

1. Need for, and Objectives of, the Rules

731. This Order fulfills the commitment the Commission undertook in its 1999 *UNE Remand Order* to reexamine, in three years, the list of network elements that incumbent LECs must offer to competitors on an unbundled basis, and responds to several significant judicial rulings that have been issued since the Commission last conducted a comprehensive review of its unbundling rules.²¹⁵⁸ More specifically, this Order refines the “impair” standard set forth in section 251(d)(2) of the Act, and applies the revised standard to an array of “transmission” and “intelligence” network elements. The revised “impair” standard is designed to reflect both the experience of the local service market during the seven years since the Act’s market-opening provisions took effect and the legal guidance mentioned above. Applying this standard, which pays special attention to the requesting carrier’s ability to self-provision the element or to obtain it from a source other than the incumbent LEC, this Order adopts a list of network elements that must be unbundled and sets forth the particular circumstances in which unbundling will be required. The approach adopted is substantially more granular than our earlier formulations of the “impair” standard, accounting for considerations of customer class, geography, and service. This Order also reaffirms a state commission’s authority to establish unbundling requirements, as long as the unbundling obligations are consistent with the requirements of section 251(d)(3) and do not substantially prevent implementation of the requirements of that section and the purposes of the Act, and authorizes state commissions to make certain factual determinations necessary to implementation of the granular analysis we adopt here.

2. Summary of Significant Issues Raised by the Public Comments in Response to the IRFA

732. In this section, we respond to various arguments raised by TeleTruth, the National Federation of Independent Businesses (NFIB), and the Office of Advocacy of the Small Business Administration (SBA Advocacy) relating to the IRFA presented in the *Triennial Review NPRM*.²¹⁵⁹ We also address concerns raised by Senator (then-Representative) James Talent in a letter submitted in response to the *UNE Remand Order*, which was later incorporated into this proceeding.²¹⁶⁰ To the extent we received comments raising general small business concerns during this proceeding, those comments are discussed throughout the Order and are summarized in Part X.A.5, below.

733. As an initial matter, we reject the contention that the Commission failed to consider the needs of small business customers of competitive LECs in fashioning the analysis set forth in this Order. We have grappled, throughout this proceeding and throughout this Order, with the consequences our determinations will have on all market participants, including small

²¹⁵⁸ See, e.g., *Verizon*, 535 U.S. 467; *CompTel*, 309 F.3d 8; *USTA*, 290 F.3d 415.

²¹⁵⁹ TeleTruth’s reply comments were filed in several separate dockets, and are not specific to the IRFA prepared for this proceeding. See generally *TeleTruth Reply*. Here, we address only those concerns pertinent to this proceeding. We will address TeleTruth’s remaining arguments in subsequent Orders, as appropriate.

²¹⁶⁰ *Triennial Review NPRM*, 16 FCC Rcd at 22788, para. 13.

business providers and the small business end users about which TeleTruth, NFIB, SBA Advocacy, and Senator Talent express concern.²¹⁶¹ We have also considered various alternatives to the rules we adopt, and have stated the reasons for rejecting these alternative rules, as commenters have urged.²¹⁶² A summary of our analysis regarding small business concerns, and of alternative rules that we considered in light of those concerns, is presented in subsection 5 of the FRFA, *infra*.

734. Many of the complaints raised regarding the Commission's IRFA hinge on the argument that in performing the analysis mandated by the RFA, an agency must analyze the effects its proposed rules will have on "customers" of the entities it regulates.²¹⁶³ But as the courts have made clear time and again, this is not the case. Indeed, the D.C. Circuit "has consistently held that the RFA imposes no obligation to conduct a small entity impact analysis of effects on entities which [the agency conducting the analysis] does not regulate."²¹⁶⁴ Thus, we emphasize that the RFA imposes no independent obligation to examine the effects an agency's action will have on the customers of the companies it regulates unless those customers are, themselves, subject to regulation by the agency. In any event, as noted above, we have considered the needs of small business customers of competitive (and incumbent) LECs

²¹⁶¹ For example, we have considered the argument that new unbundling rules will affect competitive LECs' broadband capabilities, and in turn end users' access to broadband service. *See supra* Part VI.A.4.a; *see also* TeleTruth Reply at 37.

²¹⁶² *See* TeleTruth Reply at 26; Letter from Dan Danner, Senior Vice President – Public Policy, NFIB, to Michael K. Powell, Chairman, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 1 (filed Feb. 5, 2003) (NFIB Feb. 5, 2003 *Ex Parte* Letter); Letter from Thomas M. Sullivan, Chief Counsel for SBA Advocacy, to Michael K. Powell, Chairman, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 4 (filed Feb. 5, 2003) (SBA Advocacy Feb. 5, 2003 *Ex Parte* Letter); Letter from James M. Talent, Chairman, Committee on Small Business, House of Representatives, to William Kennard, Chairman, FCC, CC Docket No. 96-98 at 2, 3 (filed July 20, 2000) (Talent July 20, 2000 *Ex Parte* Letter); 5 U.S.C. § 604(a)(5).

