NCS wants vendors to ensure that a sufficient number of public switched services remain available for public use prior to preempting any PSN service to restore an NSEP service. In response to Bellcore's suggestion for FCC sponsorship of a forum to prepare generic TSP guidelines, NCS would rely on the TSP Task Force and Task Force Subgroup formed under NSTAC to provide industry representatives a forum for advising the government regarding specific implementation issues. It notes that NCS and Bellcore are represented at TSP Task Force Subgroup meetings.

22. In its reply, AT&T states that it is not feasible to apply restoration priorities to the PSN. Bellcore replies that restoration should be limited to identifiable circuits; vendors cannot segregate NSEP traffic within the PSN and carriers should have flexibility to restore the PSN. BellSouth agrees that most of the network will have to be restored to restore any PSN. CTIA emphasizes the importance of cellular to provide service in a variety of emergencies, including floods, prison riots, earthquakes, etc. In response to Nynex, CTIA says that no preferential treatment is sought, that priorities will be assigned as with anyone else for provisioning or restoration. CBT, for its part, would permit 911-type restoration coincident with dedicated services. GTE points out that Military Airlift Command relies on civilian aircraft to augment its airlift capabilities in the event of a national emergency and therefore air-to-ground services should be included. McCaw states that those proposing limits to cellular restoration ignore existing PSN priority treatment capabilities being supplied or under development for NSEP service users, though

it admits the various examples it cites are for provisioning. It also states that those proposing limits overlook delay caused (1-2 years) in implementation, i.e., time required for Rule Making and/or procedural changes. It supports air-to-ground and mobile satellite service inclusion but opposes AT&T's suggestion to delete "virtual private line" from the definition of private NSEP telecommunication services in Section 3(k) because (1) it implies that such services are not included, (2) exclusion would obsolete emerging capabilities and (3) they are needed to provide full service packages to NSEP customers. Finally, referring to Southwestern Bell and Bellcore, McCaw states that those proposing limits view NSEP TSP as circuit based rather than service based, and argues that cellular service users can be identified by use of software in the mobile or portable terminal. Telocator also notes, in response to Nynex, that tariffs have been filed and accepted which permit priorities for switched service users and additional technological developments will unfold to permit priority treatment of PSN. MCI, citing Bell Atlantic, asks that the rules permit priority restoration of any service that can be identified as carrying the calls of a particular NSEP customer.

23. NCS opposes Bell Atlantic's assertion that the Commission should retain authority to overrule assignment of priorities for cases involving restoration of PSN and private lines. It says that this would split responsibility for priority level assignments between the FCC and EOP, and TSP in any case is sufficiently flexible, using the National Coordinating Center (NCC). NCS does not oppose Bell Atlantic's proposal to authorize carriers to restore PSN services, e.g., 911, with private line services which have been assigned restoration priorities as long as local services can be provisioned or restored without delaying the priority provisioning or restoration of NSEP services. In response to Bellcore's claim that vendors have discretion to exercise judgment in allocating resources when dealing with major outages and conflicts, NCS says priority services must be restored first. Further, NCS does not propose application of restoration priorities to PSN.

24. Discussion. It is generally agreed that cellular radio should be included as a service which may be assigned priorities under TSP. What is not agreed upon, however, is how much of the cellular system should be included, e.g., only cell sites or dedicated trunking between cell sites and carriers' control centers. Similarly, there is division with regard to other services such as air-to-ground, satellite, etc. The purpose of TSP is to assure that telecommunications services can be provisioned or restored according to their importance relative to other services in times of specified emergency conditions. We would unnecessarily limit the flexibility of TSP in the future were we at the outset to limit the kinds of services to which TSP might apply. Thus, cellular radio, air-to-ground and other services are potentially no less critical to emergency preparedness than interexchange private line service, which is included under RP. We do not agree with BellSouth or GTE that Section 4(a)(1) should be restricted. Further, because it may be possible for some carriers to restore virtual private lines on a priority basis by software techniques, we think it unnecessary to remove the reference in Section 3(k) to virtual private line, as AT&T suggests. TSP is intended to offer a system by which carriers are presumed not to be engaged in the provision of unreasonable preferences in violation of Title II of the Act if they prioritize services to users in accordance with TSP requirements and procedures. Carriers are not required to include services under TSP that they cannot provide. As a general rule, therefore, we will not limit the applicability of the TSP System to any specific service. The general PSN, however, as generally agreed upon

by the commenting parties, is not technically amenable to restoration because subscribers' PSN services are not identifiable within the switching and transport system hierarchy. We are amending the Note to Section 4(a) accordingly.

25. We believe the most efficient means for assuring optimal flexibility and response to emergencies requiring restoration of telecommunications services is to rely, to the extent reasonably possible, upon users and carriers to determine jointly the feasibility and availability of services that can be restored under a TSP priority. Sponsoring agencies and users are generally responsible for balancing the costs of seeking, maintaining and invoking service priorities against the benefits that are anticipated. Their incentive to limit costs is coincident with the goal of TSP to avoid the inclusion of services or components of services which technology does not allow to be restored on a priority basis or are exceptionally costly. As noted, not all services are necessarily subject to TSP priority assignment or restoration. For example, the record indicates that the means for cellular subscriber identification are not available to permit end-to-end cellular restoration capability. It would not be appropriate for NCS to assign a priority to network elements that carriers cannot restore, nor should users submit such requests to NCS. Accordingly, we are modifying the scope of TSP, Section 4(a), to reflect these findings.

26. Bell Atlantic has proposed a revised Section 6(f)(3) to authorize vendors to restore the PSN simultaneously with private line services which have been assigned restoration priorities. NCS has no objection provided NSEP priority services are not delayed. Our policy, as noted in the NPRM at para. 19, is to balance the needs of NSEP interests with the needs of the general public. [12] The last sentence of Section 7(b) [7(a)(1)] provides that after ensuring that a sufficient number of public switched services are available for public use, such services may be used to satisfy a requirement for provisioning NSEP services assigned priority level "E" or restoring NSEP services assigned a priority level from "1" through "5." This essentially follows the existing RP rules which state at 47 C.F.R. Part 64, Appendix A, para. 3(a), that carriers should insure "that a sufficient number of public switched network services will remain available for public use." This approach evoked no discernible problems during the implementation of RP and seems a reasonable approach for TSP that accommodates NCS as well as carriers and the public. This should also assuage Nynex's concern that inclusion of cellular service in TSP will result in that service being restored prior to basic telephone service.[13]

27. The suggestions of Bellcore with regard to the definition of private NSEP under Section 3(k) and inclusion of switches, interoffice facilities and subscriber loops under the definition of public switched network facilities in Section 3(m) appear to be useful clarifications. Exclusion of custom calling features, however, as suggested by Pacific Bell and Bellcore, seems an unnecessary restriction in view of our decision above to encourage flexibility in the services to which TSP applies. Similarly, Teltec's opposition to inclusion of RCCs in the TSP System would be restrictive and we prefer in the first instance to rely on the joint judgment of user and carrier, with NCS and FCC oversight, to determine which services should be included. Other editorial suggestions concerning, for example, the reference to public switched services in Section 13(c)[12][c] may similarly unnecessarily restrict the flexibility of the TSP System. By rules of construction, the specific definitions and explanations of intent set forth in this order should be sufficient to clarify

the applicability of the rules.

28. Delegation. In the NPRM we noted that several parties have expressed concern over what they consider over-delegation of authority from the FCC to the EOP in the process of priority application and assignment. We stated at para. 26 of the NPRM that it is neither appropriate nor possible for the Commission to delegate to EOP, or others, the ultimate authority for determining whether preferences granted under the TSP System are unlawful. The language of the proposed TSP rules, we said, recognizes the authority of the FCC over EOP priority determinations and other responsibilities described in Section 6 of the proposed appendix. We also said that we do not view delegation of administrative responsibilities for TSP implementation as an inappropriate delegation of authority, particularly in light of the essentially ministerial nature of the initial priority assignment process, and given the RP precedent. We asked interested parties to focus upon proposed Sections 6(b)(2)(g) and 6(f)(9), which seemed to offer open-ended Rule Making authority to EOP. Because it is not clear what limits on the scope of such EOP-generated regulations and procedures are contemplated, and given NCS' likely use of additional procedural instructions, e.g., Directive 3-1 which provides TSP instructions to the executive agencies, we asked NCS and interested parties to examine the intended meaning, potential impact, limitations and FCC oversight role with regard to these subsections. Finally, we asked interested parties to comment on the issuance of declaratory rulings to resolve questions regarding EOP procedures.

29. Arinc states that delegation should be restricted to interpretation of substantive rules adopted by the Commission and that the EOP should not promulgate substantive rules related to NSEP-TSP. Arinc cites Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980) and Kent v. Dulles, 357 U.S. 116 (1958), to support its assertion that the FCC lacks authority to delegate substantive Rule Making powers to the EOP. Arinc also urges that EOP have in place appropriate procedures for adoption of interpretative and administrative rules. AT&T urges the Commission to maintain close oversight over EOP-generated guidelines or rules in TSP implementation. It notes that RP did not permit EOP to issue rules and that EOP was limited to issuing forms, application and review procedures, etc. AT&T asks that EOP be required to file its proposed rules with the Common Carrier Bureau for approval, and suggests that the Commission chair the proposed. Oversight Committee, with NCS playing a major role in administering the TSP System. Ameritech favors use of declaratory rulings and urges that where ministerial functions would cause carriers to bear additional burdens solely at the discretion of the EOP there is improper delegation. For its part, AAR suggests that EOP and the Commission arrive at a mutual understanding as to the extent of EOP's Rule Making authority.

30. Bell Atlantic states that the Commission must review supplemental TSP regulations proposed by EOP. It concludes that Sections 6(a)(1), 6(b)(2)(g), 6(c)(4), 6(d)(11), and 6(f)(9) be amended to reflect that the FCC retains authority to approve, modify, or disapprove EOP regulations. Bellcore adds that all Rule Making should be done in accordance with the Administrative Procedure Act (APA) and final rules should not grant Rule Making authority to EOP. BellSouth, however, states that delegation to EOP for initial priority assignment is appropriate since the FCC has final authority for EOP priority assignment, including resolution of disputes. It too urges that EOP must comply with APA requirements, which it notes require full notice and

comment Rule Making. For its part, GTE urges that the EOP and NCS work jointly with industry to develop administrative implementation rules and procedures for the TSP System, with FCC review. It states that areas of dispute can be handled through abbreviated proceedings like declaratory rulings. McCaw does not oppose delegating Rule Making authority to EOP provided cellular and other vendors are not obligated to comply with such procedures until the Commission reviews and takes some affirmative action approving them.

31. MCI states that the Commission bears full responsibility for implementing the Act and while it may delegate ministerial functions the rules must be amended to clarify that NCS' Rule Making authority extends only to regulations directly in aid of its administrative functions. It believes that the forthcoming operations manual issued by NCS will be so substantial as to warrant approval by the FCC. It considers the declaratory ruling procedure as an inadequate substitute for a limitation on EOP for NCS Rule Making authority. US West favors delegation of administrative responsibility to EOP but not Rule Making authority. Southwestern Bell also expresses the view that the potential substantive impact of EOP regulations requires that the Commission allow review of EOP rules adopted under Section 6(b)(2)(g), and it notes that Section 6(a)(1) already provides for issuance of declaratory rulings for EOP procedures. It suggests that the proposed rules lack a mechanism for affected parties to bring specific issues to the Commission's attention. Telocator adds that the Commission may use Rule Making, declaratory ruling, public notice or letter to act upon supplemental procedures adopted by EOP. USTA also opposes what it calls open-ended and unsupervised Rule Making authority delegation to EOP, except as necessary at times of conflict or other emergency. UTC avers that "operation and use" language in the proposed rules is too broad and goes to substantive amendment of the TSP rules. It urges that Section 6 be eliminated because, to the extent it delegates Rule Making authority to EOP, it exceeds the FCC's authority.

32. NCS states that the rules adopted through EOP would be supplemental and consistent with the Commission's TSP rules. It argues that any party viewing EOP's rules as exceeding Commission authority could seek a declaratory ruling from the Commission. NCS concludes that the proposed delegated authority is neither open-ended nor without Commission oversight. It argues that, without delegation, lengthy FCC Rule Making processes will be required. It notes that specific rules such as data elements, steps for reconciliation, discrepancy resolution and the like have been intentionally excluded from its TSP proposal to minimize unnecessary oversight.

33. In its reply comments, MCI states that delegation of other than ministerial functions to NCS would be unlawful abdication of responsibility and that NCS cannot impose substantive burdens on carriers. MCI suggests that NCS' use of declaratory ruling procedure is improper. It states that the FCC's affirmative obligation to govern cannot properly be discharged through exercise of a veto power. GTE supports Pacific Bell in opposing substantive rules without FCC review under the APA. Pacific Bell suggests that NCS and industry jointly develop operational details and specifications for TSP and submit them to the FCC for review, with substantive TSP rules promulgated under the APA. It argues that the declaratory ruling procedure is not a substitute for Rule Making because it occurs after rules are adopted. For its part, Southwestern Bell says that if NCS does not intend to acquire open-ended Rule Making authority, the rules should make that intent explicit. NCS, in its reply, notes that the Commission's rules provide for informal requests (47

C.F.R. @ 1.4) or petition for declaratory ruling (47 C.F.R. @ 1.2) or Rule Making (47 C.F.R. @ 1.401). It states that the proposed rules do not grant open-ended Rule Making authority to EOP. It also states that the FCC's grant of authority is limited to regulations and procedures supplemental to and consistent with TSP rules and operation and use of the NSEP TSP System.

34. Discussion. Under Section 202 of the Act, 47 U.S.C. @ 202, it is unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage. By Section 1 of the Act, 47 U.S.C. @ 151, the Commission "shall execute and enforce the provisions of this Act." The issue before us now is whether the "issuance of regulations and procedures supplemental to and consistent [with the TSP rules]" as referenced in Sections 6(b)(2)(g) and 6(f)(9) [Sections 6(b)(2)(h) and 6(f)(11) under NCS' revised proposal] can properly be delegated to another agency.

35. NCS offers no more than a general statement that its supplemental procedures will be consistent with the Commission's rules. Because the regulations and guidelines are not before us, we do not know whether they will require the Commission to engage a notice and comment Rule Making proceeding prior to their taking effect. Nor is there sufficient detail to provide us with an understanding of how NCS would assure that its supplemental provisions will remain "consistent" with the Commission's rules. On the other hand, we know from our experience with the RP System,[14] as well as by NCS' assurances in this proceeding, that in order to implement a reasonably efficient and effective TSP System NCS must be afforded some procedural latitude. It is conceivable that a declaratory ruling procedure, or another less formal approach, would permit an initial, fully participatory examination of NCS' proposed guidelines -- fulfilling the Commission's responsibilities under the Act -- before the guidelines are effectuated. If the proposed guidelines are of the nature contemplated by AT&T, viz., strictly filing procedures, and/or they do not warrant initiation of a Rule Making proceeding, a declaratory ruling procedure will serve as an expeditious means for implementing NCS' procedural guidelines. In any event, the Commission will decide the appropriate procedural vehicle for examining and resolving the issues contained in NCS' proposed procedures manual when the manual is filed.[15] The procedures manual and other NCS regulations or guidelines will not be effective until Commission review has occurred.

36. Preemption. In the NPRM we discussed the need to clarify the preemption requirements proposed in Section 6(f)(5), which authorizes preemption of existing switched or non-switched services to provide an NSEP service. Several parties sought further detail on how this would be accomplished, how disputes would be resolved and to what extent carriers that preempt commercial non-priority circuits would be immune from liability. It was also suggested that a more flexible point of contact rule should be considered, i.e., 24 hours for small carriers may be burdensome. We asked interested parties to comment on these issues.

37. AT&T states that revenues are lost from services that are preempted by higher priority services. It asks that the rules provide that service vendors

may preempt or interrupt the services of users having lower or no priority status and that vendors who in good faith comply with such a request shall have no liability to users of interrupted services, or others. AICC states that the Commission is the only entity that can effectively generally ensure that equivalent services receive the same assignment (and interruption in inverse order of priority level) under Section 7. Ameritech asks that Section 7 provides that "so long as a carrier acts reasonably in preempting non-commercial users under the standards therein, it should be presumed to have complied with Part 64 guidelines." It feels that preemption is not a big problem in that there are generally space facilities available, and TSP requests should not divert all resources to TSP restoration. Bell Atlantic offers a subsection to exempt vendors from liability due to reasonable actions taken in compliance with rules or at the direction of EOP or the FCC. It would also amend Sections 6(f)(5) [6(f)(6)] and 7 to expand the requirement that vendors must preempt and will not be liable for commercial damages. Bellcore, Centel, NTCA, Pacific Bell and Southwestern Bell also would change Section 7 to hold vendors harmless for preemptive actions taken under TSP. See Bellcore Comments at pp. 7-8.

38. MCI adds that immunity would remove possible obstacles to rapid and flexible carrier response to NSEP needs. For its part, BellSouth states that carriers will want to include provisions in their tariffs limiting their liability for damages resulting from good faith compliance with TSP rules, and proposes the following additional subsection to Section 7:

(d) In any event, nothing contained within these rules shall be construed to prevent service vendors from including provisions limiting their liability in their appropriate tariffs and/or contracts as a result of good faith compliance with these rules.

39. GTE suggests that if the rules allows interruption of service without customer consent to satisfy NSEP requirements, the Commission should provide protection from liability. Pacific Bell urges that consent of preempted users is not needed. It suggests that the rules provide that a user's consent is not required in order to preempt that user's service, and that a user will be notified when its service is preempted, if possible. It adds that because all emergencies are not anticipatable vendors should be given latitude to make preemption choices following generic guidelines authorized by the FCC. US West would add the following additional language to Section 6(f)(5) [6(f)(6)]:

Any carrier required to preempt any customer, pursuant to the provisions of Part 64 of these rules shall be held harmless from liability should said preemption cause any customer to sustain damages in connection with said service interruption.

Teltec states that if there is no explicit immunity provision in the rules, Sections 6(f)(5) [6(f)(6)], 7(a) and 7(b) should be deleted. USTA also believes an appropriate limitation of liability provision is essential where the priority rules cause interruptions because of action that is directed by government.

40. NCS states that the purpose of Section 7 is to allow preemption without consent from affected users for "E" or restoral of "1-5." Preemption of provisioning of "1-5", on the other hand it notes, requires affected user agreement. NCS believes it is inappropriate to specify under what circumstances carriers are to be directed by government to preempt non-government users, since

the actual user may not always be readily identifiable. On the liability issue, NCS notes that under Palermo v Bell Tel. Co. of Pennsylvania, 415 F.2d 298 (3rd Cir. 1969), reasonable actions by a vendor pursuant to FCC rules should not be a basis for liability. Also, under American Tel. & Tel. Co., 82 FCC 2d 370, 372 (1980), a carrier has a right to reasonably limit liability and this is a balance between rights of aggrieved customers and the public interest in provision of telephone service at the lowest possible costs. Moreover, regulatory bodies have struck this balance by allowing vendors to limit liability for ordinary negligence. Annual 1985 Access Tariff Filings, 2 FCC Rcd 1416, 1423; see also Lebowitz Jewelers, Inc. v New England Tel. & Tel. Co., 508 N.E.2d 125 (Mass. App. 1987). NCS asserts that vendors' exposure is not so unique as to require an exemption or limitation of liability specific to TSP.