²¹⁶³ *See, e.g.*, TeleTruth Reply at 15 (asserting that "[t]he [c]ustomer" had been "[t]otally [l]eft [o]ut" of the proceeding and contending that "[f]or the average customer, the [NPRM and other FCC documents] might as well be in Aramaic, or Urdic"), 16 (arguing that the RFA imposes a notice requirement vis-à-vis small businesses that happen to consume telecommunications services), 18 (alleging that the IRFA failed to address "small business . . . customers" of telecommunications providers), 20 ("The FCC has failed to accurately assess the number of small business entities that depend on [small telecommunications competitors], from the small business users to the small business suppliers."), 34-35 (presenting analysis of the number of online customers of ISPs potentially affected by Commission's rulemakings), 43 ("A 'class' of small businesses that is totally missing from [the IRFA] are the small businesses that depends [sic] on . . . ISPs and CLECs [that will be affected by the Commission's ruling]."); *see also* NFIB Feb. 5, 2003 *Ex Parte* Letter at 1 ("[T]he FCC should make certain that it fully considers the direct and indirect impacts of its rulemaking on small-business consumers. We urge the FCC to review all data to ensure that any action taken does not hinder the availability of competition for small businesses needing local telephone services.").

²¹⁶⁴ *Michigan v. EPA*, 213 F.3d 663, 689 (D.C. Cir. 2000) (internal quotation marks omitted); *see also Motor & Equip. Mfrs. Ass'n. v. Nichols*, 142 F.3d 449, 467 (D.C. Cir. 1998); *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996); *American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1044, *reh'g granted in part, denied in part* 195 F.3d 4 (D.C. Cir. 1999), *rev'd in part on other grounds*, 531 U.S. 457 (2001).

throughout this Order. Our analysis of small business concerns is summarized in Part X.A.5, below.

735. TeleTruth argues that the Commission has taken inadequate steps to notify small businesses of this and other proceedings, in violation of the RFA.²¹⁶⁵ We disagree. The RFA requires the Commission to “assure that small entities have been given an opportunity to participate in the rulemaking,” and proposes as example five “reasonable techniques” that an agency might employ to do so.²¹⁶⁶ In this proceeding, the Commission has employed several of these techniques: it has published a “notice of proposed rulemaking in publications likely to be obtained by small entities”;²¹⁶⁷ has “includ[ed] . . . a statement that the proposed rule may have a significant economic effect on a substantial number of small entities” in the *Triennial Review NPRM*;²¹⁶⁸ has solicited comments over its computer network;²¹⁶⁹ and has acted “to reduce the cost or complexity of participation in the rulemaking by small entities” by, among other things, facilitating electronic submission of comments.²¹⁷⁰ We thus conclude that the Commission has satisfied its RFA obligation to assure that small companies were able to participate in this proceeding.

736. TeleTruth further contends that the Commission’s IRFA was flawed by its use of “boilerplate” language that differed little from the language used in the IRFAs prepared for other proceedings.²¹⁷¹ However, the only language it cites does not even appear in the IRFA prepared for this proceeding. Moreover, TeleTruth has suggested no reason why the use of similar language in several proceedings is at all problematic. Indeed, the particular language about which it complains merely describes the “number of telephone companies affected” by a given proceeding – a class that is likely to differ little, if at all, among industry-wide rulemakings such as this.

737. TeleTruth next complains that the IRFA used outdated census data from 1992 in estimating the number of small businesses that might be affected by the Commission’s decisions

²¹⁶⁵ See TeleTruth Reply at 16-18; Letter from Bruce Kushnick, Chairman, TeleTruth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 5 (filed Feb. 5, 2003) (TeleTruth Feb. 5, 2003 *Ex Parte* Letter).

²¹⁶⁶ See 5 U.S.C. § 609.

²¹⁶⁷ 5 U.S.C. § 609(a)(2). We disagree with TeleTruth’s argument that small companies pertinent to our analysis cannot be expected to learn of actions reported in the Federal Register. See TeleTruth Reply at 16. As explained above, the obligations imposed by the RFA relate only to companies regulated by the agency; TeleTruth has provided no reason to believe that small *telecommunications* companies would be unfamiliar with the Federal Register, in which all federal regulations pertinent to those companies’ operations are published.

²¹⁶⁸ 5 U.S.C. § 609(a)(1).

²¹⁶⁹ *Id.* § 609(a)(2).

²¹⁷⁰ *Id.* § 609(a)(5).

²¹⁷¹ See TeleTruth Reply at 19-20.

here.²¹⁷² While certain 1997 census data became available in late 2000 and were not incorporated into the previous NPRM, this updating would not, we believe, have affected a small entity's decisions concerning IRFA. This more recent data are reflected in subsection 3 of the FRFA, *infra*.

738. TeleTruth also contends that “[a] true IRFA analysis about small business telecom competitors would conclude that the current FCC is in violation of the Telecom Act and all of its provisions” because the Commission purportedly has failed to enforce its local competition rules.²¹⁷³ Such an assertion falls outside the scope of this rulemaking proceeding and our analysis herein. Complaints regarding carriers’ compliance with the Commission’s Rules are properly addressed in other venues. For example, section 208 of the Communications Act specifically permits small businesses and other entities to lodge complaints regarding other carriers’ activities, and to seek enforcement of Commission regulations.²¹⁷⁴ Also, to the extent an incumbent LEC’s obligations under section 251 are implemented through interconnection agreements, those obligations are enforceable as a matter of contract law through the courts.

739. TeleTruth next argues the RFA requires “an impact study on how [an agency’s regulations] will harm small businesses,” and that “the FCC has not done anything of the sort for this proceeding.”²¹⁷⁵ We disagree: the RFA requires us to provide precisely the information contained in this FRFA, but does not mandate a separate “impact study.”²¹⁷⁶ The Commission has therefore satisfied its RFA obligations.

740. In a letter challenging the *UNE Remand Order*, Senator Talent argued that that Order violated section 3(a)(2)(C) of the Small Business Act.²¹⁷⁷ Specifically, Senator Talent noted that the *UNE Remand Order* differentiated between businesses that used fewer than four access lines and those that used four or more lines, in contravention of the Small Business Act’s directive that “unless specifically authorized by statute, no Federal department or agency may prescribe a size standard for categorizing a business concern as a small business concern,” unless certain procedural requirements are satisfied.²¹⁷⁸ In the present Order, our action does not establish any special small business size standard.

741. TeleTruth and Senator Talent suggest that section 257 of the Act dictates a particular substantive result in this matter. Specifically, TeleTruth claims that this “Triennial

²¹⁷² See *id.* at 22.

²¹⁷³ See *id.* at 37-39, 41.

²¹⁷⁴ 47 U.S.C. § 208.

²¹⁷⁵ TeleTruth Feb. 5, 2003 *Ex Parte* Letter at 4.

²¹⁷⁶ See 5 U.S.C. § 604.

²¹⁷⁷ See 15 U.S.C. § 632(a)(2)(C).

²¹⁷⁸ *Id.*

Review is mandated in Section [257(c)],” and requires an outcome favorable to entrepreneurs and small businesses.²¹⁷⁹ Senator Talent argued that in limiting the class of elements subject to section 251(c), the *UNE Remand Order* “erected a new barrier to entry” by small business carriers, and consequently violated section 257 of the Communications Act. Section 257, however, did *not* mandate this proceeding and in no way cabins this Commission’s exercise of its authority to adopt rules implementing the Act. Section 257 required the Commission to conduct a proceeding designed to identify and eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services” within 15 months of the enactment of the 1996 Act,²¹⁸⁰ and periodically to review its regulations and report to Congress on any such barriers.²¹⁸¹ The Commission concluded the requisite proceeding in 1997²¹⁸² and issued its first subsequent section 257 Report to Congress in 2000.²¹⁸³ Thus, this proceeding is *not* mandated (or in any way governed) by section 257. Rather, as described above, this Order fulfills the Commission’s commitment – set forth in the *UNE Remand Order* – to reevaluate unbundling requirements, and responds to various judicial rulings regarding those requirements.²¹⁸⁴

742. TeleTruth, the NFIB, and SBA Advocacy caution that this Order may stand in violation of Executive Order 13272.²¹⁸⁵ Setting aside the question of whether a multi-member independent agency such as the FCC must comply with that Executive Order, we note that affected agencies must: (1) comply with the RFA, (2) give SBA Advocacy advanced notice of any proposed rules that might substantially impact small businesses, and (3) give “appropriate consideration to” and provide a written response to “any comments provided by” SBA Advocacy. Here, the Commission did send SBA Advocacy a copy of the published Triennial Review NPRM (which pre-dated the Executive Order).²¹⁸⁶ Moreover, in this FRFA, we fully satisfy our obligations under the RFA. Finally, we address SBA Advocacy’s other comments below. Therefore, this proceeding stands in compliance with Executive Order 13272.

²¹⁷⁹ TeleTruth Feb. 5, 2003 *Ex Parte* Letter at 3.

²¹⁸⁰ See 47 U.S.C. § 257(a).

²¹⁸¹ See *id.* § 257(c).

²¹⁸² See *Section 257 Proceeding To Identify and Eliminate Market Entry Barriers For Small Businesses*, GN Docket No. 96-113, Report, 12 FCC Rcd 16802 (1997).

²¹⁸³ See *Section 257 Report to Congress, Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses*, Report, 15 FCC Rcd 15376 (2000).

²¹⁸⁴ See *supra* Parts I, III.

²¹⁸⁵ Executive Order No. 13272, 67 Fed. Reg. 53461 (Aug. 16, 2002); see TeleTruth Feb. 5, 2003 *Ex Parte* Letter at 6-7; NFIB Feb. 5, 2003 *Ex Parte* Letter at 1; SBA Advocacy Feb. 5, 2003 *Ex Parte* Letter at 2-3.

²¹⁸⁶ *Triennial Review NPRM*, 16 FCC Rcd at 22836, para. 135.

743. SBA Advocacy argues that the Commission's IRFA "did not consider the impact of delisting unbundled network elements . . . on small competitive local exchange carriers."²¹⁸⁷ While SBA Advocacy recommends that we issue a revised IRFA to account more fully for the impact our rules might have on competitive LECs, it recognizes that we might appropriately address any such impact in this FRFA instead.²¹⁸⁸ We have adopted the latter course. We note that we have considered the concerns of competitive LECs throughout this Order, and those considerations are summarized in Part X.A.5, below. Moreover, in Part X.A.3, we attempt to estimate the number of competitive LECs that will be affected by the rules we adopt herein.