41. On the matter of 24 hour point of contact, Teltec states that it supports Section 6(f)(3)(B) provided the requirement is satisfied by the availability of a contact person -- not the actual presence of personnel. NCS urges that the matter of emergency services and reports of outages is so critical that the cost associated with maintaining a 24 hour contact is not burdensome. It suggests providing the home number of the contact person. USTA asks that a list be maintained at the NCC for LECs not represented at the NCC.

42. In their reply comments, most parties, including AT&T, Bellcore, BellSouth, CTIA and US West agree that the rules should contain specific language limiting service providers' liability for claims of damages because of good-faith action to comply with the rules. BellSouth, while generally agreeing with NCS and Southwestern Bell on their comments with regard to consent, emphasizes that preempted users' consent should not be required to exercise a priority level "1 to 5" for provisioning. It also states that it is not clear whether consent of the user whose service is to be preempted is required.

43. GTE, in its Reply at pp. 6-7, claims that NCS uses "preemption" inconsistently with regard to consent in Section 7 and suggests that the term be deleted and Sections 7(a) and (d) read as follows:

(a) Consent of the user whose service would be interrupted is required to interrupt that user's existing service to provision any NSEP service assigned a provisioning priority level from "1" through "5."

(d) Service vendors may, based on their best judgment, determine the sequence in which existing services may be interrupted to provision NSEP services assigned a provisioning priority of "1" through "5." Such interruption is subject to the consent of the user whose service will be interrupted.

McCaw notes that cellular operators may be vendors, resellers or interconnecting carriers and, under TSP, may have to preempt existing services to provide or restore service. It proposes adding a subsection to Section 7 that would provide that service vendors shall not be civilly or criminally liable to any person for reasonable actions taken in good faith compliance with Section 6(f)(6) or Section 7.

44. Southwestern Bell, in its reply, says that NCS misunderstands what preemption means. It cites Summer v Mountain States Telephone and Telegraph Co., 21 Ariz. App 385, 519 P.2d 874 (1974), where the court held that discontinuing intercept service was intentional and a limitation of liability

clause was inapplicable.[16] Southwestern Bell claims that where a vendor intentionally terminates service under NSEP the traditional form of limitation of liability, which is no more than a limitation of damages, is inadequate and the vendor requires exemption from liability because the act of preemption is essentially compelled, though not controlled, by the federal government. NCS states that it has redrafted Section 7 which, it says, should resolve AT&T, Bell Atlantic, BellSouth and US West's concern regarding leaving discretion vendor for preemption of user service. NCS also asserts that interruption without consent is referred to as ruthless preemption but TSP rules without such preemptions would create a meaningless NSEP priority system. NCS claims the existing limitations on liability are sufficient and objects to AT&T's proposal that would recover from the NSEP user potential litigation costs or lost revenues, all of which it sees as inappropriate in any case. Allowing unlimited charges would be an economic incentive to a service vendor to interrupt NSEP so that restoral charges could then be billed, NCS says.

45. Discussion. The parties' comments in response to our questions concerning preemption focus on the matter of liability for carriers engaged in interruption, or preemption, of lower priority or non-priority services under the guidance and authority of the rules. Many of the commenting parties, mostly carriers, seek specific exemption from civil and criminal responsibility for actions taken pursuant to the TSP rules. Southwestern Bell relies on Summer v Mountain States Tel. and Tel. Co., supra, but that case seems to suggest that inclusion of a liability limitation clause in the TSP rules is not necessarily assurance of exculpation, if malfeasance can be shown. The essential purpose of TSP is to provide standards that permit carriers responding to NSEP provisioning and restoration priority requests to act lawfully and avoid violation of the proscription of 47 U.S.C. @ 202 that makes it unlawful for any common carrier to engage in any unreasonable preference in connection with the provision of communications services. The rules themselves, without a specific, additional provision, offer the liability protection that the carriers in this proceeding seek because any claimant asserting unreasonable discrimination or preference has a heavy burden to show that the carrier had violated Section 202 of the Act. Presumably, the carrier would answer that it had acted under the authority of the TSP rules, whereupon the burden of proof would shift to the claimant to show that the carrier had not complied with the TSP rules. Were there a liability exculpation clause in the rules, the claimant still would have to show that the carrier had not complied with the TSP rules. The RP rules and our Declaratory Ruling on the NSEP Procedures Manual did not include an explicit clause[17] and we do not believe one is needed in the TSP rules. The existing legal framework is adequate to protect carriers from actions lawfully taken pursuant to the TSP rules, notwithstanding the increased number of potentially affected users. We therefore agree with NCS that no change need be made to Section 7 in this regard.

46. We now turn to the language of Section 7 regarding the need for consent prior to preemption. NCS has offered revisions that seem to respond to several carriers' concerns regarding leaving discretion to the vendor for preemption of user services. The new language provides that:

a. To provision NSEP services:

(1) User consent is not required to preempt any user's existing service to provision an NSEP service assigned a provisioning priority "E."

(2) Consent of the user whose service would be preempted is required to preempt that user's existing service to provision any NSEP service assigned a provisioning priority level from "1" to "5."

b. To restore interrupted NSEP services: User consent is not required to preempt any user's existing service to restore any NSEP service assigned a restoration priority level from "1" to "5."

c. Sequence in which existing services may be preempted to provision NSEP services assigned a provisioning priority level "E" or restore NSEP services assigned a restoration priority level from "1" through "5":

(1) Non-NSEP services: If suitable spare services are not available, then, based on the considerations in this appendix and the service vendor's best judgment, non-NSEP services will be preempted. After ensuring a sufficient number of public switched services will remain available for public use, based on the service vendor's best judgment, such services may be used to satisfy a requirement for provisioning NSEP services.

(2) NSEP Services: If no suitable spare for non-NSEP services are available, then existing NSEP services may be preempted to provision or restore NSEP services with higher priority level assignments. When this is necessary, NSEP services will be selected for preemption in the inverse order of priority level assignment.

(3) Service vendors who are preempting services will ensure their best effort to notify the service user of the preempted service and state the reason for and estimated duration of the preemption.

d. Service vendors may, based on their best judgment, determine the sequence in which existing services may be preempted to provision NSEP services assigned a provisioning priority of "1" through "5." Such preemption is subject to the consent of the user whose service will be preempted.

While this responsive proposal satisfies the complaints of several commenting parties, it perpetuates a problem that we believe must be solved if TSP is to function effectively, viz., the need for any prior consent.

47. The rule proposed in this proceeding are intended to permit the provisioning and restoration of NSEP services during periods of national "emergency" conditions (as defined in the proposed rules). The stated purpose of TSP, see Section 1(c), is to assure that "the priorities established can be implemented at once when the need arises." The imperative for successful implementation is the expeditious exercise of service interruption or preemption. Absent the resolute authority for carriers to act to achieve this end, rapid deployment of resources for provisioning needed services or restoring damaged services would be frustrated. The purpose of assigning priority levels to a qualified NSEP service is to reflect the relative importance of that service under active national security emergency preparedness conditions. Thus, consent of an affected service user, i.e., one having no priority or a lower priority, before interruption or preemption of that user's service is inconsistent with the achievement of the stated purpose of NSEP TSP. This is no less true when a vendor must choose among similarly classified users, i.e., users having identical levels of priority. The vendor, under TSP, is given the authority to make a choice based on equitable and practical technical factors. Further, the vendor remains subject at all times to the

prohibition of the Act if it acts unreasonably, e.g., by failing to act according to the TSP rules and engaging in an unreasonable preference. Burdening the vendor with the responsibility to track user consent prior to preemption or interruption is untenable.

48. Further, removal of the consent requirement eliminates a concern some carriers have expressed regarding their potential liability for preemption of commercial or other NSEP users' services. They feel that failure to secure consent as required by the proposed TSP rules would subject them to legal liability. Without such a rule requirement, however, failure to obtain consent before preempting a user's service would not constitute a factual predicate for violation of the procedural requirements of TSP. It is probable that during NSEP actions consent disputes and authorization inconsistencies would not be resolved quickly, causing delays in service provisioning or restoration. In general, an environment in which vendors would be required to obtain consent from competing users of a valued service could introduce an unnecessary complication in TSP implementation that would disserve the public interest. In short, we view the right of consent by a user prior to preemption of service under TSP as a barrier to the effective implementation of TSP. Accordingly, we will modify Section 7 to remove the need for user consent.[18]

49. As to the 24-hour point of contact matter, we believe that the intent of Section 6(f)(3)(b) is to assure that a carrier representative is available at all times to initiate response to NSEP TSP needs. NCS' proposed revision would require a 24-hour point of contact for receiving provisioning requests for Emergency NSEP services and reports of NSEP service outages or unusability. No party opposed NCS' revision and we are of the view that it satisfies the original intent of the provision. If the point of contact requires the availability of the home telephone number of a carrier's employee, we leave that choice to the carrier. USTA's suggestion that a current list of LECs' contact persons be maintained at the NCC, while an efficient way to achieve a centrally filed summary of contact persons, is probably better organized independent of this proceeding by NCS. We will therefore not modify the rule to require such a list.

50. Costs. In the NPRM we discussed the issue of carrier recovery of TSP expenses. The proposal itself, at Section 6(d)(5), provided that service users would "[p]ay vendors any authorized costs associated with services that are assigned priority levels." Also, Section 6(f)(7) authorized service vendors to receive compensation for costs authorized through filed tariffs or negotiated contracts. Several parties urged, among other things, that the Commission develop a mechanism with specific provisions for common carriers to recoup initial expenses and subsequent implementation costs. We noted that NCS' proposal specified two means of compensation for costs: tariffs or contracts. Some carriers, we said, may not be required to file tariffs; however, dominant carriers offering interstate services are under a statutory responsibility to file and maintain tariffs for their telecommunications offerings. We noted that there was some potential that the language of subsection (b) of Section 6(f)(7) could be incorrectly interpreted to suggest that there is an exception to the Title II requirement that carriers offering interstate services reflect the rates, terms and conditions of those services in tariffs. In order to clarify that issue, we proposed alternative language for subsection 6(f)(7), though we did not alter the language of NCS' proposal in the appendix to the NPRM.[19]

(7) Receive compensation for costs through

(a) Provisions contained in properly filed tariffs; or

(b) Provision of properly negotiated contracts where the carrier is not required to file tariffs.

51. We observed that it is not clear that the intent of NCS' proposed carrier cost recovery rule, i.e., to rely on tariffs or contracts, is inconsistent with methods currently used by carriers, under RP or otherwise. We noted that Title II of the Act and the Commission's rules contain the procedures for filing, examining and challenging tariffs filed with the Commission. We also noted that all related support data are in the public domain, subject to petition or opposition. We asked interested parties to explain why implementation of NCS' proposal cannot be accomplished through existing regulatory cost recovery mechanisms, and why existing accounting rules and Commission policies do not provide adequate guidance to identify and allocate costs. We emphasized that the Commission's fundamental policy is that costs be assigned to the cost-causative user, not the general ratepayer. We asked that parties who do not find these policies, practices and procedures adequate to suggest and justify new procedures or methods to accomplish effective cost review and cost-causative recovery. We also asked that such suggestions be fully explained and justified under Title II of the Act and the Commission's rules and policies.

52. In their comments, Arinc, McCaw and USTA agree that using existing regulatory cost recovery mechanisms and charging cost-causative users by tariff is appropriate. McCaw, however, suggests amending Section 6(f)(7) [6(f)(8)(b)] to read that "tariffs are not required" rather than "the carrier is not required to file tariffs" in order to recognize that service vendors which are not carriers are also entitled to compensation for costs through properly negotiated contracts and avoid possible misinterpretation of the Commission's proposed revision. AICC and NCS state that they favor the Commission's proposed revision, though NCS adds that the language should read, "Provisions contained in properly filed state or federal tariffs." Ameritech generally favors recovery through tariffs, including the up-front developmental expenditures. It urges that tariffs for TSP cost recovery also include provisions for expenses for restoring preempted services.

53. BellSouth and NARUC agree that cost-causers, i.e., service users, should be responsible for actual installation and restoration costs. NTCA, Pacific Bell and Southwestern Bell concur that general ratepayers should not pay. NTCA suggests that the National Exchange Carrier Association (NECA) develop a standard TSP tariff for all carriers in order to reduce the burden on small carriers. USTA urges the Commission to consider a particular carrier's, NECA's and other tariff proposals designed to effectuate the TSP System. USTA also urges that TSP developmental and implementation costs be expensed because all parties are benefited. BellSouth asks that initial and ongoing costs of TSP be recoverable by the service providers. It recommends that a new subsection (c) be added to Section 6(f)(7) [6(f)(8)] to read:

Costs shall include, but not be limited to, initial costs incurred in the installation and implementation of the NSEP system, direct costs incurred as a result of the expedited installation and emergency restoration of NSEP approved circuits to the end-user and on-going costs incurred in maintaining the NSEP

system.

Nynex suggests that recovering costs from TSP users would be "exceedingly difficult to administer." It states that it is not possible to determine how the costs will be allocated without knowing in advance the ultimate number of TSP users, and no estimates are available. It further states that the costs for each TSP user would vary based on the number of circuits involved. For example, it says, the Nynex region might have 2,000 TSP circuits while other regions may have more. It claims that the implementation costs for its region are approximately $ 2.2 million and the cost per circuit in the Nynex region would be about $ 2,200 each, but could be less in other regions. It concludes that costs could be difficult to justify to customers and would be a hindrance to full priority implementation.

54. UTC, for its part, opposes costs being shifted from carriers to individual users seeking restoration priority because the NSEP TSP System is intended to protect the general public through the restoration of emergency and essential telecommunications services.

55. Centel states that specific tariff rate elements may be required, but existing cost allocation procedures and methods are adequate. It notes, however, that implementation costs will not be covered by these tariff elements. GTE generally favors the Commission's proposed rewording of Section 6(f)(7) [6(f)(8)] but suggests that details of implementation are needed to determine costs. Southwestern Bell argues that inclusion of intrastate services and facilities in the scope of TSP creates a problem with respect to compensation because the FCC's jurisdiction does not extend to pricing such services. It states that developmental and startup costs, the distinction between routine and special charges for activities such as service reconciliation studies, and whether costs will be recovered directly from NCS or from service users through new TSP tariffs all require FCC guidance. Section 6(d)(5), it urges, does not identify either the party responsible or the method of payment for special administrative costs incurred in responding to record reconciliation requests. It questions whether the charge to all service users for maintaining restoration priority status should include a share of the special administrative costs or whether separate charges should be established to recover such costs only from service users that cause the special activity.

56. MCI also agrees that existing regulatory mechanisms are sufficient for recovery of costs of development and administration of the TSP System, but states that tariff charges are difficult to develop with required notifications of circuit completion and database audits. US West states that carriers should be compensated for all costs associated with priority assignments implemented by request of EOP or any duly authorized agency, whether or not such assignments ultimately are approved by the FCC. Pacific Bell is concerned that the proposed rule does not address startup costs. System development, reprogramming, developing standard procedures, training, and identifying and marking certain circuits are part of such costs, it says. Moreover, it continues, some systems are unique to Pacific Bell. It urges that all costs to implement changes necessary to support the TSP System be identified and collected and paid for by NCS over a negotiated time period such as 24 months. As an alternative, it would assess monthly implementation charges for each circuit in TSP until costs have been recovered, though it notes that this would be difficult. AT&T suggests that costs of administration to enter orders, establish restoration procedures, establish and maintain data bases and file reports should be

recovered through charges to users receiving priority assignments, on a one-time, non-recurring and/or monthly basis. It notes that AT&T Tariffs FCC Nos. 9 and 11 impose charges for changes in RP assignments. AT&T also suggests that less predictable costs, such as auditing, reconciling data, testing and evaluating TSP, and preparing special reports for NCS, should be rolled into charges to priority service users who benefit from NCS oversight.

57. In its reply, BellSouth states that "most" parties agree with it that initial costs and ongoing maintenance costs are equally significant to vendors and should be recoverable by them from the cost-causative users rather than general ratepayers. However, Cincinnati Bell states that it is not clear how costs of implementing and maintaining TSP would be recovered, i.e., from the TSP user, NCS or ratepayers. McCaw supports NCS' suggested amendment to Section 6(f)(7) [6(f)(8)], and favors existing regulatory and contractual cost recovery mechanisms, with only general guidance from the FCC on cost recovery. MCI urges that start-up costs be recoverable on a non-recurring basis under existing tariff rules, whereas monthly charges are more appropriate for on-going costs, such as restoration and administration. MCI states that permitting carriers to assess charges against NCS as the direct causer of the costs (citing Pacific Bell) would ensure accountability for obligations imposed on vendors and would solve Nynex's concern regarding inability to apportion estimated start-up costs.

58. NCS responds to Pacific Bell's suggestion, asserting that the NSEP user and not EOP is always the cost-causer. If NCS were to pay the costs, NCS suggests, users would not be paying their full share of NSEP services, leading to more NSEP services than would likely be requested. NCS agrees with current FCC policy that assigns costs to the end-user as the cost-causer. NCS states that it is continuing to work with the NSTAC TSP Task Force to determine the frequency of reconciliation and volume of reconciliation information involved with vendor-to-vendor reconciliation activities which are necessary.

59. Southwestern Bell urges that especially for emergency NSEP services [which specify recovery without regard to cost], cost recovery mechanisms must be established in TSP early on, in sufficient detail to assure that vendors' cost recovery will occur. GTE suggests that the FCC consider requiring that NCS contract with each service provider to cover the initial developmental costs and then have the day-to-day operating costs borne by the users when they request NSEP priorities. This, it claims, would more fairly allocate the quantity-independent development costs to the true cost-causer and not result in geographically varying costs. It urges that audit and reconciliation costs be charged directly to NCS whenever it requests such services. In any case, GTE says, costs cannot be determined until NCS provides firm details of its requirements and quantities involved, e.g., data elements, steps required during reconciliation, how discrepancies are to be resolved, media and format for information, how service vendors are to provide information to EOP, how revised or revoked priority levels should be handled, how users provide information to EOP and how users provide EOP-designated service identification and assigned priority levels to service vendors. GTE notes that NCS has used the term "EOP designated service identification" (a 12-digit code) that it asserts may be either a new requirement or simply unapproved terminology for a previously identified requirement. GTE advocates settling the details first, before costing or implementation can be determined. Telocator concludes in its reply that additional tariff requirements for NSEP services are unnecessary.