744. SBA Advocacy also claims that the proposals contained in the *Triennial Review NPRM* were not sufficiently specific to allow small businesses the opportunity to comment meaningfully.²¹⁸⁹ We disagree. This proceeding has elicited well over one thousand filings, submitted by scores of parties. These parties – which include numerous small businesses – found in the Notice sufficient specificity to permit meaningful comment. SBA Advocacy notes its "particular concern" that the Commission "is considering removing elements from the list" of incumbent LECs' unbundling obligations, whereas the *Triennial Review NPRM* purportedly gave no indication of this eventuality.²¹⁹⁰ But in fact, the *Triennial Review NPRM* clearly explained that the Commission was considering "an unbundling analysis that is more targeted," including approaches "that take into consideration specific services, facilities, and customer and business considerations."²¹⁹¹ The Commission expressly sought comment "on applying the unbundling analysis to define the network elements" subject to unbundling,²¹⁹² and indicated its intention to "probe whether and to what extent we should adopt a more sophisticated, refined unbundling analysis."²¹⁹³ The Commission also specifically stated its intention to reexamine unbundling obligations with respect to loops,²¹⁹⁴ switching,²¹⁹⁵ interoffice transport,²¹⁹⁶ OSS,²¹⁹⁷ call-related signaling,²¹⁹⁸ and call-related databases.²¹⁹⁹ We are thus not persuaded that the Notice

²¹⁸⁷ SBA Advocacy Feb. 5, 2003 *Ex Parte* Letter at 1.

²¹⁸⁸ *Id.* at 1-2.

²¹⁸⁹ *See id.* at 3-4.

²¹⁹⁰ *Id.* at 3.

²¹⁹¹ *Triennial Review NPRM*, 16 FCC Rcd at 22789, para. 16.

²¹⁹² *Id.*

²¹⁹³ *Id.* at 22797-98, para. 34.

²¹⁹⁴ *See id.* at 22803-05, paras. 49, 51-52.

²¹⁹⁵ *See id.* at 22806-09, paras. 56-62.

²¹⁹⁶ *See id.* at 22810-12, paras. 64-66.

²¹⁹⁷ *See id.* at 22813, para. 70.

²¹⁹⁸ *See id.* at 22812, para. 68.

somehow failed to signal the Commission's intent to examine rules that might result in modification of the list of elements (including possible removal of elements) subject to section 251(c)(3)'s unbundling requirements.

3. Description and Estimate of the Number of Small Entities To Which the Actions Taken Will Apply

745. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules.²²⁰⁰ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."²²⁰¹ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.²²⁰² A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).²²⁰³

746. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by rules adopted in this Order. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission published in its *Trends in Telephone Service May 2002* report.²²⁰⁴ The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,²²⁰⁵ Paging,²²⁰⁶ and Cellular and Other Wireless Telecommunications.²²⁰⁷ Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and

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²¹⁹⁹ See *id.* at 22812-13, para. 69.

²²⁰⁰ 5 U.S.C. §§ 603(b)(3), 604(a)(3).

²²⁰¹ *Id.* § 601(6).

²²⁰² *Id.* § 601(3) (incorporating by reference the definition of "small business concern" set forth in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

²²⁰³ 15 U.S.C. § 632.

²²⁰⁴ *Trends in Telephone Service May 2002 Report* at Table 5.3.

²²⁰⁵ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (changed to 517110 in Oct. 2002).

²²⁰⁶ *Id.* § 121.201, NAICS code 513321 (changed to 517211 in Oct. 2002).

²²⁰⁷ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

747. We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a wired telecommunications carrier having 1,500 or fewer employees), and “is not dominant in its field of operation.”²²⁰⁸ SBA Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.²²⁰⁹ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

748. *Wired Telecommunications Carriers.* The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.²²¹⁰ According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year.²²¹¹ Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more.²²¹² Thus, under this size standard, the great majority of firms can be considered small.

749. *Incumbent LECs.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²²¹³ According to Commission data, 1,329 carriers reported that they were engaged in the provision of local exchange services.²²¹⁴ Of these 1,329 carriers, an estimated 1,024 have 1,500 or fewer

²²⁰⁸ 5 U.S.C. § 601(3).

²²⁰⁹ Letter from Jere W. Glover, Chief Counsel for SBA Advocacy, and Eric E. Menge, Assistant Chief Counsel for Telecommunications, SBA Advocacy, to William E. Kennard, Chairman, FCC, CC Docket Nos. 98-147, 99-68, 97-181 (filed May 27, 1999). The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a); 5 U.S.C. § 601(3). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

²²¹⁰ 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

²²¹¹ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization)” (1997 Economic Census, Establishment and Firm Size), Table 5, NAICS code 513310 (issued Oct. 2000).

²²¹² *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”

²²¹³ 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

²²¹⁴ *Trends in Telephone Service May 2002 Report* at Table 5.3.

employees and 305 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted herein.

750. *Competitive LECs.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to providers of competitive exchange services or to competitive access providers or to “Other Local Exchange Carriers,” all of which are discrete categories under which TRS data are collected. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²²¹⁵ According to Commission data, 532 companies reported that they were engaged in the provision of either competitive access provider services or competitive LEC services.²²¹⁶ Of these 532 companies, an estimated 411 have 1,500 or fewer employees and 121 have more than 1,500 employees.²²¹⁷ In addition, 55 carriers reported that they were “Other Local Exchange Carriers.” Of the 55 “Other Local Exchange Carriers,” an estimated 53 have 1,500 or fewer employees and two have more than 1,500 employees.²²¹⁸ Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, and “Other Local Exchange Carriers” are small entities that may be affected by the rules and policies adopted herein.

751. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²²¹⁹ According to Commission data, 229 companies reported that their primary telecommunications service activity was the provision of interexchange services.²²²⁰ Of these 229 companies, an estimated 181 have 1,500 or fewer employees and 48 have more than 1,500 employees.²²²¹ Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the rules and policies adopted herein.

752. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to OSPs. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that

²²¹⁵ 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

²²¹⁶ *Trends in Telephone Service May 2002 Report* at Table 5.3.

²²¹⁷ *Id.*

²²¹⁸ *Id.*

²²¹⁹ 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

²²²⁰ *Trends in Telephone Service May 2002 Report* at Table 5.3.

²²²¹ *Id.*

size standard, such a business is small if it has 1,500 or fewer employees.²²²² According to Commission data, 22 companies reported that they were engaged in the provision of operator services.²²²³ Of these 22 companies, an estimated 20 have 1,500 or fewer employees and two have more than 1,500 employees.²²²⁴ Consequently, the Commission estimates that the great majority of OSPs are small entities that may be affected by the rules and policies adopted herein.

753. *Prepaid Calling Card Providers.* The SBA has developed a size standard for a small business within the category of Telecommunications Resellers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.²²²⁵ According to Commission data, 32 companies reported that they were engaged in the provision of prepaid calling cards.²²²⁶ Of these 32 companies, an estimated 31 have 1,500 or fewer employees and one has more than 1,500 employees.²²²⁷ Consequently, the Commission estimates that the great majority of prepaid calling card providers are small entities that may be affected by the rules and policies adopted herein.

754. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to “Other Toll Carriers.” This category includes toll carriers that do not fall within the categories of interexchange carriers, OSPs, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²²²⁸ According to Commission’s data, 42 companies reported that their primary telecommunications service activity was the provision of payphone services.²²²⁹ Of these 42 companies, an estimated 37 have 1,500 or fewer employees and five have more than 1,500 employees.²²³⁰ Consequently, the Commission estimates that most “Other Toll Carriers” are small entities that may be affected by the rules and policies adopted herein.

755. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of Paging²²³¹ and

²²²² 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

²²²³ *Trends in Telephone Service May 2002 Report* at Table 5.3.

²²²⁴ *Id.*

²²²⁵ 13 C.F.R. § 121.201, NAICS code 513330 (changed to 517310 in Oct. 2002).

²²²⁶ *Trends in Telephone Service May 2002 Report* at Table 5.3.

²²²⁷ *Id.*

²²²⁸ 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

²²²⁹ *Trends in Telephone Service May 2002 Report* at Table 5.3.

²²³⁰ *Id.*

²²³¹ 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in Oct. 2002).

Cellular and Other Wireless Telecommunications.²²³² Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1320 firms in this category, total, that operated for the entire year.²²³³ Of this total, 1303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.²²³⁴ Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications firms, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.²²³⁵ Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.²²³⁶ Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

756. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined “small entity” for Blocks C and F as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.²²³⁷ For Block F, an additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.²²³⁸ These standards defining “small entity” in the context of broadband PCS auctions have been approved by the SBA.²²³⁹ No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business

²²³² 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

²²³³ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Employment Size of Firms Subject to Federal Income Tax: 1997” (1997 Economic Census, Employment Size of Firms), Table 5, NAICS code 513321 (issued Oct. 2000).

²²³⁴ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”

²²³⁵ 1997 Economic Census, Employment Size of Firms, Table 5, NAICS code 513322 (issued Oct. 2000).

²²³⁶ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”

²²³⁷ *See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824 (1996) (*Parts 20 and 24 Amendment Order*); *see also* 47 C.F.R. § 24.720(b).

²²³⁸ *See Parts 20 and 24 Amendment Order*, 11 FCC Rcd 7824.

²²³⁹ *See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5332 (1994).

bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.²²⁴⁰ On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In addition, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

757. *Narrowband PCS.* To date, two auctions of narrowband PCS licenses have been conducted. For purposes of the two auctions that have already been held, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.²²⁴¹ A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million. A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million. The SBA has approved these small business size standards.²²⁴² In the future, the Commission will auction 459 licenses to serve Metropolitan Trading Areas (MTAs) and 408 response channel licenses. There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future actions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined under the Commission’s Rules. The Commission assumes, for purposes of this analysis that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission’s partitioning and disaggregation rules.

²²⁴⁰ FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. Jan. 14, 1997); *see also Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, Second Report and Order, 12 FCC Rcd 16436 (1997).

²²⁴¹ *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS*, Docket Nos. ET 92-100, PP 93-253, Second Report and Order and Second Further Notice of Proposed Rulemaking, 15 FCC Rcd 10456 (2000).

²²⁴² *See* Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (filed Dec. 2, 1998) (SBA Dec. 2, 1998 *Ex Parte* Letter).

758. *220 MHz Radio Service – Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to “Cellular and Other Wireless Telecommunications” companies. This standard provides that such a company is small if it employs no more than 1,500 persons.²²⁴³ According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.²²⁴⁴ Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.²²⁴⁵ If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA’s small business size standard.

759. *220 MHz Radio Service – Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²²⁴⁶ This small business size standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.²²⁴⁷ A “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years. The SBA has approved these small business size standards.²²⁴⁸ Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.²²⁴⁹ In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three

²²⁴³ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

²²⁴⁴ 1997 Economic Census, Employment Size of Firms, Table 5, NAICS code 513322 (issued Oct. 2000).

²²⁴⁵ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”

²²⁴⁶ *Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70, at paras. 291-95 (1997) (*220 MHz Third Report and Order*).

²²⁴⁷ *Id.* at 11068-69, para. 291.

²²⁴⁸ See Letter from Aida Alvarez, Administrator, SBA, to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC (filed Jan. 6, 1998) (SBA Jan. 6, 1998 *Ex Parte* Letter).