Finally, USTA states that all costs, both recurring and non-recurring, should be expensed in the year the cost is incurred, under Part 32. Tariffs are the correct vehicle, it concludes, but the FCC should verify that the government budgetary process will be able to accommodate the tariffs covering the non-recurring developmental costs; the FCC should also require that agencies provide accurate forecasts of volumes of circuits required -- before tariffs can be developed.

60. Discussion. The essential question posed in the NPRM was who should pay TSP costs: the general ratepayer, users such as federal agencies, taxpayers or NCS. The Commission's policy, as noted in the NPRM, is that the cost-causative user should be responsible for charges incurred by its request for a TSP priority or its use of TSP-related services. UTC's argument, which is basically that the general ratepayer is the ultimate beneficiary of TSP -- and should therefore pay for it -- is not without merit. Indeed, the purpose of TSP is to provision or restore facilities that are essential to the national security, and the general ratepayer is the most broadly identifiable user of the national telecommunications network. But the cost-causative user of NSEP telecommunications services is not the ubiquitous subscriber to the public switched service or the beneficiary of the TSP service [20]-- it is, as the term "causative" suggests, the entity that requests and invokes TSP priorities, viz., the service user as defined in Section 3(s) [3(t)] of the TSP rules.[21] Ultimately, of course, taxpayers pay for the TSP System because the TSP service user is generally a government body, but taxpayers do not directly request priority classifications or invoke NSEP TSP activities -- the service user does. In short, by assigning the costs of providing TSP System priorities and services to "users", the Commission's policy of requiring the cost-causative subscriber to pay for the services provided is furthered. Moreover, no commenting party has offered a convincing showing that this policy should not be applied with regard to TSP. For these reasons we also reject the notion that NCS itself should be responsible for funding any of the carriers' start-up or administrative costs.

61. Most parties agree that the proposed tariff and contract mechanisms are suitable means for carrier compensation of TSP-related costs. Several parties commented on the proposed language of Section [6(f)8] and the revision offered by the Commission in the NPRM, cited supra. McCaw's suggestion that the language "tariffs are not required" rather than "the carrier is not required to file tariffs" in subsection (b) of the proposed revision, in order to recognize that service vendors which are not carriers are also entitled to compensation for costs through properly negotiated contracts, seems unnecessary. The plain meaning of the section is to require either a tariff or a contract. A carrier that is not required to file tariffs is embraced by the scope of the existing language, and that subsection does not apply to non-carriers. In fact, until invocation by the President of Section 706 of the Act, the TSP System rules are limited by their own terms to common carrier services.[22] NCS would add "state or federal" to our proposed revision to subsection (a), so that it would read, "Provisions contained in properly filed state or federal tariffs. . . ." While it is not clear what other kind of tariff NCS contemplates, since state and federal tariffs are the only tariffs we believe would be considered in the context of TSP, we see no harm in the suggested language.

Services which are provided by government and/or non-common carriers and [which] are interconnected to common carrier services assigned a priority level pursuant to section 9 of this appendix.

The extent to which non-common carrier services, systems or facilities are subject to or protected by pre-706 TSP System rules is limited by the degree to which the common carrier vendor uses those services, systems or facilities to provide its common carrier services, systems and facilities. This does not preclude NCS from using an alternative interpretation in discussions or negotiations with parties not subject to Title II of the Act to establish analogous provisioning or restoration priorities. See, e.g., AAR Comments at pp. 3 and 6. This also resolves the question raised by AT&T concerning the Commission's authority over equipment vendors who sell equipment to others for direct connection to the network.

62. The bulk of comments on the cost issue concern what cost elements carriers may seek to recover, and when. Various carriers suggest that administrative, start-up, software development, reconciliation, audit, standards and procedures development, training, database maintenance, system testing, report preparation and other costs be specifically recoverable under TSP, either on a recurring or non-recurring basis. It has also been noted that a significant number of carriers will not be subject to subject to Commission review prior to their provision of TSP service. This is because local carriers and interstate non-dominant carriers, both of which are subject to the TSP rules, are not required to file TSP tariffs with the Commission.

63. Under the RP System, we relied upon interstate carriers to file tariffs using historically acceptable practices and we have received no reports of abuse or complaint. When the RP System was developed, carriers were generally subject to the tariff filing requirements of our rules and AT&T was the primary interexchange carrier, with its subsidiary Bell Operating Companies and other carriers concurring in its tariffs. Now, in a more deregulated environment and with a TSP System that is vastly expanded, AT&T's tariff filing no longer represents the bulk of the industry or necessarily serves as for other carriers. Instead, we look to three possible alternative means to check carriers' use of improper accounting or cost recovery methodologies or practices. First, dominant interstate carriers, as before, are required to file tariffs with the Commission, and non-dominant interstate carriers may file such tariffs. These tariffs must comply with the practices set forth in Part 61 of the Commission's rules and are subject to review and opposition by any interested party, including NCS or a service user. Further, the Commission's accounting standards, embodied in Part 31 of the rules, provide means to identify and prevent interstate carriers' subsidization of competitive services by monopoly services, i.e., cross-subsidization, or misallocation of costs between intrastate and interstate accounts. Failure to comply with these restrictions may subject the carriers to substantial penalties, and/or rejection of the tariff. It would appear that preliminary installation and implementation costs, direct costs associated with database development and recurring administrative costs, could be reasonable components of tariff-based charges. Second, the states will continue to apply their regulatory oversight procedures to the rates, terms and conditions of intrastate TSP services, much as the Commission does with dominant interstate vendors. Third, carriers engaging in contractual TSP negotiations with service users will be competing with other carriers on the basis of price and service factors. By their budgetary and administrative review requirements, TSP service users can be expected to exercise diligence in negotiating TSP service agreements with carriers, challenging questionable accounting provisions and disallowing excessive or inappropriate charges.

64. We believe that the boundaries established by these regulatory and

market mechanisms provide sufficient guidance to carriers as they embark on developing their tariffs or engaging in contract negotiations for TSP services. It is incumbent upon service users to examine closely the accounting methodologies and cost figures used by carriers with which they contract. Finally, for interstate carriers, both dominant and non-dominant, our Title II complaint procedures are available where violation of law is alleged or apparent. We do not believe it is necessary in this proceeding, therefore, to establish new standards or accounting guidelines for carriers in the provision of TSP services. The existing regulatory and market mechanisms appear adequate to assure the TSP cost accounting methodologies are conducted in the public interest. We remain available, however, to address specific instances of anticompetitive conduct or excessive cost allocation by carriers under our Title II complaint procedures.

65. Procedures. In the NPRM we observed that NCS' proposal did not commit NCS to respond to TSP priority requests within any specified time. We expressed the belief that some guidance or limit would be appropriate. We asked interested parties to offer comment on an amendment to Sections 6(b)(2)(a) and (b) that would require NCS to act within 30 days upon receipt of requests for priority assignment. We also asked interested parties to comment on the procedures necessary, e.g., under the APA, to respond to requests for review of priorities. NPRM at para. 32.

66. Most parties commenting on our 30 days NCS response proposal favored it, agreeing that review of priority assignment requests by NCS should have deadlines. Arinc added that applications for review of EOP assignments be automatically stayed pending appeal to the Commission.[23] McCaw would require NCS response to requests for "essential" priority assignments within 30 days but 5 days for "emergency" level requests. MCI recommends a 7 to 10 day response requirement. Southwestern Bell favors five days for "essential" and immediate action for "emergency" provisioning priority requests, stating that actions based on requested but not yet authorized priority levels will result in increased costs and increased risk of error. Telocator favors NCS response to requests for "essential" priorities within 30 days and 3-5 days for "emergency" requests. Centel and UTC favor the Commission's 30 day proposal. UTC also advocates the Commission acting within 30 days on assignment appeals. NCS, for its part, states that hearings are not authorized under the APA [5 U.S.C. @ 554] for appeals of priority assignments. NCS Comments, pp. 29-30. Also, NCS objects to the 30 day requirement, stating that it will initiate processing requests within 24 hours for "emergency" priority action requests and respond to "essential" requests as soon as possible. It further states that it expects to process all priority requests in less than 30 days, but opposes the 30 day limit.

67. In its reply comments, McCaw urges that more than good intentions are needed and that reducing the period to 7-14 days is justified in view of NCS' assertion that less than 30 days is actually necessary. MCI suggests that deadlines should apply to actual issuance of the priority assignment, not initiation of NCS review. Telocator urges that NSEP service providers need certainty regarding when they will receive a response from NCS on priority assignment requests. NCS replies that its opposition to 30 days does not imply that it expects a long response time, e.g., 30 days is irrelevant under the "E" classification. It again asserts that rigid time frames are unnecessary.

68. Discussion. Apart from NCS, no party has opposed our proposal to establish a time limit on EOP for responding to priority requests. We continue to believe that such a limit is a necessary adjunct to efficient and responsive TSP System implementation. Several parties urged a shorter response requirement than the 30 days we proposed; only NCS argues that a 30 day requirement is unwarranted. As McCaw notes, NCS states that it will process requests in less than 30 days, which would suggest that the 30 day requirement would not significantly burden NCS. We do not believe that a shorter period than 30 days is advisable because during the first year of implementation NCS may find it difficult to accommodate the initial onslaught of TSP priority requests. As experience grows we believe the 30 day period will become an increasingly distant time boundary.[24] For these reasons, we believe that 30 days represents a reasonable initial limit for NCS and we will adopt that in Sections 6(b)(2)(a) and (b).[25] Response to requests for emergency category priority assignments will be handled by NCS in an expedited fashion and do not require a specific time limit. Parties experiencing delays in securing interim priority assignments from NCS may direct inquiries or complaints to the Commission.[26]

69. The current procedure for appeals is contained in Section 12 [11] of the TSP rules. We believe that revision of that section will expedite the TSP appeal process as well as provide participants with more detailed notice of the procedure they must follow. Before submitting an appeal to the Commission, we believe it more appropriate that EOP be given an opportunity to review its initial decision since, as a practical matter, the FCC will not routinely revise initial EOP assignments. Only then does it seem necessary to involve formal Commission review. We will adjust Section [11] accordingly. Service users and sponsoring federal organizations may appeal any priority level assignment, denial, revision, revocation, approval or disapproval to EOP within 30 days of dispatch of notification by NCS of the assigned interim priority to the service user. Such appeals will be submitted using an appropriate form or format and a copy must be sent to the Commission. EOP will issue its decision within 90 days. Service users and sponsoring agencies, if still dissatisfied, may then file an appeal with the FCC.[27] The party filing the FCC appeal must include factual details supporting its claim of priority assignment error and will serve a copy on EOP and any other party directly involved in the matter.[28] Any interested party may file a response with 20 days, and a reply within 10 days thereafter. No public notice of such appeals will be issued. The Commission will notify the parties participating in the appeal of its decision. The rules will be amended to reflect these changes. See Section [11].

70. Multiple service facilities and orderwires. At para. 33 of the NPRM we indicated that AT&T supported proposed Section 4(b), which provides that control services and orderwires (internal network management circuits) have priority over all other telecommunications services and are exempt from priority interruption. AT&T also recommended that Section 6(f)(2), which permits broadband and multiple service facilities to be restored even if] they carry mostly non-NSEP tariff, be included within the Section 4(b) exemption. We agreed with NCS that AT&T's position would result in an automatic exemption and elevation to exempt-priority status any multiple-channel facility. We nevertheless welcomed interested parties to comment further on AT&T's position.

71. Teltec disagrees with AT&T's proposal because it would allow AT&T "to scatter NSEP services across many facilities, elevating all AT&T

wideband facilities to high priority." It favors classifying control services and orderwires as exempt. Teltec also asks whether CCS #7 (central office switch) is covered by Section 4(b). For its part, GTE states that control services and orderwires may be obtained from other carriers so they should be exempt no matter who owns them. It proposes assigning a unique priority level code for these services, or allowing use of "priority 1". USTA favors such services automatically receiving exempt priority. NCS proposes to revise Section 4(b) to exempt these services from "preemption" instead of "interruption". In its reply, Bellcore supports GTE and would assign orderwires a special priority code to assure immediate restoration, though it also states that there is no need to include them in TSP since they can be identified and given proper restoration emphasis.

72. Discussion. It is generally agreed that control services and orderwires should be treated differently from telecommunications services generally offered to users.[29] The rationale is that facilities used for these purposes are the essential internal means by which the underlying network is managed and controlled. The commenting parties are divided only as to whether it would be more useful to assign these services a special or high TSP priority or, as NCS as proposed in Section 4(b), it would be best to exclude them from priority assignment entirely. We believe that Section 4(b), which excludes underlying carriers' control services and orderwires from TSP, represents the most practicable means of assuring that the integrity of the network remains intact. Assigning control services and orderwires priorities under TSP would invoke procedures that would unnecessarily burden both carriers and NCS and would potentially undermine TSP responsiveness. Moreover, it is not clear that carriers' internal operations are the proper subject of TSP since they are not services offered to users and are therefore not subject to all provisions of Title II. For these reasons, we will adopt NCS' proposal, including its change of "interruption" to "preemption" in Section 4(b).

73. The matter of broadband or multi-channel facilities or services receiving Section 4(b) treatment by virtue of a single embedded control or orderwire service presents a Hobson's choice. Denying Section 4(b) status to a multi-channel or broadband service that unavoidably carries an orderwire or control service would defeat the intent of the TSP System to exempt control and orderwire services. On the other hand, granting the entire facility or service exempt status by the presence of a single control or orderwire service could result in elevation of otherwise non-NSEP services to Section 4(b) status. The lesser evil, of course, is to choose the latter and expect that carriers will endeavor to separate their control and orderwire circuits from other bulk facilities -- where they judge it technically and operationally advisable. Since underlying carriers cannot charge users a premium under TSP for exempt Section 4(b) services, the incentive for abuse would seem minimal.[30] Nevertheless, we remain ready to respond to any complaint concerning marketing of facilities or services that are accorded Section 4(b) treatment, other than to other carriers for control or orderwire purposes. Consistent with the foregoing, we will adopt Section 4(b), as amended.

74. Resellers. In the NPRM we noted that the proposed TSP rules are similar to the RP rules with regard to the treatment of resellers except that the TSP rules would not require concentration of priority resale services in a minimum number of underlying facilities. The purpose of this change, we stated, would be to avoid a possible adverse impact on the survivability of NSEP services, i.e., by encouraging diversity. The TSP proposal requires that the highest

priority level assigned to any service using an underlying facility would determine that facility's priority level assignment; a single NSEP circuit could cause all non-NSEP circuits on a facility to effectively have the same priority. As a result, we said, resellers who strategically distribute their NSEP with their non-NSEP circuits among a variety of facilities could gain a competitive advantage over the underlying facility vendors. The vendors would be required to restore all of the resellers' circuits before restoring some of their own customers' non-NSEP circuits. In response to a suggestion by AT&T that deleting the proposed reseller rule section would void the problem, NCS replied that this would probably cause continual disagreement between resale and underlying facility carriers and create a competitive disadvantage for resale carriers in supplying NSEP services.

75. One possible alternative, we offered, would be to have the distribution of services among underlying facilities subject to FCC review, and the desired distribution specified by the customer rather than the reseller or vendor. We said it would be useful to know the extent to which priority reseller services could be restored on a circuit by circuit basis because this would avoid the problem of having to restore a group of circuits to accommodate a limited number of priority services. We asked interested parties, in addition to commenting on this or alternative approaches to the reseller issue, to provide data regarding the extent to which users served by resellers will seek TSP priority, i.e., the percentage of TSP services likely to be handled by resellers.

76. AT&T claims that NCS' proposal forces it to give competing OCCs [other common carriers] and resellers priority restoration of all leased circuits if a single circuit qualified for priority treatment. According to AT&T, the underlying vendor might have to preempt its own bank of facilities to provide a pipe for a reseller, losing revenues for the unused circuits. It adds that the alternative, for customer specification of distribution of circuits among underlying facilities, would satisfy neither the vendor nor reseller. The vendor can best determine optimum routine for prompt provisioning and restoration and neither the customer nor the FCC can manage service vendor networks. FCC involvement, it says, would burden administering TSP and delay implementation of TSP priorities. It states that Sections 3(t) and 6(f)(4) treat resellers as service vendors and require cooperation. This, AT&T argues, is enough to assure fair and appropriate restoration of reseller circuits. The underlying carrier would restore priority circuits without restoring non-priority circuits, if feasible, and would not have to discriminate against its own customer, AT&T states. AT&T would delete Section 8 and rely instead on the generic requirement that all service vendors must cooperate with each other to restore priority circuits.

77. Ameritech states that under today's technology it is generally not possible for a carrier to designate a TSP classification for individual circuits assigned to a non-channelized facility provided to an end user, interexchange carrier, or reseller. Only entire "pipes" can be assigned TSP designations. To prevent abuse by resellers who would spread their circuits out through multiple "pipes". For its part, Centel states priority restoration treatment of an entire facility because a TSP circuit is on the facility should be by industry guidelines, and not by the customer. The FCC can then review the results, within a reasonable time limit. In any case, it says, the customer should not be allowed to determine distribution of circuits. If the customer is permitted to choose and non-TSP circuits are not permitted, the

carrier should be compensated by the customer for vacant, unused capacity which the carrier otherwise would have been able to use.

78. GTE favors the end user specifying the distribution of its NSEP circuits, which would than be reviewed by the FCC. GTE's concern is that resellers and facilities-based carriers each receive a level playing field. GTE states that it cannot offer any number of TSP circuits likely to be carried by resellers, that this information is only obtainable from the government. McCaw suggests that the proposed rule regarding resale carriers be amended to read, "Resale and Interconnecting Carriers", and offers several language changes.[31] It opposes underlying facility carriers determining the distribution or interconnection of reseller-supplied NSEP telecommunication services. McCaw will work with carriers and/or users "to help separately identify NSEP services to them." McCaw Comments, pp. 12-13. MCI states that facility dispersion could require restoration of non-priority circuits and dilute the ability of carriers to respond to other NSEP needs. It suggests that the simplest way to maximize a carrier's ability to respond to NSEP needs is to require resellers to concentrate NSEP service in a minimum number of facilities. It adds that if survivability of a circuit is required, the end user of reseller can order route diversity services.

Certain telecommunications service vendors to not own any or all of the transmission facilities used to provide telecommunications services. They rely instead, in whole or in part, on facilities leased from other telecommunications vendors. These resale or interconnecting carriers may provide services that qualify for priority level assignment. In order for the priority level assignment to have practical value, it must also apply to the service leased by the resale or interconnecting carrier from other telecommunications service vendor, such that the highest priority level assigned to any service using the underlying facility will determine that facility's priority level assignment. Resale and interconnecting carriers must also ensure that telecommunication service vendors supplying underlying facilities are provided information necessary to implement any priority levels assigned to resale or interconnecting carrier services.