²²⁴⁹ See generally *Phase II 220 MHz Service Auction Closes, Winning Bidders in the Auction of 908 Phase II 220 MHz Service Licenses Down Payments Due November 6, 1998, FCC Form 601s Due November 6, 1998, Ten-Day Petition to Deny Period*, Report No. AUC-18-F, 14 FCC Rcd 605 (1998).

nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.²²⁵⁰

760. *800 MHz and 900 MHz Specialized Mobile Radio Licenses.* The Commission awards “small entity” and “very small entity” bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than \$15 million in each of the three previous calendar years, or that had revenues of no more than \$3 million in each of the previous calendar years, respectively.²²⁵¹ These bidding credits apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. The Commission assumes, for purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the Small Business Act. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz SMR bands. There were 60 winning bidders that qualified as small or very small entities in the 900 MHz SMR auctions. Of the 1,020 licenses won in the 900 MHz auction, bidders qualifying as small or very small entities won 263 licenses. In the 800 MHz auction, 38 of the 524 licenses won were won by small and very small entities. Consequently, the Commission estimates that there are 301 or fewer small entity SMR licensees in the 800 MHz and 900 MHz bands that may be affected by the rules and policies adopted herein.

761. *Common Carrier Paging.* In the Paging Third Report and Order, we developed a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²²⁵² A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.²²⁵³ Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. At present, there are approximately 24,000

²²⁵⁰ *Phase II 220 MHz Service Spectrum Auction Closes*, Report No. AUC-24-E, 14 FCC Rcd 11218 (1999).

²²⁵¹ 47 C.F.R. § 90.814(b)(1).

²²⁵² *220 MHz Third Report and Order*, 12 FCC Rcd at 11068-70, paras. 291-95.

²²⁵³ *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, 10085, para. 98 (1999).

Private-Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the *Trends in Telephone Service May 2002 Report*, 471 carriers reported that they were engaged in the provision of either paging and messaging services or other mobile services.²²⁵⁴ Of those, the Commission estimates that 450 are small, under the SBA business size standard specifying that firms are small if they have 1,500 or fewer employees.²²⁵⁵

762. *700 MHz Guard Band Licensees.* In the 700 MHz Guard Band Order, we adopted a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²²⁵⁶ A “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.²²⁵⁷ Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.²²⁵⁸

763. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.²²⁵⁹ A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS).²²⁶⁰ The Commission uses the SBA’s small business size standard applicable to “Cellular and Other Wireless Telecommunications,” *i.e.*, an entity employing no more than 1,500 persons.²²⁶¹ There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

²²⁵⁴ *Trends in Telephone Service May 2002 Report* at Table 5.3.

²²⁵⁵ *Id.* The SBA size standard is that of Paging, 13 C.F.R. § 121.201, NAICS code 517211.

²²⁵⁶ *See Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 99-168, Second Report and Order, 15 FCC Rcd 5299 (2000).

²²⁵⁷ *See generally 220 MHz Service Auction Closes*, Report No. WT 98-36 (rel Oct. 23, 1998).

²²⁵⁸ *700 MHz Guard Band Auction Closes*, Report No. AUC-38-F, 16 FCC Rcd 4590 (2001).

²²⁵⁹ The service is defined in section 22.99 of the Commission’s Rules, 47 C.F.R. § 22.99.

²²⁶⁰ BETRS is defined in sections 22.757 and 22.759 of the Commission’s Rules, 47 C.F.R. §§ 22.757 and 22.759.

²²⁶¹ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

764. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.²²⁶² We will use SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.²²⁶³ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard.

765. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.²²⁶⁴ Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$15 million dollars. In addition, a "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$3 million dollars.²²⁶⁵ There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards.

766. *Fixed Microwave Services.* Fixed microwave services include common carrier,²²⁶⁶ private operational-fixed,²²⁶⁷ and broadcast auxiliary radio services.²²⁶⁸ At present, there are

²²⁶² The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

²²⁶³ 13 C.F.R. § 121.201, NAICS codes 513322 (changed to 517212 in Oct. 2002).

²²⁶⁴ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

²²⁶⁵ *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

²²⁶⁶ See 47 C.F.R. § 101 *et seq.* (formerly Part 21 of the Commission's Rules) for common carrier fixed microwave services (except MDS).

²²⁶⁷ Persons eligible under Parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. See 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category “Cellular and Other Telecommunications,” which is 1,500 or fewer employees.²²⁶⁹ The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA’s small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

767. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.²²⁷⁰ There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA’s small business size standard for “Cellular and Other Wireless Telecommunications” services.²²⁷¹ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.²²⁷²

768. *Wireless Communications Services (WCS).* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the WCS auction. A “small business” is an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” is an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these small business size standards.²²⁷³ The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as “very small business” entities, and one that qualified as a “small business”

(Continued from previous page) _____

²²⁶⁸ Auxiliary Microwave Service is governed by Part 74 of the Commission’s Rules. See 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

²²⁶⁹ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

²²⁷⁰ This service is governed by Subpart I of Part 22 of the Commission’s Rules. See 47 C.F.R. §§ 22.1001-22.1037.

²²⁷¹ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

²²⁷² *Id.*

²²⁷³ See SBA Dec. 2, 1998 *Ex Parte* Letter.

entity. We conclude that the number of geographic area WCS licensees affected by this analysis includes these eight entities.

769. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of \$40 million or less in the three previous calendar years.²²⁷⁴ An additional size standard for “very small business” is: an entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.²²⁷⁵ The SBA has approved these small business size standards.²²⁷⁶ The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and policies adopted herein.

770. *Multipoint Distribution Service (MDS), Multichannel Multipoint Distribution Service (MMDS), and Instructional Television Fixed Service (ITFS).* MMDS systems, often referred to as “wireless cable,” transmit video programming to subscribers using the microwave frequencies of the MDS and ITFS.²²⁷⁷ In connection with the 1996 MDS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.²²⁷⁸ The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in annual receipts.²²⁷⁹ According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.²²⁸⁰ Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard also

²²⁷⁴ See *Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, Report and Order and Second Notice of Proposed Rulemaking, 12 FCC Rcd 18600 (1997).

²²⁷⁵ *Id.*

²²⁷⁶ SBA Feb. 4, 1998 *Ex Parte* Letter.

²²⁷⁷ *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Docket Nos. MM 94-131, PP 93-253, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

²²⁷⁸ 47 C.F.R. § 21.961(b)(1).

²²⁷⁹ 13 C.F.R. § 121.201, NAICS code 513220 (changed to 517510 in Oct. 2002).

²²⁸⁰ 1997 Economic Census, Establishment and Firm Size, Table 4, NAICS code 513220 (issued Oct. 2000).

appears applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.²²⁸¹ Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

771. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.²²⁸² The auction of the 1,030 LMDS licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.²²⁸³ An additional small business size standard for “very small business” was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.²²⁸⁴ The SBA has approved these small business size standards in the context of LMDS auctions.²²⁸⁵ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses consists of the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers.

772. *218-219 MHz Service.* The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry-over losses), has no more than \$2 million in annual profits each year for the previous two years.²²⁸⁶ In the 218-219 MHz Report and Order and Memorandum Opinion and Order, we established a small business size standard for a “small business” as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues

²²⁸¹ In addition, the term “small entity” within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

²²⁸² See *Local Multipoint Distribution Service*, Second Report and Order, CC Docket No. 92-297, 12 FCC Rcd 12545 (1997).

²²⁸³ *Id.*

²²⁸⁴ *Id.*

²²⁸⁵ See SBA Jan. 6, 1998 *Ex Parte* Letter.

²²⁸⁶ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

not to exceed \$15 million for the preceding three years.²²⁸⁷ A “very small business” is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed \$3 million for the preceding three years.²²⁸⁸ We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum.

773. *24 GHz – Incumbent Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of “Cellular and Other Wireless Telecommunications” companies. This category provides that such a company is small if it employs no more than 1,500 persons.²²⁸⁹ According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.²²⁹⁰ Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.²²⁹¹ Thus, under this size standard, the great majority of firms can be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent and TRW, Inc.²²⁹² It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

774. *24 GHz – Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for “small business” is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of \$15 million.²²⁹³ “Very small business” in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for

²²⁸⁷ *Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999).

²²⁸⁸ *Id.*

²²⁸⁹ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

²²⁹⁰ 1997 Economic Census, Employment Size of Firms, Table 5, NAICS code 513322 (issued Oct. 2000).

²²⁹¹ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”

²²⁹² Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

²²⁹³ *Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967 para. 77 (2000) (*Parts 1, 2; 87 and 101 Amendment Order*); see also 47 C.F.R. § 101.538(a)(2).

the preceding three years.²²⁹⁴ The SBA has approved these small business size standards.²²⁹⁵ These size standards will apply to the future auction, if held.

775. *Internet Service Providers.* While internet service providers (ISPs) are only indirectly affected by our present actions, and ISPs are therefore not formally included within this present FRFA, we have addressed them informally to create a fuller record and to recognize their participation in this proceeding. The SBA has developed a small business size standard for Online Information Services, which consists of all such companies having \$21 million or less in annual receipts.²²⁹⁶ According to Census Bureau data for 1997, there were 2,751 firms in this category, total, that operated for the entire year.²²⁹⁷ Of this total, 2,659 firms had annual receipts of \$9,999,999 or less, and an additional 67 had receipts of \$10 million to \$24,999,999.²²⁹⁸ Thus, under this size standard, the great majority of firms can be considered small.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

776. Pursuant to sections 251(c) and (d) of the Act, incumbent LECs, including those that qualify as small entities, are required to provide nondiscriminatory access to UNEs.²²⁹⁹ The only exception to this rule applies to qualifying rural carriers that have gone through the process of obtaining an exemption, suspension, or modification pursuant to section 251(f) of the Act. This Order represents, in large part, a fresh examination of the issues presented in implementing the unbundling requirements of section 251, based on comments from interested parties responding to the *Triennial Review NPRM*. This Order also interprets the necessary and impair standards of section 251(d)(2) in a manner that satisfies the D.C. Circuit's directives that (1) the Commission eschew broad national standards in favor of more granular analysis,²³⁰⁰ and that, (2) in determining whether a carrier is "impaired" by diminished access to a given element, the Commission distinguish between "cost disparities that are universal as between new entrants and

²²⁹⁴ *Parts 1, 2; 87 and 101 Amendment Order*, 15 FCC Rcd at 16967, para. 77; *see also* 47 C.F.R. § 101.538(a)(1).

²²⁹⁵ *See* Letter from Gary M. Jackson, Assistant Administrator, SBA, to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (filed July 28, 2000) (SBA July 28, 2000 *Ex Parte* Letter).

²²⁹⁶ 13 C.F.R. § 121.201, NAICS code 514191 (changed to 518111 in Oct. 2002).

²²⁹⁷ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Receipts Size of Firms Subject to Federal Income Tax: 1997" (1997 Economic Census, Receipts Size of Firms), Table 4, NAICS code 514191 (issued Oct. 2000).

²²⁹⁸ *Id.*

²²⁹⁹ 47 U.S.C. § 251(c), (d).