79. Southwestern prefers that the rules restrain abuse of NSEP by intermediary service vendors. Otherwise, it argues, they can strategically distribute NSEP circuits among all circuits purchased so that they will have rendered all their services/facilities NSEP, and market to their advantage. It urges the FCC is pursue data collection concerning percentage of TSP services likely to be handled by resellers. Pacific Bell states that the problem of resellers' distributing their services among many facilities is common to all carriers and is no more than a marketing tool. Pacific Bell believes non-disclosure of NSEP services is in the national interest because this will prevent marketing abuse. Teltec disagrees with AT&T's original proposal to delete the reseller provision. It doesn't want FCC review of resellers' distribution of services among underlying facilities because these are basic business decisions and it would involve millions of circuits.

80. USTA urges that "resale circuits generally should be excluded from TSP system inclusion because of administrative and cost problems." USTA Comments, p. 5. It states that a circuit resold to the government or other priority customer might not be known to the underlying facilities-based carrier and restoration of that circuit would be impossible without either specific advance circuit identification or unnecessary restoration of other circuits in a

trunk. NCS states that NSEP services provided by resale carriers must be recognized by the provider of the underlying services and treated according to Section 6(f) of the TSP proposal. It would incorporate the intent of Section 8 into Section 6(f), and delete Section 8. This, it suggests, would clarify the equal application of the proposed rules to all service vendors.

81. In its reply, AT&T withdraws its earlier support for Section 8 and substitutes NCS' revised Section [6(f)(5)], which provides:

All service vendors, specifically including resale carriers, are required to ensure that service vendors supplying underlying facilities are provided information necessary to implement priority treatment of facilities that support NSEP services.

AT&T views resellers as service vendors and states that rules should not grant preferred restoration rights to resellers over underlying carriers. GTE also agrees with NCS that there should be equal application of the proposed rules to all service vendors. It also supports Pacific Bell's suggestion that a non-disclosure rule could help avoid marketing abuse.

82. McCaw does not agree that reliance on "service vendor cooperation" is adequate as a replacement for Section 8. It urges that specifying the rights of resale and interconnecting carriers would not provide resale or interconnecting carriers with a competitive advantage, but would prevent them from being subjected to a competitive disadvantage. It argues that if Section 8 is deleted the Commission should clarify that Section 6(f)(4) requiring cooperation also requires all service vendors to provide equal and non-discriminatory treatment to a vendor's affiliated entities and resale and interconnecting carriers. Also, McCaw calls attention to NCS' proposed Section [6(f)(5)] that includes "specifically including resale carriers" but does not include such language in Section 6(f)(4) regarding the obligation to cooperate.

83. In its reply, NCS states that the decision to restore on a priority basis the entire facility or the single service should reside with the service vendor providing service to the reseller. NCS prefers a more flexible approach than MCI's request that resellers be required to concentrate NSEP services in a minimum number of facilities. It suggests that the determination as to which NSEP services are assigned to which facilities be left to vendors, using contracts. In response to Southwestern Bell's suggestion that facility-based carriers use the Commission to resolve cases of TSP abuse, NCS notes that Sections 6(b)(2)(i) [6(b)(2)(j)] and 6(f)(2)(e) already provide for the Oversight Committee and EOP to resolve conflicts. Nothing else is needed, NCS argues. NCS also concurs, for national security reasons, with the suggestion that information regarding facilities that contain NSEP services should not be disclosed to those not having a need-to-know. NCS would add a new Section 6(f)(11) that would require service vendors to "not disclose information concerning NSEP services they provide to those not having a need-to-know, and not disclose this information in order to offer preferred restoration to potential or actual customers."

84. Discussion. In the RP System we adopted a rule that required concentration of resellers' priority facilities onto the minimum number of underlying facilities. The rationale for this approach was to avoid the consequential elevation of underlying facilities to priority status, an appropriate objective given the ability of most carriers at that time

to identify and/or segregate facilities assigned RP priorities. Now, however, services are not necessarily associated with specific facilities. Today's networks use a variety of transmission techniques to interlace disparate services onto one facility, e.g., through digital encoding and time division multiplexing. The proposed TSP rules respond to these evolutionary changes by, inter alia, focusing on services rather than facilities.[32]

85. Section 8 of the proposed rules provides that any facility carrying a reseller's priority service will itself carry that level of priority. The difficulty of this approach, as noted in the NRPM and by several commenters, is that the dispersion of a reseller's priority services could result, by the nature of trunking, in a multiplicity of the reseller's non-NSEP facilities being restored before the underlying carrier's non-NSEP services, and resulting in loss of revenues to the underlying carrier for facilities it must take out of service to satisfy the reseller's priority needs. Based on the comments, there is inadequate support to invoke our proposal to subject the distribution of services among underlying facilities to FCC review, with the desired distribution specified by the customer rather than the reseller or vendor. We agree with AT&T that FCC involvement in this process would potentially delay TSP implementation or, as Teltec suggests, require review of an enormous quantity of circuits. Commenters generally do not favor customer specification of service distribution, which purportedly would lead to more administrative problems that it would solve. GTE's view, that customers specify the distribution of NSEP circuits, would require FCC review, which we do not believe is justified. MCI's position, to require concentration of NSEP services in a minimum number of facilities and require the end user or reseller to order route diversity for increased survivability, seems unnecessarily inflexible.

86. In the NPRM we asked interested parties, in addition to commenting on alternative approaches to the reseller issue, to provide data regarding the extent to which users served by resellers will seek TSP priority, i.e., the percentage of TSP services likely to be handled by resellers. No party offered any hard data to aid in resolution of this issue. Nevertheless, in the absence of such data, we would not exclude resale circuits generally from the TSP System, as USTA urges in its comments. A substantial component of the communications service industry is represented by entities that at least in part resell other vendors' facilities or services. Restricting TSP priority assignments to underlying facility-based carriers would offer no administrative advantage and could remove an important class of vendor of emergency or essential telecommunications services from the TSP System.

87. Several parties, including NCS, agree that Section 8 is not needed if additional language is included in Section 6(f) to specify resale carriers. It would appear that the consensus of those commenting on the reseller issue is that Section 8 should be deleted but that additional language elsewhere in the rules provide that carriers generally cooperate in good faith on matters of priority treatment. Apart from the consensus, it seems that the intent of proposed Section 8 is embodied by provisions contained in other sections of the rules. There are three essential elements to Section 8: recognition of resellers, assignment of the reseller's service priority to the underlying vendor's service and reseller's burden to notify underlying service vendor of priority information. By adding new Section [6(f)(5)], which specifically refers to resale carriers, there is adequate recognition of resellers as well as sufficient assurance that underlying carriers are supplied

with the information needed to implement priority treatment of facilities that support NSEP services. Also, the general requirements in the rules for recognition of properly assigned priorities removes the need for a special reference to resellers for that recognition -- or for equal and non-discriminatory treatment of a vendor's affiliated entities and resale and interconnecting carriers. Accordingly, we will delete Section 8, as proposed.

88. Finally, it has been suggested that resellers' distribution of services among many facilities is no more than a marketing tool. The thought seems to be that a reseller can offer priority restoration to users that do not independently qualify for priority treatment because they know that certain non-NSEP services are embedded in the TSP-priority facilities. It has also been suggested that, to the extent distribution is a marketing tool, non-disclosure of NSEP services is a means to prevent abuse. We believe that Title II of the Communications Act already contains adequate safeguards against this kind of conduct. A primary purpose of TSP, as noted earlier herein, is to provide carriers with protection against allegations of unreasonable preferences arising out of priority provisioning or restoration. 47 U.S.C. @ 202. Were a carrier to market non-NSEP services based even in part upon representations that those services would be provisioned or restored on a priority basis (because they would be embedded in TSP-priority facilities), in might have engaged in actionable conduct, i.e., in violation of the Communications Act. We believe that this disincentive is sufficient to assure that resellers will not abuse ancillary priority benefits they derive from their TSP involvement.[33] NCS' support for a rule section that would codify this expectation is founded on a general security rationale, viz., that NSEP-related information should should not be disclosed to parties not having a "need-to-know". The utility of NCS' proposed Section 6(f)(11) to prevent abuse by resellers is questionable because there is no standard established for the meaning of "need-to-know." Nevertheless, its inclusion would not be inconsistent with the Title II restrictions we have discussed, and it would alert carriers to the need to exercise caution with regard to information about NSEP services, for both security and marketing-abuse reasons. On balance, we favor this change and will adopt it as Section [6(f)(13)] of the final rules, with minor revision.

89. Recordkeeping and reconciliation. In the NPRM interested parties were asked to comment on the extent to which TSP, in conjunction with NCS' recordkeeping and reconciliation efforts, will alleviate the problem of inconsistent of faulty records. It was recalled that one of the problems of the RP System was recordkeeping deficiencies among the various participating entities, including NCS and the carriers. NCS originally proposed: Section 6(b)(2)(e), which would require the EOP to periodically initiate the identification and reconciliation of any discrepancies between EOP records relating to priority level assignments and the records of service users/contracting activities and vendors; Section 6(c)(3), which would require sponsoring federal agencies to cooperate with EOP (a) during NSEP telecommunication service audits and revalidations, and (b) to identify and reconcile any discrepancies among service user contracting activity, vendor and EOP records relating to priority level assignments; Section 6(d)(10), which would require service users to cooperate with EOP (a) during NSEP telecommunication service audits and revalidations, and (b) to identify and reconcile any discrepancies among service user/contracting activity, vendor and EOP records relating to priority level assignments; and Section 6(f)(6)(e), which would require vendors to cooperate with the federal government to identify and reconcile any discrepancies between user/contracting activity, EOP, and

vendor records.

90. In order to avoid the possibility that recordkeeping processes "may be used improperly as a means to change circuit designations free of charge . . .," Ameritech suggests, without explaining its assertion, that any guidelines distinguish between audits and revalidation or quality assurance activities. It urges that discrepancies be resolved through the normal service order process, subject to tariff charges, with appeals handled by the customer relations process. BellSouth expresses concern regarding periodic audits which may be conducted by the Commission. It fears an overly burdensome level of detail and recommends that audits as defined in Section 3 be limited to review of billing discrepancies and/or reconciliation of NSEP user and vendor date base information. It urges no more than annual reviews. US West suggests the definition of audit be revised to read: "Audit means a review, conducted by the parties, in response to an identified problem."

91. Pacific Bell suggests that, rather than responding to audits, vendors should respond to inquiries because audits are expenses and time-consuming. It would delete Section 3(b), Definition of Audit, and replace it with "verification", i.e., review in response to problems identified through revalidation and reconciliation. It proposes a new Section 6(f)(10) that would require vendors "to provide to EOP, upon reasonable request, information sufficient to verify discrepancies." Also, to assist the verification process, Pacific Bell would add language in Section 5 that would include a reference to the NCS' Management Information System (MIS) database as a source of priority level information. It also proposes that EOP be responsible for deciding whether there are discrepancies between EOP records and users and vendors and suggests that revalidation be limited to once a year, and not less than once every three years. Finally, Pacific Bell questions the identity of "authorized" entity in proposed Sections 6(f)(3)(c) and 6(f)(6)(a) [6(f)(7)(a)].

92. Southwestern Bell identifies two types of audits, billing inquiries and reconciliation. The first of these, it notes, are normal daily business activities; the second, it states, involves comparison of NSEP information between one or more vendors and government for the purpose of resolving discrepancies. Reconciliation, it urges, should be allowed no more than once a year between EOP and each vendor, and should be accomplished by use of computer tapes. It argues that the charges should be borne by the cost-causer and determined by underlying service costs. Southwestern Bell would revise the definition of audit in Section 3 to read, "Audit means a quality assurance review in response to billing discrepancies and/or reconciliation of NSEP TSP service information/database." It would also add the following new definition in Section 3: "Reconciliation means the comparison of NSEP information and the resolution of identified discrepancies."

93. For its part, NCS states that it developed the reconciliation process to cure the current disagreement in RP records. It states that EOP will reconcile its NSEP service information with users and vendors, but vendors will be responsible for reconciling their information with their subcontractors. It states that information confirming NSEP service completion will be stored in EOP's MIS and reconciled against the prime service vendor.[34] If no information is received, EOP will send a reminder notice to the vendor. NCS states that EOP wants to initiate reconciliation no more than once a year with each prime service vendor. It adds that vendors with subcontractors will be responsible

for reconciliation with those subcontractors at least once every three years and will provide confirmation to the EOP that this has been done. NCS too would add a definition for reconciliation in Section 3, as well as a requirement for vendor mutual cooperation. NCS Comments pp. 14-15. NCS offers a new Section [6(f)(7)(f)] which states, "Periodically initiating reconciliation with their subcontractors, and by their subcontractors cooperating with other service vendors during reconciliation."

94. In its reply, AT&T interprets NCS' proposed general duty on vendors to supply reconciliation data to require carriers to reconcile circuits with LECs which provide access channels at each end of each circuit, increasing the vendor's burden. AT&T claims that data systems do not distinguish between prime and subcontractor priority circuits. Also, AT&T says, vendors will take on an increasing share of government circuits and they will have to develop a major MIS to accommodate NCS' requirement for reconciliation. AT&T asserts that the cost-causer for reconciliation is NCS. AT&T suggests that completion reports during the "turn up" phase of TSP service will provide adequate confidence that the database will be reliable, so that reconciliation need only apply to newly entered data. It also proposes that reconciliation address only circuits for which some order activity has occurred within the 12-month period preceding the reconciliation report, with no review needed except in the event of trouble. Under NCS' proposal, AT&T asserts, reconciliation would grow each year, whereas by AT&T's proposal the magnitude would remain constant. AT&T also suggests that there be no reconciliation on RP System circuits until TSP is fully operational, at which time a one-time reconciliation of transitioned circuits followed by reconciliation of new circuits could occur.

95. GTE favors reconciliation, stating that such procedures are needed to ensure ongoing quality and accuracy of the TSP System. It, like AT&T, would ascribe billing for reconciliation to NCS. GTE urges that billing arrangements between contractors and subcontractors be worked out before TSP is implemented. It expects that contractors' costs will be higher because they must expend more effort in the reconciliation process. GTE Comments, 14. For its part, McCaw finds NCS' use of "by their subcontractors" in its new proposed Section [6(f)(7)(f)] unclear in that it may mean prime contractors must ensure subcontractors or other service vendors cooperate with such vendors, or other possible interpretations. McCaw also asks whether Section 10(b)(3) [9(b)(3)] allows a subcontractor to act without EOP identification and what the possible consequences of violation would be. It suggests that subcontractors be similarly restrained and prime contractors should be required to forward priorities to subcontractors.

96. Southwestern Bell, in its reply, concurs with Pacific Bell that EOP should be responsible for discrepancies between EOP records and service users' and vendors' records. It asks that NCS be required to track TSPs and determine, via completed order notification, that requested service has been connected. It also supports reconciliation annually between NCS and prime contractors and every three years between prime contractors and subcontractors. The burden of identifying and re-validating TSP users every 3 years should be NCS' and service users' responsibility, Southwestern Bell asserts. USTA emphasizes the importance of restricting priority assignments and urges the government to monitor assignments and periodically reassessing priority classifications.

97. In its reply, NCS disagrees with BellSouth regarding review of billing discrepancies and reconciliation matters, arguing that EOP would rarely, if ever, become involved with billing disputes. NCS also disagrees with US West regarding who should conduct audits; NCS says only EOP should conduct them. In response to Pacific Bell's suggestion that priority level assignments be retained by the NCS in its MIS database, NCS notes that Section 6(b)(2)(c) states that EOP is responsible for maintaining data on priority level assignments, so that no modification is needed. NCS also offers a number of minor editorial amendments, which generally will be adopted.

98. Discussion. Most parties do not dispute the need for a centralized administrative mechanism for resolving recordkeeping inconsistencies or discrepancies, and we agree that NCS is the logical entity to administer such a mechanism.[35] However, an apparent problem with NCS' original proposal was its use of the word "audit" in Section 3(b). As proposed, audit was defined as "a periodic review as mutually agreed, in response to identified problems." NCS intent was that, in the event of an inconsistency or problem with a priority, NCS would investigate and, with the assistance of all parties, resolve the problem, which would generally consist of reported or suspected data discrepancies. Several commenting parties have interpreted audit to mean a review in an extended tax sense, i.e., an exhaustive examination and tabulation.[36] In apparent anticipation of these interpretations, NCS offers a revised Section 3(b) as follows:

Audit means a quality assurance review in response to identified problems.

We agree that this revised Section 3(b) sufficiently clarifies the intent of the audit function.

99. The problems associated with reconciliation of errors or discrepancies in databases maintained by innumerable parties are potentially significant. Apart from audits, which are essentially troubleshooting exercises, reconciliations will be initiated by EOP to assure that database records amongst all TSP participants comport. It is generally agreed that reconciliations should be initiated no more than once a year between EOP and each prime service vendor, with subcontractor-vendor reconciliation at least once every three years, and written confirmation to EOP. Hence, while "periodically" is not defined in the rules, we will expect reconciliations to be initiated by EOP in accordance with this understanding. It is not likely NCS will engage, however, in audits concerning matters of billing except as a user, in which case it would seek redress or correction as would any other user. Coupled with our statement of the purpose of audits, we believe the concerns expressed by Ameritech, [37] AT&T, Bellsouth, GTE, [38] Pacific Bell, [39] Southwestern Bell [40] and US West are effectively answered.

100. Implementation. We discussed in the NRPM the periods needed to achieve initial operating capability (IOC) and full operating capability (FOC) of the TSP System. We concluded that, based on industry meetings and NCS' comments, IOC at 90 days after FCC rule adoption appeared reasonable. Given the nation's need to proceed with these important NSEP-TSP rules and the purported interest of parties to move forward with assignments, we stated that any request for delay must be well justified. We also indicated that while we tentatively favor a 90 day implementation date, with a sunset provision of July 1, 1990 for the RP System, the final rules would not be put in place until we are satisfied all legitimate concerns have been addressed. We asked for public comment on these

matters, particularly urging any party not agreeing with the 90 day IOC date to substantiate its assertion.

101. AT&T, with whom GTE agrees, asserts that the 90 day IOC and July 1, 1990 sunset dates do not leave adequate time for development of systems necessary to implement the TSP System. Algorithms must be developed by NCS to establish, maintain and administer TSP, order entry systems must be developed, new databases created, personnel instructed, operating procedures created and tariffs developed and filed, they say. AT&T and GTE suggest a 12 month IOC (after FCC rule adoption) and sunset two-and-a-half years later. Ameritech adds that less than 1 year for IOC would jeopardize the accuracy of identifying TSP services, increasing costs of development (two stages would then be needed). Bell Atlantic agrees that one year is needed to avoid using a cumbersome and inaccurate manual system. BellCore emphasizes the need to develop software for the BOCs, which involves design parameters such as flow of information between government and industry. It suggests that once TSP is initiated minor problems can be handled by abbreviated proceedings at the Commission, but in any case one year for IOC is needed for smooth transition from RP to TSP.

102. BellSouth urges the Commission to be flexible as to TSP implementation to permit carriers to modify mechanized systems to meet the specifications of TSP and implement necessary tariffs and other procedures. Both BellSouth and Nynex recommend IOC one year after issuance of the final rules. GTE and Pacific Bell also urge one year, but note that until FCC final rules and FCC approval of NCS-generated implementing procedures are finished, no planning can be done. GTE argues that the IOC date must be measured from when implementing procedures are completed, including training, software development, internal procedure preparation, and tariff development and filing. Pacific Bell would require NCS to provide TSP specifications within 90 days of the rules and the data should be subject to further comment. Arinc, Centel and USTA express concern regarding the relationship between RP and TSP during the transition period, i.e., which dominates.

103. McCaw and Telocator state that cellular vendors are prepared to implement TSP on 90 days notice after FCC action on the rules. McCaw urges that prompt implementation is needed to assure integrated rules for all. It emphasizes, however, that only IOC is possible 90 days after rule adoption. FOC will take longer, it states, because cellular vendors will need to begin to supply NSEP services and generate the associated revenue to facilitate the evolution to FOC. MCI states that time is needed to develop some systems, such as the means by which NCS notifies carriers of a need to re-prioritize circuits. For IOC it prefers one year -- or only after approval of the operations manual which will govern carrier obligations. Ameritech urges that the federal government's new inventory system for communications circuits should be in place first, to permit generation of usable TSP classification requests. It favors a rapid transition to the new system, with one year for IOC and 60 days for sunset of RP. For its part, Southwestern Bell suggests that 4-6 months are needed for NCS adoption and FCC approval of operational and vendor-interface rules, and then one year is needed for IOC. For its part, USTA urges that there should be a flash cut after FCC final action and after EOP completes and publishes its Directive 3-1 operating procedures, tentatively July 1, 1989, with sunset on January 1, 1990. It opposes simultaneous existence of RP and TSP because of possible differing classifications.

104. In its comments, NCS agrees that a year is needed to complete several essential elements of TSP. The planned NCS Directive 3-1 (which will define use of NSEP TSP Systems, including assignment of responsibilities to NCS) will require, it states, several months to complete and time will also be needed for EOP to develop and implement its automated TSP MIS and prepare training materials. It also notes that tariff filing procedures and industry's need to implement organizational procedures require time. It supports a two-and-a-half year period for transition from RP to TSP, beginning one year after the Commission's final order adopting TSP rules. NCS Comments, p. 5.

105. In its reply comments, AT&T favors an IOC date of 6 months after operating procedures become available, with FOC one year afterwards. BellSouth, BellCore, CBT, Pacific Bell, USTA and US West reiterate the inadequacy of 90 days and the need for an IOC date commencing, alternately, one year after Commission adoption of TSP rules or one year after Commission approval of Operations Procedures (developed by NCS). CTIA supports the notion of permissive TSP implementation and a final FOC date. GTE favors a one year IOC date from Commission approval of rules, and a sunset of RP two and a half years thereafter. US West opposes the need for a two-and-a-half year transition period and suggests instead a six month period, to reduce costs. McCaw, joined by Telocator, argues that cellular operators are under a disadvantage if they cannot implement TSP immediately because they cannot yet restore NSEP services. McCaw asks that the Commission either establish a date by which all vendors must begin TSP while others may begin earlier, or authorize cellular under RP now -- until TSP becomes effective. MCI opposes Ameritech's flash cut proposal because there would not be sufficient time to sort out problems endemic in the RP System. It agrees with an IOC date of one year after Commission approval of NCS' Operations Manual. Southwestern Bell supports an IOC date of one year after FCC approval of EOP's operation procedures and a sunset date of six months. It would also require resubmission of RP assignments to EOP by government agencies within 18 months.

106. Also in reply, NCS opposes delaying IOC until Commission approval of TSP Vendor Operating Procedures, arguing that national security and emergency preparedness posture requires more expeditious action. In response to the matter of RP/TSP dominance during the transition, NCS notes that service vendor operational procedures will address this problem by including an RP to TSP restoration priority correlation matrix to show that, during the transition, neither system takes precedence over the other. See NCS Reply, p. 26. For example, it notes, an RP of "3C" would, during the transition period, be treated as a TSP restoration priority of "3". NCS favors a sunset period for RP of two-and-a-half years.

107. Discussion. Our principal consideration in establishing IOC and FOC dates is to balance the essential public interest need of expeditiously initiating a workable NSEP TSP System with the practical requirements of competent preparation. Our experience with RP and its flawed recordkeeping and skewed priority distribution emphasizes the importance of allowing adequate time for vendors, users and the government to develop and implement the mechanisms they deem necessary to avoid these infirmities in TSP. To do otherwise, in the long run, would disserve the public interest and ultimately invoke corrective measures that would be both costly and dilatory. While we anticipated in the NPRM adoption of a 90 day IOC, with FOC by July 1, 1989, these dates are generally not supportable.

108. The majority of commenting parties favor a one year IOC date. They agree that less time would not be adequate to develop the necessary procedural guidelines and internal operating systems or, where appropriate, obtain regulatory approvals. NCS's concurrence with IOC of one year adds additional weight to the need for this period. The issue that remains with regard to IOC is whether it should commence with Commission adoption of the TSP System rules or with Commission adoption of an order approving NCS' Operations Manual. [41]

109. There is general support for delay of IOC until one year after Commission review of NCS' Operations Manual. See para. 35, supra. Several parties, including NCS, argue that there is no need to delay that long, and some parties recommend that IOC occur upon Commission adoption of the TSP rules. NCS' position is, in effect, that one year is sufficient time after Commission adoption of TSP rules to allow for review of NCS' procedures, as well as carriers and users to absorb its contents and implement their administrative processes. [42] NCS properly seeks to initiate TSP as quickly as possible, but it has offered no date specific for completion of its administrative guidelines. Nevertheless, in view of its statements concerning current progress on development of procedural guidelines, NCS's stated interest in expediting implementation of TSP and the ongoing work of industry-government representatives in a variety of forums since adoption of the NPRM, we anticipate that a final proposal can be presented by NCS to the Commission for approval within three months of official release of the final TSP rules. An additional nine months from release of such approval should be adequate time for all parties to develop their various internal mechanisms, including software refinements, because many of the details concerning the nature of TSP System requirements are already known. The IOC date, therefore, will be nine months from official release of the Commission's order reviewing NCS' procedural guidelines, which we expect NCS to submit within three months of the Federal Register date of this order. [43] In short, the IOC date will likely be just beyond one year after official release of the TSP rules.

110. We do not agree with McCaw or Telocator that dispensation for historical exclusion from the current program is warranted. Allowing carriers to implement TSP earlier than the IOC date we have established could lead to claims of anticompetitive conduct, with carriers that have developed more detailed or compliant recordkeeping and assignment tracking systems effectively handicapped in the competitive provision of priority services by other vendors that the have quickly implemented "makeshift" or minimally compliant systems. The public interest does not support an environment that requires vendors to develop "lowest common denominator" systems to compete effectively. For TSP, it is important that all parties operate under uniform standards and capabilities that will not undermine the long term reliability of TSP System administration or lead to the infirmities we have experienced with RP. [44] Such a policy encourages industry and government to work cooperatively toward implementation of the most effective TSP System possible.

111. It has been suggested by various commenting parties that the FOC date, when all RP priority assignments will have been converted to TSP priority assignments or deleted, should be from 6 to 30 months from the IOC date. The purpose of the FOC period is to establish a transition period that allows RP assignees to seek reassignment under TSP or terminate their priority assignments. There does not appear to be justification for accelerating FOC to

6 months after IOC because once IOC has occurred TSP will be operational and the compelling public interest reasons for developing the RP replacement will have been achieved. A longer FOC period would assure that all RP assignees have sufficient time to adjust to TSP. We do not believe that 30 months is unreasonable and, given the absence of a specific showing that the costs associated with 30 months over 6 months constitute a significant factor not outweighed by the general need for an adjustment period, we will adopt 30 months in Section 2 as the FOC period, i.e., 30 months from IOC. Other issues raised by the parties, e.g., Arinc, Centel and USTA at para. 102, supra, have been adequately resolved in earlier discussions and by NCS.

Additional Items

112. EMP. Leggett favors the inclusion of electromagnetic pulse (EMP) protection measures in the TSP rules. He argues that EMP would add balance missing from the proposal, viz., by a regulatory effort to prevent services from failing rather than relying on restoration procedures. He proposes a new section, Obligation to Protect NSEP Services Against the Effects of an Electromagnetic Pulse, with a requirement that within one year of classification of any NSEP service as Emergency or Essential all associated services and equipment would be EMP protected. In response to Leggett, NCS agrees that users should implement measures that increase survivability of NSEP services, but protection from EMP is not a requirement of the TSP System.

113. EMP is an intense burst of electromagnetic energy that is generated by a high-altitude nuclear explosion. Purportedly, a single burst could blanket the entire continental United States with an intense electromagnetic pulse and disable most solid-state electronic devices, thus rendering many of our telecommunications systems inoperative. In the Bureau's Memorandum Opinion and Order, DA 86-305, released December 12, 19986, the Bureau rejected Leggett's request to institute a notice of inquiry [NOI] to consider the effects of EMP on civilian communications systems and to possibly establish countermeasures. It noted that the issues raised were topical and important, but it decided that examination of them was unwarranted because a comprehensive study of EMP was underway by NSTAC and the American National Standards Institute (ANSI). The Bureau also noted the limited interest displayed by the public and lack of a prima facie showing by Leggett that the public interest would be served by requiring a public forum.

114. On reconsideration, 2 FCC Rcd 2739 (19987), the Commission stated that the seriousness of the EMP problem causes us to defer to activities currently underway in other forums. We also stated that the sensitivity of EMP and its national security implications weigh against a public proceeding. This position was supported by the Department of Defense (DoD), which has primary responsibility for the nation's security. As DoD stated, ". . . much of the details regarding the impact of EMP and mitigation measures is classified national security information not properly debated in a regulatory proceeding." Id. at 2740. The Commission interpreted the paucity of participation in the proceeding to reflect the collective inclination of the private sector to rely on NSTAC and ANSI to take the lead in the development of EMP policy. "In short, we are not convinced that in view of other ongoing EMP studies there is an immediate need to institute an NOI." Id. We believe the rationale applied in the Commission's reconsideration of Leggett's petition in 1987 also applies to Leggett's proposed TSP rule now before us. Nothing has been shown to have changed since the Commission issued its reconsideration of

Leggett's EMP petition. We will therefore reject his request.

115. FAR. Pacific Bell notes that the Federal Acquisition Regulations (FAR) contain procedures for federal procurement of goods and services. It asks the extent to which service vendors can respond to emergency procurement though the FAR has not been followed, i.e., are they liable for not following the FAR? Pacific Bell also refers to Section 6(f)(7)(b), suggesting that "with proper contracting activities" is unclear and asking whether these refer to authorities or procedures. In that Section 6(f)(7)(b) has been modified in the appendix (see Section [6(f)(8)(b)]), Pacific Bell's question is moot. The matter of FAR as raised by Pacific Bell is not within the scope of this Commission's jurisdiction, i.e., through Title II of the Communications Act. EOP may wish to offer guidance to users or vendors or issues involving compliance with FAR.

116. Sponsorship. AAR asks that privately owned services of the railroad industry be included in the TSP System. It notes that the Peacekeeper Rail Garrison depends on railroads to provide highly survivable and capable strategic weapons systems, and relies heavily on communications. It states that it is important that non-Federal users not be without recourse in matters of restoration of their telecommunications. UTC expresses concern that some utilities, e.g., water companies, seeking priority classification without sponsorship must apply to EOP. It recommends, without further explanation, that such application be made directly to the Commission.

117. As discussed earlier herein, e.g., at paras. 23-26, TSP offers a means by which carriers may provide priority provisioning or restoration service to a user without violating the unreasonable preference prohibition of Title II of the Communications Act. Private services, i.e., services not offered by a common carrier, would not be subject to allegations of unreasonable preferences under Title II of the Communications Act and therefore would not require the protection of TSP. Indeed, the scope of TSP is predicated on the need for a standardized system of issuing priorities to common carriers and is not intended to be applied by the Commission to non-common carriers.

118. Private telecommunications owners may offer their communications services alone or in conjunction with leased common carrier services. In either case, as noted above, these private offerings are not generally within the scope of TSP. [45] However, Section [4(c)], as proposed, permits users to "apply" the TSP System to any private service offering, provided the private service does not connect to other services that have been properly assigned a TSP priority level. See Sections [4(c)(1)] and [2]. There is no prohibition against private carriers using TSP System standards and procedures in conjunction with services they provide their users, even if those users also are TSP users. The private carriers, however, will not derive any of the legal benefits that a common carrier gains from compliance with the TSP System. [46] Railroads, utilities and others that own private communications systems and that wish to offer priority provisioning or restoration treatment in conjunction with their private service offerings must do so independently of formal TSP procedures, e.g., by contract. Under the proposed TSP System, it is not contemplated that the Commission will accept applications for, or review, non-common carrier priority assignments. On the other hand, we do not wish to discourage the use of the TSP rules as guidance for such private agreements. Proposed Section [4(c)] would offer this guidance. Accordingly, we will adopt Section [4(c)] as proposed. As to UTC's preference that certain entities apply directly to the

Commission for TSP priority level assignment, we note that Sections 6(a)(4) and 6(e) offer mechanisms for entities that cannot otherwise secure the sponsorship of a federal agency. Thus, were an energy or water utility not able to secure the sponsorship of the Department of Energy, it could seek Commission sponsorship, or it could choose under Section 6(e) to submit its request directly to EOP.

119. Notification, revalidation, verification and back-up. US West suggests deletion of the provision in Section 13(b)(2)(b) [12(b)(2)(b)] that, after 30 days, priority level E services are revoked unless extended. It argues that the requirement for written notice to carriers is redundant and could be costly to TSP service users. It asks whether the E level classification which provisioned the service would be required for subsequent changes in the service, absent the same urgency as originally required. It also asks whether the 3 year revalidation requirement for priority assignments is a responsibility of carriers. Finally, US West asks whether the three time periods of TSP means that there is a requirement for contingent priority levels. It states that carriers do not have the ability to accept orders for contingent priorities, only one at a time, and that changes in priority levels from changes in time periods or stress conditions will require subsequent service requests to alter priority levels.

120. UTC states that it is not clear whether utilities' special needs for back-up common carrier services fall within the additional justification requirement of Section 13(d) [12(d)]. It requests amendment of the proposal to permit utility back-up services to satisfy the "additional justification" requirement. In its reply comments, BellCore suggests that the Section 13(b)(2)(c) [12(b)(2)(c)] emergency restoration 30 day priority option should be deleted and assigned under the same operational arrangements as other TSP restoration priority circuits. It claims that no priority assignments should be automatic. BellCore and Southwestern Bell concur with US West that contingent priorities cannot be maintained without great expense and likely confusion.

121. NCS disagrees with US West concerning Section 13(b)(2)(b) [12(b)(2)(b)] and states that EOP will revoke E after 30 days and notify the user unless the user requests an extension. It further states that the user must transmit notice of the revocation to the vendor. Relying on vendors to automatically change priorities on dates would burden vendors to maintain tickler files, NCS argues. It concludes that the better practice is to require notice of any such revocation. Also, it adds, no revision is needed to clarify the rules in response to US West's question about whether E need be issued for subsequent changes, even if changes do not have the same urgency as the original requisition. NCS says subsequent changes must be separately justified. We believe NCS' response adequately reflects a reasonable approach to these matters and we will not alter the language proposed. If after adoption of the TSP rules interested parties find that there are improvements possible that would justify instituting a proceeding to amend the rules, they are welcome to submit the appropriate petitions.

122. As to contingent assignments, NCS notes that Section 5 states that although priority levels normally will be assigned by EOP and retained by service vendors only for the current time period, if a user wants to activate a contingent priority a service order will be issued to the vendor. This is treated like any priority level change in that a new service order is needed, NCS states. Vendors will not need to maintain contingent assignments in

their databases. We believe this sufficiently responds to the concerns of parties regarding contingent priorities. In response to Pacific Bell, which asks for a definition of who is authorized to seek verification of a priority level, NCS states that EOP will generally do so. As to US West's question concerning revalidation, NCS states that users are responsible for rejustifying their priority level assignments with EOP at least once every 3 years, and that any changes require a service order to the vendor. Finally, we do not believe that utilities require special interpretation of Section 13(d) [12(d)] so that UTC's question concerning its need for back-up services is a matter that can be taken up with EOP or its sponsoring agency as the need arises.

V. CONCLUSION

123. By the rules we adopt in this order we initiate a program that modernizes the means by which the nation is assured that essential communications facilities provided by common carriers receive provisioning and restoration priorities in times of emergency. The rules may also serve as guidance for the provisioning and restoration of private systems. NCS has provided the basis for the rules that we adopt and will soon offer for Commission approval its procedures for implementation. Through the substantive participation of carriers, users and government, many complicated legal and technical issues have been resolved in this proceeding, resulting in a number of changes to the proposed rules. It is anticipated that, with these changes, the TSP System will provide a uniform and efficient means of providing preferences to qualified users in response to the nation's emergency communications needs. [47]

VI. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

124. Reason for action. The Commission is responding to deficiencies in the existing Restoration Priority System by which carriers may provide priority provisioning and restoration of service when specific National Security Emergency Preparedness needs have been identified. These rules will allow carriers to "discriminate" among services and users when NSEP is involved without violating the provisions of the Communications Act.

125. Objectives. The objective of this proceeding is to ensure that NSEP telecommunications needs are adequately handled without unduly interfering with the public's telecommunications needs.

126. Legal Basis. The legal authority for this action is contained in Sections 1, 4(i), 201-05 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. @@ 151, 154(i), 201-05 and 303(r).

127. Description, potential impact and number of small entities affected. The impact of the new TSP rules upon large and small telecommunications providers will vary depending upon the number of NSEP services they provide. The burden hours, estimated at 105,000 annually, will be assumed by NCS/DoD which will handle essential administration and review of priority applications and overall implementation. The economic impact of the rules will be minimal on carriers because they will recover their costs through cost-causative cost recovery mechanisms. Further, once the carriers have adapted to the new rules, the economic impact should be minimal.

128. Recording, recordkeeping and other compliance requirements. The

Executive Office of the President will be responsible for maintaining the database for TSP. All recording, recordkeeping and compliance records will be handled by the Executive Office of the President, with continuing access by the Commission. Carriers will be required to maintain records of their priorities, which in some cases may require development of new software. Costs for such development will be recovered through standard cost recovery mechanisms.

129. Federal rules that overlap, duplicate, or conflict with these rules: None.

130. Any significant alternative minimizing impact on small entities and consistent with stated objective: None.

VII. ORDER

131. Accordingly, IT IS ORDERED, That pursuant to authority contained in Sections 1, 4(i), 201-05 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. @@ 151, 154(i), 201-05 and 303(r), Parts 0 and 64 of the Commission's Rules and Regulations ARE AMENDED as set forth in the Appendix below effective December 27, 1988.

132. IT IS FURTHER ORDERED, That the initial operating capability date of these rules will be nine months after the appearance in the Federal Register of the Commission's order concerning the Executive Office of the President's procedures for implementation.

133. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau IS DELEGATED AUTHORITY to participate in and conduct discussions and meetings and issue orders to resolve issues in connection with implementation of the Telecommunications Service Priority System.

134. IT IS FURTHER ORDERED, That the Secretary shall cause a summary of this decision to be printed in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy, Secretary

APPENDIX

A. Part O of the Commission's Rules and Regulations (Chapter 1 of Title 47 of the Code of Federal Regulations, Part O) is amended as follows:

1. The authority citation for Part O continues to read as follows:

AUTHORITY: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, unless otherwise noted.

2. @ 0.11(a)(10) is revised to read as follows:

@ 0.11 Functions of the Office.

(a) * * *

(10) Under the general direction of the Defense Commissioner, coordinate the defense activities of the Commission, including recommendation of national emergency plans and preparedness programs covering Commission licenses and planning for continuity of essential Commission functions during national emergency conditions. Support the Chief, Common Carrier Bureau on matters involving assignment of Telecommunications Service Priority System priorities and in the administration of that System. Act as FCC Defense Coordinator and principal to the National Communications System.

* * *

3. @ 0.91 is amended by adding new paragraph (1) to read as follows:

@ 0.91 Functions of the Bureau.

* * *

(1) Administers the Telecommunications System Priority System with the concurrence of the Office of the Managing Director, and resolves matters involving assignment of priorities and other issues pursuant to Part 64 of the rules.

4. @ 0.314(g) is revised to read as follows:

@ 0.314 Additional authority delegated.

* * *

(g) To act on and make determinations on behalf of the Commission regarding requests for assignments and reassignments of priorities under the Telecommunications Service Priority System, Part 64 of the rules, when circumstances require immediate action and the common carrier seeking to provide service states that it cannot contact the National Communications System or the Commission office normally responsible for such assignments.

* * *

B. Part 64 of the Commission's Rules and Regulations (Chapter 1 of Title 47 of the Code of Federal Regulations, Part 64) is amended as follows:

1. The authority citation for Part 64 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, unless otherwise noted.

2. @ 64.401 is revised to read as follows:

@ 64.401 Policies and procedures for provisioning and restoring certain telecommunications services in emergencies.

The communications common carrier shall maintain and provision and, if disrupted, restore facilities and services in accordance with policies and procedures set forth in the Appendix to this part.

3. @ 64.402 is removed.

4. Appendix B to Part 64 is removed.

5. Appendix A to Part 64 is revised to read as follows:

APPENDIX - Telecommunications Service Priority (TSP) System for National Security Emergency Preparedness (NSEP)

1. Purpose and Authority.

a. This appendix establishes policies and procedures and assigns responsibilities for the National Security Emergency Preparedness (NSEP) Telecommunications Service Priority (TSP) System. The NSEP TSP System authorizes priority treatment to certain domestic telecommunications services (including portions of U.S. international telecommunication services provided by U.S. service vendors) for which provisioning or restoration priority (RP) levels are requested, assigned, and approved in accordance with this appendix.

b. This appendix is issued pursuant to Sections 1, 4(i), 201 through 205 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. @@ 151, 154(i), 201 through 205 and 303(r). These sections grant to the Federal Communications Commission (FCC) the authority over the assignment and approval of priorities for provisioning and restoration of common carrier-provided telecommunications services. Under Section 706 of the Communications Act, this authority may be superseded, and expanded to include non-common carrier telecommunication services, by the war emergency powers of the President of the United States. This appendix provides the Commission's Order to telecommunication service vendors and users to comply with policies and procedures establishing the NSEP TSP System, until such policies and procedures are superseded by the President's war emergency powers. This appendix is intended to be read in conjunction with regulations and procedures that the Executive Office of the President * issues (1) to implement responsibilities assigned in Section 6(b) of this appendix, or (2) for use in the event this appendix is superseded by the President's war emergency powers.

c. Together, this appendix and the regulations and procedures issued by the Executive Office of the President establish one uniform system of priorities for provisioning and restoration of NSEP telecommunication services both before and after invocation of the President's war emergency powers. In order that

government and industry resources may be used effectively under all conditions, a single set of rules, regulations, and procedures is necessary, and they must be applied on a day-to-day basis to all NSEP services so that the priorities they establish can be implemented at once when the need arises.

* In Sections 2(a)(2) and 2(b)(2) of Executive Order No. 12472, "Assignment of National Security and Emergency Preparedness Telecommunications Functions" April 3, 1984 (49 Fed. Reg. 13471 (1984)), the President assigned to the Director, Office of Science and Technology Policy, certain NSEP telecommunication resource management responsibilities. The term "Executive Office of the President" as used in this appendix refers to the official or organization designated by the President to act on his behalf.

2. Applicability and Revocation.

a. This appendix applies to NSEP telecommunications services:

(1) For which initial or revised priority level assignments are requested pursuant to Section 8 of this appendix.

(2) Which were assigned restoration priorities under the provision of FCC Order 80-581; 81 FCC 2d 441 (1980); 47 CFR Part 64, Appendix A, "Priority System for the Restoration of Common Carrier Provided Intercity Private Line Services"; and are being resubmitted for priority level assignments pursuant to Section 10 of this appendix. (Such services will retain assigned restoration priorities until a resubmission for a TSP assignment is completed or until the existing RP rules are terminated.)

b. FCC Order 80-581 will continue to apply to all other intercity, private line circuits assigned restoration priorities thereunder until the fully operating capability date of this appendix, 30 months after the initial operating capability date referred to in subsection d of this Section.

c. In addition, FCC Order, "Precedence System for Public Correspondence Services Provided by the Communications Common Carriers" (34 Fed. Reg. 17292 (1969)); (47 CFR Part 64, Appendix B), is revoked as of the effective date of this appendix.

d. The initial operating capability (IOC) date for NSEP TSP will be nine months after release in the Federal Register of the FCC's order following review of procedures submitted by the Executive Office of the President. On this IOC date requests for priority assignments generally will be accepted only by the Executive Office of the President.

3. Definitions.

As used in this part:

a. Assignment means the designation of priority level(s) for a defined NSEP telecommunications service for a specified time period.

b. Audit means a quality assurance review in response to identified problems.

c. Government refers to the Federal government or any foreign, state,

county, municipal or other local government agency or organization. Specific qualifications will be supplied whenever reference to a particular level of government is intended (e.g., "Federal Government", "state government"). "Foreign government" means any sovereign empire, kingdom, state, or independent political community, including foreign diplomatic and consular establishments and coalitions or associations of governments (e.g., North Atlantic Treaty Organization (NATO), Southeast Asian Treaty Organization (SEATO), Organization of American States (OAS), and government agencies or organization (e.g., Pan American Union, International Postal Union, and International Monetary Fund)).

d. National Communications System (NCS) refers to that organization established by the President in Executive Order No. 12472, "Assignment of National Security and Emergency Preparedness Telecommunications Functions," April 3, 1984, 49 Fed. Reg. 13471 (1984).

e. National Coordinating Center (NCC) refers to the joint telecommunications industry-Federal government operation established by the National Communications System to assist in the initiation, coordination, restoration, and reconstitution of NSEP telecommunication services or facilities.

f. National Security Emergency Preparedness (NSEP) telecommunications services," or "NSEP services," means telecommunication services which are used to maintain a state of readiness or to respond to and manage any event or crisis (local, national, or international), which causes or could cause injury or harm to the population, damage to or loss of property, or degrades or threatens the NSEP posture of the United States. These services fall into two specific categories, Emergency NSEP and Essential NSEP, and are assigned priority levels pursuant to Section 9 of this appendix.

g. NSEP Treatment refers to the provisioning of a telecommunication service before others based on the provisioning priority level assigned by the Executive Office of the President.

h. Priority Action means assignment, revision, revocation, or revalidation by the Executive Office of the President of a priority level []
associated with an NSEP telecommunications service.

i. Priority Level means the level that may be assigned to an NSEP telecommunications service specifying the order in which provisioning or restoration of the service is to occur relative to other NSEP and/or non-NSEP telecommunication services. Priority levels authorized by this appendix are designated (highest to lowest) "E," "1," "2," "3," "4," and "5" for provisioning and "1," "2," "3," "4," and "5" for restoration.

j. Priority Level Assignment means the priority level(s) designated for the provisioning and/or restoration of a particular NSEP telecommunications service under Section 9 of this appendix.

k. Private NSEP Telecommunications Services include non-common carrier telecommunications services including private line, virtual private line, and private switched network services.

l. Provisioning means the act of supplying telecommunications service to a user, including all associated transmission, wiring and equipment. As used herein, "provisioning" and "initiation" are synonymous and include altering the

state of an existing priority service or capability.

m. Public Switched NSEP Telecommunications Services include those NSEP telecommunications services utilizing public switched networks. Such services may include both interexchange and intraexchange network facilities (e.g., switching systems, interoffice trunks and subscriber loops).

n. Reconciliation means the comparison of NSEP service information and the resolution of identified discrepancies.

o. Restoration means the rejustification by a service user of a priority level assignment. This may result in extension by the Executive Office of the President of the expiration date associated with the priority level assignment.

p. Revalidation means the rejustification by a service user of a priority level assignment. This may result in extension by the Executive Office of the President of the expiration date associated with the priority level assignment.

q. Revision means the change of priority level assignment for an NSEP telecommunications service. This includes any extension of an existing priority level assignment to an expanded NSEP service.

r. Revocation means the elimination of a priority level assignment when it is no longer valid. All priority level assignments for an NSEP service are revoked upon service termination.

s. Service Identification refers to the information uniquely identifying an NSEP telecommunications service to the service vendor and/or service user.

t. Service User refers to any individual or organization (including a service vendor) supported by a telecommunications service for which a priority level has been requested or assigned pursuant to Section 8 or 9 of this appendix.

u. Service Vendor refers to any person, association, partnership, corporation, organization, or other entity (including common carriers and government organizations) that offers to supply any telecommunications equipment, facilities, or services (including customer premises equipment and wiring) or combination thereof. The term includes resale carriers, prime contractors, subcontractors, and interconnecting carriers.

v. Spare Circuits or Services refers to those not being used or contracted for by any customer.

w. Telecommunication Services means the transmission, emission, or reception of signals, signs, writing, images, sounds or intelligence of any nature, by wire, cable, satellite, fiber optics, laser, radio, visual or other electronic, electric, electromagnetic, or acoustically coupled means, or any combination thereof. The term can include necessary telecommunication facilities.

x. Telecommunications Service Priority (TSP) System User refers to any individual, organization, or activity that interacts with the NSEP TSP System.

4. Scope.

a. Domestic NSEP Services. The NSEP TSP System and procedures established by this appendix authorize priority treatment to the following domestic telecommunication services (including portions of U.S. international telecommunication services provided by U.S. vendors) for which provisioning or restoration priority levels are requested, assigned, and approved in accordance with this appendix:

(1) Common carrier services which are:

(a) Interstate or foreign telecommunications services.

(b) Intrastate telecommunication services inseparable from interstate or foreign telecommunications services, and intrastate telecommunication services to which priority levels are assigned pursuant to Section 9 of this appendix.

NOTE: Initially, the NSEP TSP System's applicability to public switched services is limited to (a) provisioning of such services (e.g., business, centrex, cellular, foreign exchange, Wide Area Telephone Service (WATS) and other services that the selected vendor is able to provision) and (b) restoration of services that the selected vendor is able to restore.
(2) services which are provided by government and/or non-common carriers and are interconnected to common carrier services assigned a priority level pursuant to Section 9 of this appendix.

b. Control services and orderwires. The NSEP TSP System and procedures established by this appendix are not applicable to authorize priority treatment to control services or orderwires owned by a service vendor and needed for provisioning, restoration, or maintenance of other services owned by that service vendor. Such control services and orderwires shall have priority provisioning and restoration over all other telecommunication services (including NSEP services) and shall be exempt from preemption. However, the NSEP TSP System and procedures established by this appendix are applicable to control services or orderwires leased by a service vendor.

c. Other Services. The NSEP TSP System may apply, at the discretion of and upon special arrangements by the NSEP TSP System users involved, to authorize priority treatment to the following telecommunication services:

(1) Government or non-common carrier services which are not connected to common carrier provided services assigned a priority level pursuant to Section 9 of this appendix.

(2) Portions of U.S. international services which are provided by foreign correspondents. (U.S. telecommunication service vendors are encouraged to ensure that relevant operating arrangements are consistent to the maximum extent practicable with the NSEP TSP System. If such arrangements do not exist, U.S. telecommunication service vendors should handle service provisioning and/or restoration in accordance with any system acceptable to their foreign correspondents which comes closest to meeting the procedures established in this appendix.)

5. Policy.

The NSEP TSP System is the regulatory, administrative, and operational system authorizing and providing for priority treatment, i.e., provisioning and

restoration, of NSEP telecommunication services. As such, it establishes the framework for telecommunication service vendors to provision, restore, or otherwise act on a priority basis to ensure effective NSEP telecommunication services. The NSEP TSP System allows the assignment of priority levels to any NSEP service across three time periods, or stress conditions: Peacetime/Crisis/Mobilizations. Attack/War, and Post-Attack/Recovery. Although priority levels normally will be assigned by the Executive Office of the President and retained by service vendors only for the current time period, they may be preassigned for the other two time periods at the request of service users who are able to identify and justify in advance, their wartime or post-attack NSEP telecommunication requirements. Absent such preassigned priority levels for the Attack/War and Post-Attack/Recovery periods, priority level assignments for the Peacetime/Crisis/Mobilization period will remain in effect. At all times, priority level assignments will be subject to revision by the FCC or (on an interim basis) the Executive Office of the President, based upon changing NSEP needs. No other system of telecommunication service priorities which conflicts with the NSEP TSP System is authorized.

6. Responsibilities.

a. The FCC will:

(1) Provide regulatory oversight of implementation of the NSEP TSP System.

(2) Enforce NSEP TSP System rules and regulations, which are contained in this appendix.

(3) Act as final authority for approval, revision, or disapproval of priority actions by the Executive Office of the President and adjudicate dispute regarding either priority actions or denials of requests for priority actions by the Executive Office of the President, until superseded by the President's war emergency powers under Section 706 of the Communications Act.

(4) Function (on a discretionary basis) as a sponsoring Federal organization. (See Section 6(c) below.)

b. The Executive Office of the President will:

(1) During exercise of the President's war emergency powers under Section 706 of the Communications Act, act as the final approval authority for priority actions or denials of requests for priority actions, adjudicating any disputes.

(2) Until the exercise of the President's war emergency powers, administer the NSEP TSP System which includes:

(a) Receiving, processing, and evaluating requests for priority actions from service users, or sponsoring Federal government organizations on behalf of service users (e.g., Department of State or Defense on behalf of foreign governments, Federal Emergency Management Agency on behalf of state and local governments, and any Federal organization on behalf of private industry entities). Action on such requests will be completed within 30 days of receipt.

(b) Assigning, revising, revalidating, or revoking priority levels as necessary or upon request of service users concerned, and denying requests for priority actions as necessary, using the categories and criteria specified in

Section 12 of this appendix. Action on such requests will be completed within 30 days of receipt.

(c) Maintaining data on priority level assignments.

(d) Periodically forwarding to the FCC lists of priority actions by the Executive Office of the President for review and approval.

(e) Periodically initiating reconciliation.

(f) Testing and evaluating the NSEP TSP System for effectiveness.

(g) Conducting audits as necessary. Any Telecommunications Service Priority (TSP) System user may request the Executive Office of the President to conduct an audit.

(h) Issuing, subject to review by the FCC, regulations and procedures supplemental to and consistent with this appendix regarding operation and use of the NSEP TSP System.

(i) Serving as a centralized point-of-contact for collecting and disseminating to all interested parties (consistent with requirements for treatment of classified and proprietary material) information concerning use and abuse of the NSEP TSP System.

(j) Establishing and assisting a TSP System Oversight Committee to identity and review any problems developing in the system and recommend actions to correct them or prevent recurrence. In addition to representatives of the Executive Office of the President, representatives from private industry (including telecommunication service vendors), state and local governments, the FCC, and other organizations may be appointed to that Committee.

(k) Reporting at least quarterly to the FCC and TSP System Oversight Committee, together with any recommendations for action, the operational status of and trends in the NSEP TSP System, including:

(i) Numbers of requests processed for the various priority actions, and the priority levels assigned.

(ii) Relative percentages of services assigned to each priority level under each NSEP category and subcategory.

(iii) Any apparent serious misassignment or abuse of priority level assignments.

(iv) Any existing or developing problem.

(l) Submitting semi-annually to the FCC and TSP System Oversight Committee a summary report identifying the time and event associated with each invocation of NSEP treatment under Section 9(c) of this appendix, whether the NSEP service requirement was adequately handled, and whether any additional charges were incurred. These reports will be due by April 30th for the preceding July through December and by October 31st for the preceding January through June time periods.

(m) All reports submitted to the FCC should be directed to Chief, Domestic Services Branch, Common Carrier Bureau, Washington, D.C. 20554.

(3) Function (on a discretionary basis) as a sponsoring Federal organization. (See Section 6(c) below.)

c. Sponsoring Federal organizations will:

(1) Review and decide whether to sponsor foreign, state, and local government and private industry (including telecommunication service vendors) requests for priority actions. Federal organizations will forward sponsored requests with recommendations for disposition to the Executive Office of the President. Recommendations will be based on the categories and criteria in Section 12 of this appendix.

(2) Forward notification of priority actions or denials of requests for priority actions from the Executive Office of the President to the requesting foreign, state, and local government and private industry entities.

(3) Cooperate with the Executive Office of the President during reconciliation, revalidation, and audits.

(4) Comply with any regulations and procedures supplemental to and consistent with this appendix which are issued by the Executive Office of the President.

d. Service users will:

(1) Identify services requiring priority level assignments and request and justify priority level assignments in accordance with this appendix and any supplemental regulations and procedures issued by the Executive Office of the President that are consistent with this appendix.

(2) Request and justify revalidation of all priority level assignments at least every three years.

(3) For services assigned priority levels, ensure (through contractual means or otherwise) availability of customer premises equipment and wiring necessary for end-to-end service operation by the service due date, and continued operation; and, for such services in the Emergency NSEP category, by the time that vendors are prepared to provide the services. Additionally, designate the organization responsible for the service on an end-to-end basis.

(4) Be prepared to accept services assigned priority levels by the service due dates or, for services in the Emergency NSEP category, when they are available.

(5) Pay vendors any authorized costs associated with services that are assigned priority levels.

(6) Report to vendors any failed or unusable services that are assigned priority levels.

(7) Designate a 24-hour point-of-contact for matters concerning each request for priority action and apprise the Executive Office of the President thereof.

(8) Upon termination of services that are assigned priority levels, or

circumstances warranting revisions in priority level assignment (e.g., expansion of service), request and justify revocation or revision.

(9) When NSEP treatment is invoked under Section 9(c) of this appendix, within 90 days following provisioning of the service involved, forward to the National Coordinating Center (see Section 3(e) of this appendix) complete information identifying the time and event associated with the invocation and regarding whether the NSEP service requirement was adequately handled and whether any additional charges were incurred.

(10) Cooperate with the Executive Office of the President during reconciliation, revalidation, and audits.

(11) Comply with any regulations and procedures supplemental to and consistent with this appendix that are issued by the Executive Office of the President.

e. Non-federal service users, in addition to responsibilities prescribed above in Section 6(d), will obtain a sponsoring Federal organization for all requests for priority actions. If unable to find a sponsoring Federal organization, a non-federal service user may submit its request, which must include documentation of attempts made to obtain a sponsor and reasons given by the sponsor for its refusal, directly to the Executive Office of the President.

f. Service vendors will:

(1) When NSEP treatment is invoked by service users, provision NSEP telecommunication services before non-NSEP services based on priority level assignments made by the Executive Office of the President. Provisioning will require service vendors to:

(a) Allocate resources to ensure best efforts to provide NSEP services by the time required. When limited resources constrain response capability, vendors will address conflicts for resources by:

(i) Providing NSEP services in order of provisioning priority level assignment (i.e., "E", "1", "2", "3", "4", or "5");

(ii) Providing Emergency NSEP services (i.e., those assigned provisioning priority level "E") in order of receipt of the service requests;

(iii) Providing Essential NSEP services (i.e. those assigned priority levels "1", "2", "3", "4", or "5") that have the same provisioning priority level in order of service due dates; and

(iv) Referring any conflicts which cannot be resolved (to the mutual satisfaction of service vendors and users) to the Executive Office of the President for resolution.

(b) Comply with NSEP service requests by: (i) Allocating resources necessary to provide Emergency NSEP services as soon as possible, dispatching outside normal business hours when necessary;

(ii) Ensuring best efforts to meet requested service dates for Essential NSEP services, negotiating a mutually (customer and vendor) acceptable service due date when the requested service due date cannot be met; and

(iii) Seeking National Coordinating Center (NCC) assistance as authorized under the NCC Charter (see Section 1.3, NCC Charter, dated October 9, 1985).

(2) Restore NSEP telecommunications services which suffer outage, or are reported as unusable or otherwise in need of restoration, before non-NSEP services, based on restoration priority level assignments. (NOTE: For broadband or multiple service facilities, restoration is permitted even though it might result in restoration of services assigned no or lower priority levels along with, or sometimes ahead of, some higher priority level services.) Restoration will require service vendors to restore NSEP services in order of restoration priority level assignment (i.e., "1", "2", "3", "4", "5") by:

(a) Allocating available resources to restore NSEP services as quickly as practicable, dispatching outside normal business hours to restore services assigned priority levels "1," "2," and "3" when necessary, and services assigned priority level "4" and "5" when the next business day is more than 24 hours away:

(b) Restoring NSEP services assigned the same restoration priority level based upon which can be first restored. (However, restoration actions in progress should not normally be interrupted to restore another NSEP service assigned the same restoration priority level);

(c) Patching and/or rerouting NSEP services assigned restoration priority levels from "1" through "5," when use of patching and/or rerouting will hasten restoration;

(d) Seeking National Coordinating Center (NCC) assistance as authorized under the NCC Charter; and

(e) Referring any conflicts which cannot be resolved (to the mutual satisfaction of service vendors and users) to the Executive Office of the President for resolution.

(3) Respond to provisioning requests of customers and/or other service vendors, and to restoration priority level assignments when an NSEP service suffers an outage or is reported as unusable, by:

(a) Ensuring that vendor personnel understand their responsibilities to handle NSEP provisioning requests and to restore NSEP service; and

(b) Providing a 24-hour point-of-contact for receiving provisioning requests for Emergency NSEP services and reports of NSEP service outages or unusability.

(c) Seeking verification from an authorized entity if legitimacy of a priority level assignment or provisioning requests for an NSEP service is in doubt. However, processing of Emergency NSEP service requests will not be delayed for verification purposes.

(4) Cooperate with other service vendors involved in provisioning or restoring a portion of an NSEP service by honoring provisioning or restoration priority level assignments, or requests for assistance to provision or restore NSEP services, as detailed in Sections 6(f)(1), (2), and (3) above.

(5) All service vendors, including resale carriers, are required to ensure that service vendors supplying underlying facilities are provided information necessary to implement priority treatment of facilities that support NSEP services.

(6) Preempt, when necessary, existing services to provide an NSEP service as authorized in Section 7 or this appendix.

(7) Assist in ensuring that priority level assignments of NSEP services are accurately identified "end-to-end" by

(a) Seeking verification from an authorized Federal government entity if the legitimacy of the restoration priority level assignment is in doubt;

(b) Providing to subcontractors and/or interconnecting carriers the restoration priority level assigned to a service;

(c) Supplying, to the Executive Office of the President, when acting as a prime contractor to a service user, confirmation information regarding NSEP service completion for that portion of the service they have contracted to supply;

(d) Supplying, to the Executive Office of the President, NSEP service information for the purpose of reconciliation.

(e) Cooperating with the Executive Office of the President during reconciliation.

(f) Periodically initiating reconciliation with their subcontractors and arranging for subsequent subcontractors to cooperate in the reconciliation process.

(8) Receive compensation for costs authorized through tariffs or contracts by

(a) Provisions contained in properly filed state or federal tariffs; or

(b) Provisions of properly negotiated contracts where the carrier is not required to file tariffs.

(9) Provision or restore only the portions of services for which they have agreed to be responsible (i.e., have contracted to supply), unless the President's war emergency powers under Section 706 of the Communications Act are in effect.

(10) Cooperate with the Executive Office of the President during audits.

(11) Comply with any regulations or procedures supplemental to and consistent with this appendix that are issued by the Executive Office of the President and reviewed by the FCC.

(12) Insure that at all times a reasonable number of public switched network services are made available for public use.

(13) Not disclose information concerning NSEP services they provide to those

not having a need-to-know or might use the information for competitive advantage.

7. Preemption of Existing Services.

When necessary to provision or restore NSEP services, service vendors may preempt services they provide as specified below. "User" as used in this Section means any user of a telecommunications service, including both NSE and non-NSEP services. Prior consent by a preempted user is not required.

a. The sequence in which existing services may be preempted to provision NSEP services assigned a provisioning priority level "E" or restore NSEP services assigned a restoration priority level from "1" through "5":

(1) Non-NSEP services: If suitable spare services are not available, then, based on the considerations in this appendix and the service vendor's best judgment, non-NSEP services will be preempted. After ensuring a sufficient number of public switched services are available for public use, based on the service vendor's best judgment, such services may be used to satisfy a requirement for provisioning or restoring NSEP services.
(2) NSEP services: If no suitable spare or non-NSEP services are available, then existing NSEP services may be preempted to provision or restore NSEP services with higher priority level assignments. When this is necessary, NSEP services will be selected for preemption in the inverse order of priority level assignment.

(3) Service vendors who are preempting services will ensure their best effort to notify the service user of the preempted service and state the reason for and estimated duration of the preemption.

b. Service vendors may, based on their best judgment, determine the sequence in which existing services may be preempted to provision NSEP services assigned a provisioning priority of "1" through "5". Preemption is not subject to the consent of the user whose service will be preempted.

8. Requests for Priority Assignments.

All service users are required to submit requests for priority actions through the Executive Office of the President in the format and following the procedures prescribed by that Office.

9. Assignment, Approval, Use, and Invocation of Priority Levels.

a. Assignment and Approval of Priority Levels. Priority level assignments will be based upon the categories and criteria specified in Section 12 of this appendix. A priority level assignment made by the Executive Office of the President will serve as that Office's recommendation to the FCC. Until the President's war emergency powers are invoked, priority level assignments must be approved by the FCC. However, service vendors are ordered to implement any priority level assignments that are pending FCC approval. After invocation of the President's war emergency powers, these requirements may be superseded by other procedures issued by the Executive Office of the President.

b. Use of Priority Level Assignments.

(1) All provisioning and restoration priority level assignments for services in the Emergency NSEP category will be included in initial service orders to vendors. Provisioning priority level assignments for Essential NSEP services, however, will not usually be included in initial service orders to vendors. NSEP treatment for Essential NSEP services will be invoked and provisioning priority level assignments will be conveyed to service vendors only if the vendors cannot meet needed service dates through the normal provisioning process.

(2) Any revision or revocation of either provisioning or restoration priority level assignments will also be transmitted to vendors.

(3) Service vendors shall accept priority levels and/or revisions only after assignment by the Executive Office of the President.

NOTE: Service vendors acting as prime contractors will accept assigned NSEP priority levels only when they are accompanied by the Executive Office of the President designated service identification, i.e., TSP Authorization Code. However, service vendors are authorized to accept priority levels and/or revisions from users and contracting activities before assignment by the Executive Office of the President when service vendor, user, and contracting activities are unable to communicate with either the Executive Office of the President or the FCC. Processing of Emergency NSEP service requests will not be delayed for verification purposes.

c. Invocation of NSEP Treatment. To invoke NSEP treatment for the priority provisioning of an NSEP telecommunications service, an authorized Federal official either within, or acting on behalf of, the service user's organization must make a written or oral declaration to concerned service vendor(s) and the Executive Office of the President that NSEP treatment is being invoked. Authorized Federal officials include the head or director of a Federal agency, commander of a unified/specified military command, chief of a military service, or commander of a major military command; the delegates of any of the foregoing; or any other officials as specified in supplemental regulations or procedures issued by the Executive Office of the President. The authority to invoke NSEP treatment may be delegated only to a general or flag officer of a military service, civilian employee of equivalent grade (e.g., Senior Executive Service member). Federal Coordinating Officer or Federal Emergency Communications Coordinator/Manager, or any other such officials specified in supplemental regulations or procedures issued by the Executive Office of the President. Delegates must be designated as such in writing, and written or oral invocations must be accomplished, in accordance with supplemental regulations or procedures issued by the Executive Office of the President.

10. Resubmission of Circuits Presently Assigned Restoration Priorities.

All circuits assigned restoration priorities must be reviewed for eligibility for initial restoration priority level assignment under the provisions of this appendix. Circuits currently assigned restoration priorities, and for which restoration priority level assignments are requested under Section 8 of this appendix, will be resubmitted to the Executive Office of the President. To resubmit such circuits, service users will comply with applicable provisions of Section 6(d) of this appendix.

11. Appeal.

Service users or sponsoring Federal organizations may appeal any priority level assignment, denial, revision, revocation, approval, or disapproval to the Executive Office of the President within 30 days of notification to the service user. The appellant must use the form of format required by the Executive Office of the President and must serve the FCC with a copy of its appeal. The Executive Office of the President will act on the appeal within 90 days of receipt. Service users and sponsoring Federal organizations may only then appeal directly to the FCC. Such FCC appeal must be filed within 30 days of notification of the Executive Office of the President's decision on appeal. Additionally, the Executive Office of the President may appeal any FCC revisions, approvals, or disapprovals to the FCC. All appeals to the FCC must be submitted using the form or format required. The party filing its appeal with the FCC must include factual details supporting its claim and must serve a copy on the Executive Office of the President and any other party directly involved. Such party may file a response within 20 days, and replies may be filed within 10 days thereafter. The Commission will not issue public notices of such submissions. The Commission will provide notice of its decision to the parties of record. Any appeals to the Executive Office of the President that include a claim of new information that has not been presented before for consideration may be submitted at any time.

12. NSEP TSP System Categories, Criteria, and Priority Levels.

a. General. NSEP TSP System categories and criteria, and permissible priority level assignments, are defined and explained below.

(1) The Essential NSEP category has four subcategories: National Security Leadership; National Security Posture and U.S. Population Attack Warning; Public Health, Safety, and Maintenance of Law and Order; and Public Welfare and Maintenance of National Economic Posture. Each subcategory has its own criteria. Criteria are also shown for the Emergency NSEP category, which has no subcategories.

(2) Priority levels of "1," "2," "3," "4," and "5" may be assigned for provisioning and/or restoration of Essential NSEP telecommunication services. However, for Emergency NSEP telecommunications services, a priority level "E" is assigned for provisioning. A restoration priority level from "1" through "5" may be assigned if an Emergency NSEP service also qualifies for such a restoration priority level under the Essential NSEP category.

(3) The NSEP TSP System allows the assignment of priority levels to any NSEP telecommunications service across three time periods, or stress conditions: Peacetime/Crisis/Mobilization, Attack/War, and Post-Attack/Recovery. Priority levels will normally be assigned only for the first time period. These assigned priority levels will apply through the onset of any attack, but it is expected that they would later be revised by surviving authorized telecommunication resource managers within the Executive Office of the President based upon specific facts and circumstances arising during the Attack/War and Post-Attack/Recovery time periods.

(4) Service users may, for their own internal use, assign subpriorities to their services assigned priority levels. Receipt of and response to any such subpriorities is optional for service vendors.

(5) The following paragraphs provide a detailed explanation of the

categories, subcategories, criteria, and priority level assignments, beginning with the Emergency NSEP category.

b. Emergency NSEP. Telecommunications services in the Emergency NSEP category are those new services so critical as to be required to be provisioned at the earliest possible time, without regard to the costs of obtaining them.

(1) Criteria. To qualify under the Emergency NSEP category, the service must meet criteria directly supporting or resulting from at least one of the following NSEP functions:

(a) Federal government activity responding to a Presidentially declared disaster or emergency as defined in the Disaster Relief Act (42 U.S.C. @ 5122).

(b) State or local government activity responding to a Presidentially declared disaster or emergency.

(c) Response to a state of crisis declared by the National Command Authorities (e.g., exercise of Presidential war emergency powers under Section 706 of the Communications Act.)

(d) Efforts to protect endangered U.S. personnel or property.

(e) Response to an enemy or terrorist action, civil disturbance, natural disaster, or any other unpredictable occurrence that has damaged facilities whose uninterrupted operation is critical to NSEP or the management of other ongoing crises.

(f) Certification by the head or director of a Federal agency, commander of a unified/specified command, chief of a military service, or commander of a major military command, that the telecommunications service is so critical to protection of life and property or to NSEP that it must be provided immediately.

(g) A request from an official authorized pursuant to the Foreign Intelligence Surveillance Act (50 U.S.C. @ 1801 et seq. and 18 U.S.C. @@ 2511, 2518, 2519).

(2) Priority Level Assignment.

(a) Services qualifying under the Emergency NSEP category are assigned priority level "E" for provisioning.

(b) After 30 days, assignments of provisioning priority level "E" for Emergency NSEP services are automatically revoked unless extended for another 30-day period. A notice of any such revocation will be sent to service vendors.

(c) For restoration, Emergency NSEP services may be assigned priority levels under the provisions applicable to Essential NSEP services (see Section 12(c)). Emergency NSEP services not otherwise qualifying for restoration priority level assignment as Essential NSEP may be assigned a restoration priority level "5" for a 30-day period. Such 30-day restoration priority level assignments will be revoked automatically unless extended for another 30-day period. A notice of any such revocation will be sent to service vendors.

(c) Essential NSEP. Telecommunication services in the Essential NSEP category are those required to be provisioned by due dates specified by service users, or restored promptly, normally without regard to associated overtime or expediting costs. They may be assigned priority levels of "1", "2,", "3", "4," or "5" for both provisioning and restoration, depending upon the nature and urgency of the supported function, the impact of lack of service or of service interruption upon the supported function, and, for priority access to public switched services, the user's level of responsibility. Priority level assignments will be valid for no more than three years unless revalidated. To be categorized as Essential NSEP, a telecommunications service must qualify under one of the four following subcategories: National Security Leadership; National Security Posture and U.S. Population Attack Warning; Public Health, Safety and Maintenance of Law and Order; or Public Welfare and Maintenance of National Economic Posture. (Note: Under emergency circumstances, Essential NSEP telecommunication services may be recategorized as Emergency NSEP and assigned a priority level "E" for provisioning.)

(1) National Security Leadership. This subcategory will be strictly limited to only those telecommunication services essential to national survival if nuclear attack threatens or occurs, and critical orderwire and control services necessary to ensure the rapid and efficient provisioning or restoration of other NSEP telecommunication services. Services in this subcategory are those for which a service interruption of even a few minutes would have serious adverse impact upon the supported NSEP function.

(a) Criteria. To qualify under this subcategory, a service must be at least one of the following:

(i) Critical orderwire, or control service, supporting other NSEP functions.

(ii) Presidential communications service critical to continuity of government and national leadership during crisis situations.

(iii) National Command Authority communications service for military command and control critical to national survival.

(iv) Intelligence communications service critical to warning of potentially catastrophic attack.

(v) Communications service supporting the conduct of diplomatic negotiations critical to arresting or limiting hostilities.

(b) Priority Level Assignment. Services under this subcategory will normally be assigned priority level "1" for provisioning and restoration during the Peace/Crisis/Mobilization time period.

(2) National Security Posture and U.S. Population Attack Warning. This subcategory covers those minimum additional telecommunication services essential to maintaining an optimum defense, diplomatic, or continuity-of-government postures before, during, and after crises situations. Such situations are those ranging from national emergencies to international crises, including nuclear attack. Services in this subcategory are those for which a service interruption ranging from a few minutes to one day would have serious adverse impact upon the supported NSEP function.

(a) Criteria. To qualify under this subcategory, a service must support at

least one of the following NSEP functions:

(i) Threat assessment and attack warning.

(ii) Conduct of diplomacy.

(iii) Collection, processing, and dissemination of intelligence.

(iv) Command and control of military forces.

(v) Military mobilization.

(vi) Continuity of Federal government before, during, and after crises situations.

(vii) Continuity of state and local government functions supporting the Federal government during and after national emergencies.

(viii) Recovery of critical national functions after crises situations.

(ix) National space operations.

(b) Priority Level Assignment. Services under this subcategory will normally be assigned priority levels "2," "3," "4," or "5" for provisioning and restoration during Peacetime/Crisis/Mobilization.

(3) Public Health, Safety, and Maintenance of Law and Order. This subcategory covers the minimum number of telecommunication services necessary for giving civil alert to the U.S. population and maintaining law and order and the health and safety of the U.S. population in times of any national, regional, or serious local emergency. These services are those for which a service interruption ranging from a few minutes to one day would have serious adverse impact upon the supported NSEP functions.

(a) Criteria. To qualify under this subcategory, a service must support at least one of the following NSEP functions:

(i) Population warning (other than attack warning).

(ii) Law enforcement.

(iii) Continuity of critical state and local government functions (other than support of the Federal government during and after national emergencies).

(iv) Hospitals and distributions of medical supplies.

(v) Critical logistic functions and public utility services.

(vi) Civil air traffic control.

(vii) Military assistance to civil authorities.

(viii) Defense and protection of critical industrial facilities.

(ix) Critical weather services.

(x) Transportation to accomplish the foregoing NSEP functions.

(b) Priority Level Assignment. Service under this subcategory will normally be assigned priority levels "3," "4," or "5" for provisioning and restoration during Peacetime/Crisis/Mobilization.

(4) Public Welfare and Maintenance of National Economic Posture. This subcategory covers the minimum number of telecommunications services necessary for maintaining the public welfare and national economic posture during any national or regional emergency. These services are those for which a service interruption ranging from a few minutes to one day would have serious adverse impact upon the supported NSEP function.

(a) Criteria. To qualify under this subcategory, a service must support at least one of the following NSEP functions:

(i) Distribution of food and other essential supplies.

(ii) Maintenance of national monetary, credit, and financial systems.

(iii) Maintenance of price, wage, rent, and salary stabilization, and consumer rationing programs.

(iv) Control of production and distribution of strategic materials and energy supplies.

(v) Prevention and control of environmental hazards or damage.

(vi) Transportation to accomplish the foregoing NSEP functions.

(b) Priority Level Assignment. Services under this subcategory will normally be assigned priority levels "4" or "5" for provisioning and restoration during Peacetime/Crisis/Mobilization.

d. Limitations. Priority levels will be assigned only to the minimum number of telecommunication services required to support an NSEP function. Priority levels will not normally be assigned to backup services on a continuing basis, absent additional justification, e.g., a service user specifies a requirement for physically diverse routing or contracts for additional continuity-of-service features. The Executive Office of the President may also establish limitations upon the relative numbers of services which may be assigned any restoration priority level. These limitations will not take precedence over laws or executive orders. Such limitations shall not be exceeded absent waiver by the Executive Office of the President.

e. Non - NSEP services. Telecommunication services in the non-NSEP category will be those which do not meet the criteria for either Emergency NSEP or Essential NSEP.

Footnotes

[1] Executive Order No. 12472, "Assignment of National Security and Emergency Preparedness Telecommunications Functions," April 3, 1984 (49 Fed. Reg. 13471 (1984)), established the NCS. Section 1(e) of Executive Order No. 12472 designates the Secretary of Defense as Executive Agent for the NCS. By direction of the Executive Office of the President (EOP), the NCS member organizations are: Department of Agriculture, Central Intelligence Agency, Department of Commerce, Department of Defense, Department of Energy, Federal Emergency Management Agency, General Services Administration, Department of the Interior, Department of Justice, National Aeronautics and Space Administration, National Security Agency, National Telecommunications & Information Administration, Organization of the Joint Chiefs of Staff, Department of State, Department of Transportation, Department of Treasury, U.S. Information Agency, and the Veterans Administration. The Nuclear Regulatory Commission has been invited by the EOP and has elected to serve as an NCS member organization. The FCC, Federal Reserve System, and United States Postal Service also participate in the activities of the NCS.

[2] In its comments to the NPRM, NCS filed a revised proposal in response to some of the concerns discussed in the NPRM. In this decision references are to the original proposal that constituted the appendix to the NPRM. References to NCS' revised proposal are indicated in brackets where appropriate.

[3] Comments were filed by Aeronautical Radio, Inc. (Arinc), Alarm Industry Communications Committee (AICC), American Telephone and Telegraph Company (AT&T), Ameritech Operating Companies (Ameritech), Association of American Railroads (AAR), Bell Atlantic Telephone Companies (Bell Atlantic), Bell CommunicationsResearch, Inc. (Bellcore), BellSouth Corporation (BellSouth), Cellular Telecommunications Industry Association (CTIA), Centel Corporation (Centel), Federal Executive Agencies (DoD or NCS), GTE Service Corporation (GTE), Nickolaus E. Leggett (Leggett), McCaw Cellular Communications, Inc. (McCaw), MCI Telecommunications Corporation (MCI), The Mountain States Telephone and Telegraph Company, Northwestern Bell Company and Pacific Northwest Bell Telephone Company (collectively, US West), National Association of Regulatory Utility Commissioners (NARUC), National Telephone Cooperative Association (NTCA), NYNEX Telephone Companies (NYNEX), Pacific Bell and Nevada Bell (collectively, Pacific Bell), Southwestern Bell Telephone Company (Southwestern Bell), Telocator Network of America (Telocator), Teltec Saving Communications Co. (Teltec), United States Telephone Association (USTA) and Utilities Telecommunications Council (UTC). Reply comments were filed by AT&T, Bellcore, BellSouth, CTIA, Cincinnati Bell Telephone (CBT), GTE, McCaw, MCI, NCS, Pacific Bell, Southwestern Bell, Telocator, USTA and US West.

[4] A priority System for the Use and Restoration of Leased Intercity Private Line Services, 6 F.C.C. 2d 344 (1967). These rules have been amended on three occasions. *See* 22 F.C.C. 2d 159 (1970); 77 F.C.C. 2d 114 (1980); 81 F.C.C. 2d 441 (1980). *See also* Declatory Ruling, 104 FCC 2d 945 (1986), *recon*., FCC 86-592 (Jan. 8, 1987).

[5] Section 706, 47 U.S.C. @ 706, provides, in part, that during war the President is authorized "to direct that such communications as in his judgment may be essential to the national defense and security shall have preference or priority with any carrier subject to this Act." The Executive Branch has promulgated rules parallel to the Commission's to accommodate the transfer of regulatory authority over the RP system to the President in the event Section 706 is invoked.

[6] Under the current rules, federal and foreign government users' requests are submitted to the NCS; state and local government and private industry requests are submitted directly to the FCC.

[7] As used in this proceeding, the word "provisioning" refers to the initiation of a new service or line as opposed to the restoration of an existing service or line.

[8] NCS noted that as technology is changing it is becoming infeasible to physically identify specific circuits in a carrier's office and associate them with specific restoration priorities. The TSP system is designed to alleviate this problem by assigning priorities to services, and even users, when appropriate.

[9] The petition stated that in September of 1984, in light of these problems and the vast changes that have occurred in the telecommunications industry over the last five years, the Manager of NCS directed action to update and modernize the RP system. NCS asked each industry entity represented on the National Security Telecommunications Advisory Committee (NSTAC) to provide advice regarding the matters that needed to be addressed in provisioning and restoring NSEP services. The NSTAC Industry Executive Subcommittee (IES) subsequently established a TSP Task Force to assist the government in the development of the TSP system. NCS, in conjunction with the TSP Task Force, began work on drafting TSP System baseline

requirements. The requirements were distributed to the telecommunications industry and the NCS Council of Representatives for review and comment and were approved by NSTAC's IES and the NCS Committee of Principals in June 1985. Next, a TSP System Concept, which was to describe the TSP System in sufficient detail to permit its subsequent design and implementation, and was drafted and approved by the NCS Committee of Principals and NSTAC in the spring of 1986. Subsequently, work was begun on the petition for Rule Making together with detailed procedures for implementing and operating the TSP System.

[10] NARUC v. FCC, 746 F.2d 1492, 1498-99 (D.C. Cir. 1984); California v. FCC, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); North Carolina Util. Comm'n v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) (NCUC I); North Carolina Util. Comm'n v. FCC 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (NCUC II). See also C&P Tel. Co. of Maryland, 2 FCC Rcd 3528 (1987).

[11] In the NPRM, at para. 34, we discussed the argument raised by Bell Atlantic that the proposed rules would bar the restoration of any facility not a part of the TSP system, even if it were an important local service such as 911, prior to the restoration of all TSP services. NCS noted that Section 5 of the rules bars only conflicting priority systems. In response to the NPRM, Centel suggests that 911 and other vital local services be assigned priority status if they are not otherwise part of TSP, and NCS recommends that 911 service be given restoration priority status. We believe that the policy set forth herein, in conjunction with the language and intent of Section 5, offers adequate guidance on this matter.

[12] In a large scale failure it is possible that portions of the PSN will be restored before some NSEP priority private line services. We believe this kind of occurrence may be occasionally unavoidable and we would not rule now that such a result is *per se* not compliant with the TSP rules. *See* discussion, *infra*, on preemption.

[13] The term "sufficient number" in Section [7(a)(1)| is open-ended and may in some cases result in near normal PSN service or, in other cases, very few available PSN lines. At this time we will rely on the good faith of carriers to provide, to the extent possible, a reasonably sufficient array of PSN circuits. The change from "will remain" to "are" in Section [7(a)(1)| assures that consideration is given to PSN circuits in the event all circuits in an area are down. (Of course, NSEP priorities will take precedence).

[14] See existing Part 64 rules and Declatory Ruling, 104 F.C.C. 2d 945 (1986).

[15] In this order we will delegate authority to the Chief, Common Carrier Bureau to decide the matter of disposition of the filing(s) to the Commission and to resolve, in the first instance, all related substantive and procedural issues. *See* para. 133, *infra*. *See also* note 41, *infra*.

[16] NCS cites Burdick v. Southwestern Bell Telephone Company, 9 Kan. App. 2d 182, 675 P.2d 922 (1984), reaching an opposite result on intent.

[17] In Declatory Ruling, supra, at para. 23, we stated that

> The procedures appear reasonable and it is important for national security reasons that carriers know that actions they take to meet NSEP requirements should not later be subject to potential liability. Accordingly, we find that carrier actions in response to requests made in accordance with the Procedures Manual are prima facie lawful. Any party challenging discriminatory treatment occasioned by a request made pursuant to the Manual would have a very heavy burden to demonstrate its unreasonableness.

[18] While consent will not be mandated, we would expect notification as a matter of normal business practice, where practicable. *See* Section [7(a)(3)|.

[19] Our alternative language at para. 29 of the NPRM was:

> (7) Receive compensation for costs through
> (a) Provisions contained in properly filed tariffs; or
> (b) Provisions of properly negotiated contracts where the carrier is not required to file tariffs.

[20] Moreover, in each case of TSP invocation a different set of general ratepayers may benefit and in many cases persons or entities that are not general ratepayers may benefit, such as private line service subscribers or even non-telephone subscribers.

[21] Section [3(t)| reads: *Service User* refers to any individual or organization (including a service vendor) supported by a telecommunications service for which a priority level has been requested or assigned pursuant to Section 8 or 9 of this appendix.
[22] *See* Section 1(b) of TSP rules. We note, as did UTC in its comments, that Sections 3(k), 3(t), and 4(c) refer to services which are not strictly common carrier in nature and which, therefore, are not subject to Title II of the Act or the TSP rules. However, Section [4(a)(2), amended| provides that the scope of TSP includes

> Services which are provided by government and/or noncommon carriers and [which] are interconnected to common carrier services assigned a priority level pursuant to section 9 of this appendix.

The extent to which non-common carrier services, systems or facilities are subject to or protected by pre-706 TSP System rules is limited by the degree to which the common carrier vendor user uses those services, systems or facilities to provide its common carrier services, systems, and facilities. This does not preclude NCS from using an alternative interpretation in discussions or negotiations with parties not subject to Title II of the Act to establish analogous provisioning or restoration priorities. See, e.g., AAR Comments at pp. 3 and 6. This also resolves the question raised by AT&T concerning the Commission's authority over equipment vendors who sell equipment to others for direct connection to the network.
[23] Arinc also urges that the Commission not permit NCS to downgrade priorities already approved under RP. We reject this request. A critical reason for NCS proposing TSP is the skewed distribution of RP priority assignments. With TSP should come a review of all assignments, some of which may be upgraded or downgraded.
[24] Since NCS recommendations are considered interim assignments pending FCC review, and assignees (users or sponsoring agencies) are authorized to proceed on the basis of receipt of the interim assignments, FCC review time is not included in the 30 day limit. In other words, the 30 day requirement is solely applicable to NCS' response to priority requests.
[25] Upon sufficient showing, the 30 day period can be waived.
[26] In order to expedite resolution of disputes and other matters involving TSP that are submitted to the Commission, we will delegate all necessary authority to the Chief, Common Carrier Bureau to discharge, among other matters, the Commission's responsibilities under Section 6.
[27] The FCC Form 915 has been eliminated. Any new form will be developed in conjunction with NCS and the Office of Management and Budget.
[28] For example, if a service user files an appeal it must provide a copy to the service provider.
[29] Control services and orderwires as used in TSP refer to internal means used by carriers for network management purposes. Similar terms, not related to matters associated with this proceeding, have been used with regard to control channels for specialized data services such as ISDN.
[30] Resellers may secure special circuits, such as control or orderwire services, in order to manage the services and facilities they offer users. They are not responsible for the integrity of the underlying physical plant and so would not benefit from TSP exemption for their leased internal management facilities or services. Their leased orderwire and control services could qualify, however, for priority treatment under the TSP System rules. Accordingly, the last sentence of Section 4(b) will be adopted as proposed.
[31] McCaw's revised Section 8 would read:

> Certain telecommunications service vendors do not own any or all of the transmission facilities used to provide telecommunications services. They rely instead, in whole or in part, on facilities leased from other telecommunications vendors. These resale or interconnecting carriers may provide services that qualify for priority level assignment. In order for the priority level assignment to have practical value, it must also apply to the service leased by the resale or interconnecting carrier from another telecommunications service vendor, such that the highest priority level assigned to any service using the underlying facility will determine that facility's priority level assignment. Resale and interconnecting carriers must also ensure that telecommunications service vendors supplying underlying facilities are provided information necessary to implement any priority levels assigned to resale or interconnecting carrier services.

[32] While TSP focuses on services, it is facilities that are always actually provisioned or restored.

[33] "Non-disclosure" as a standard business practice would serve as a defense against an assertion of abuse.
[34] This information includes identification, priority, contracting activity and contract identification data which must be received by EOP directly from the prime service vendor.
[35] It has been suggested that charges incurred as a result of reconciliation and audits be borne by NCS as the cost causative user. *See* discussion, *supra*, concerning costs.
[36] It has been informally suggested that a different term be used, such as investigation, reconciliation procedure, problem review, etc. In view of our discussion herein, we believe the term audit is appropriate.
[37] The definition of "revalidation" in Section 3(o)[3(p)| in conjunction with the clarification of "audit" should alleviate Ameritech's concern regarding improper changing circuit designations through the recordkeeping process.
[38] NCS' changes in Sections 6(c)(3), 6(d)(10) and 6(f)(6)(e) [6(f)(7)(e)| as well as its addition of Section [6(f)(7)(f)] to require vendors to track their contractors' records, respond to suggestions and concerns expressed by AT&T, GTE, McCaw regarding reconciliation responsibilities. Further in response to McCaw, we interpret Section [6(f)(7)(f)| to require contractors, in turn, to be primarily responsible for their subcontractors' reconciliation activities. This institutionalized burden flow-through represents the most expedient means of assuring that reconciliation is conducted correctly by each succeeding subcontractor. We will modify the language of Section [6(f)(7)(f)| accordingly.
[39] NCS has indicated that it will maintain its MIS database of priority level assignments. *See* Section 6(b)(2)(c). Hence, the concern expressed by Pacific Bell to assure a source of information is moot. We are also satisfied that NCS' statement that in most cases verification will be obtained from EOP is responsive to Pacific Bell's concern regarding the identity of "authorized entity" in Sections 6(f)(3)(c) and 6(f)(6)(a) [6(f)(7)(a)].
[40] Southwestern Bell's suggestion to include a definition of "reconciliation" has been adopted by NCS. *See* Section 3[n].
[41] There are several references in the pleadings to the issuance of procedural guidelines by NCS. The guidelines are called, variously, vendor operating procedures, operational procedures, operational guidelines, operations manual, procedural guidelines, etc. All of these refer to the procedural guidelines that are currently under preparation by NCS for government and vendors. Our analysis applies equally to both, and for purposes of this discussion there is no decisional significance to any of the terms used for NCS' procedural guidelines, since, in whole or part, they will appear before us for review. Proposed Directive 3-1 is subsumed in this term as well.
[42] NCS apparently based its position in part on its predicate argument that the Commission should delegate EOP authority to develop rules that implement TSP. *See* paras. 34-35, *supra*.
[43] The difference between the adoption date and Federal Register date will likely be only a matter of weeks. The Commission's decision is effective 30 days following the Federal Register date. (The Federal Register date also constitutes the official release date. If there is no Federal Register publication, the official release date is the day the order is released to the public at the Commission's main offices, 1919 M Street, N.W., Washington, D.C.). We also note that RP assignments may be issued until the IOC date, in order to preserve the availability of a priority procedure until TSP is initiated. This is codified in Section 2 of the TSP rules. With effectuation of the TSP rules (IOC date), however, the RP rules and the precedence rules will be deleted from the Code of Federal Regulations. Nevertheless, the extent to which RP remains viable, i.e., until the FOC date, will be by reference through Section 2 of the rules.
[44] Moreover, application of RP to cellular services would require a Rule Making proceeding, resolution of which would probably not occur prior to TSP IOC. The TSP NPRM did not contemplate any interim changes to the existing RP rules.
[45] Of course, the common carrier component may be subject to TSP if the common carrier provider of that component complies with the TSP procedures.
[46] Private system owners may be subject to antitrust action if they provide priority treatment to certain users. Collateral compliance by private users with TSP standards and procedures may not necessarily provide them with a defense to antitrust allegations.
[47] Section 0.314(g) of the Commission's rules delegates authority to the Engineer in Charge (EIC) at each installation to act on and make determinations on behalf of the Commission regarding requests for reassignment of restoration priority levels and assignment of new restoration priorities concerning the restoration in emergencies of common carrier-provided intercity private line service pursuant to Appendix A of Part 64 of the Commission's rules when, for any reason, the Commission's ROP processing staff

cannot be contacted. This provision was predicated on the RP system, which involved assignment of priorities by either the Commission or NCS. The TSP System, however, essentially reserves initial assignment (or reassignment) of all priorities to NCS. A general delegation to the EIC to issue priorities under TSP potentially could conflict with the process established under TSP. On the other hand, there may be exceptional circumstances under which an EIC, on-site and with authority to alter or grant priorities, would serve the purposes of TSP and the public interest. Those circumstances should be limited to cases where, in the judgment of the EIC, after reasonable effort neither NCS nor the logistics warrant immediate action. In any such case, the NCS and the Commission must be notified as soon as possible by the EIC, and the carrier involved must expeditiously seek priority in accordance with normal TSP procedures. We will amend Section 0.314(g) accordingly.