²³⁰⁰ *USTA*, 290 F.3d at 422.

incumbents in *any* industry” and disparities resulting specifically from the conditions of natural monopoly that the Act is designed to redress.²³⁰¹

777. In this Order, we determine that requesting carriers (1) are impaired without access to local circuit switching in providing service to mass market customers using DS0 capacity loops;²³⁰² (2) are presumed not impaired without access to unbundled local circuit switching for the enterprise market;²³⁰³ (3) are not impaired without access to packet switching, including routers and DSLAMs;²³⁰⁴ (4) are not impaired without access to incumbent LECs’ signaling systems except where they are also impaired without access to the incumbent LEC’s unbundled circuit switching;²³⁰⁵ (5) are impaired without unbundled access to the incumbent LEC’s 911 and e911 databases;²³⁰⁶ (6) are not impaired without access to the incumbent LEC’s other call-related databases if they deploy their own switches, but otherwise are impaired;²³⁰⁷ (7) are impaired without access to incumbent LECs’ OSS;²³⁰⁸ (8) are impaired without access to copper loop or subloop facilities (and must condition copper loops for provision of advanced services), but are not impaired without access to line-sharing (subject to a three-year transition) or hybrid loops;²³⁰⁹ (9) are not impaired without access to new build/greenfield fiber-to-the-home (FTTH) loops for broadband or narrowband services or overbuild/brownfield FTTH loops for broadband services;²³¹⁰ (10) are not impaired without unbundled access to OCn capacity loop facilities, but are impaired, subject to certain triggers, without access to dark fiber loops, DS1 loops, and DS3 loops;²³¹¹ (11) are impaired without access to unbundled subloops associated with accessing customer premises wiring at multiunit premises and are also impaired without unbundled access to the incumbent LEC Inside Wire Subloops and NIDs, regardless of loop type;²³¹² (12) are not impaired without unbundled access to OCn transport facilities, but are impaired, subject to certain triggers, without access to dark fiber transport facilities, DS1

²³⁰¹ *Id.* at 426.

²³⁰² *See supra* Part VI.D.6.

²³⁰³ State commissions may rebut this finding as specified above. *See supra* Part VI.D.1.

²³⁰⁴ *See supra* Part VI.A.2.

²³⁰⁵ *See supra* Part VI.A.3.

²³⁰⁶ *See supra* Part VI.A.4.

²³⁰⁷ *See id.*

²³⁰⁸ *See supra* Part VI.A.5.

²³⁰⁹ Incumbent LECs also may not retire copper loops without state approval. *See supra* Part VI.B.1. The Commission reaffirms incumbent LEC line-splitting obligations. *See supra* Part VI.B.1.

²³¹⁰ *See supra* Part VI.B.2.

²³¹¹ *See supra* Part VI.B.3.

²³¹² *See supra* Parts VI.B.2, VI.B.3.

transport facilities, and DS3 transport facilities;²³¹³ and (13) are impaired without access to unbundled shared transport only to the extent they are impaired without access to local circuit switching.²³¹⁴ The Order also affirms that incumbent LECs are obligated to provide access to UNE combinations.²³¹⁵

778. In this Order, we adopt rules to implement a congressionally-mandated scheme, embodied in Section 251 of the Act, that imposes upon incumbent LECs an obligation to provide unbundled access to certain network elements. This Order articulates a new impairment standard to govern which network elements incumbent LECs must unbundle for competitors in accordance with the Act. While this Order imposes no general obligations on competitive LECs, the Order does require competitive LECs to satisfy certain reporting requirements in order to obtain as UNEs certain high-capacity network elements from incumbent LECs. We have attempted to keep the obligations imposed by this Order to the minimum necessary to implement the requirements of the Act.

779. In addition, this Order outlines procedures whereby states may conduct proceedings to determine whether certain network elements satisfy our impairment standard according to specific guidelines and triggers, as outlined in the Order. While this Order does not specifically impose any obligations on carriers in this regard, records regarding facility use may be necessary for these state proceedings.

780. The various compliance requirements contained in this Order will require the use of engineering, technical, operational, accounting, billing, and legal skills. The carriers that are affected by these requirements already possess these skills. This Order contains new or modified information collections, which are subject to Office of Management and Budget review pursuant to the Paperwork Reduction Act of 1995.²³¹⁶

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

781. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small

²³¹³ See *supra* Part VI.B.3.

²³¹⁴ See *supra* Part VI.B.4.

²³¹⁵ See *supra* Part VI.B.6.

²³¹⁶ Pub. L. No. 104-13, 109 Stat. 163 (codified at 44 U.S.C. § 3507).

entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.²³¹⁷

782. In this Order, we adopt rules regarding the unbundling of network elements. We have modified our impairment analysis to find that a requesting carrier is impaired when lack of access to a facility in the incumbent LEC's network poses barriers that are likely to make entry into the market uneconomic.²³¹⁸ These can include both operational and economic barriers, such as scale economies, sunk costs, first mover advantages, absolute cost advantages, and barriers within the control of the incumbent LEC. In adopting this interpretation, we considered a variety of factors relating to the size of regulated entities and the customers they serve.²³¹⁹ We considered a number of barriers to competitive entry, including those faced by small competitors, as well as the importance of scale economies as they relate to small entities.²³²⁰ Finally, we considered and rejected a number of suggested approaches to impairment.²³²¹

783. In applying our impairment analysis to specific network elements, we adopt a more granular approach, including the considerations of customer class, geography, and service. We found that conducting a more granular analysis permits us to distinguish, with more particularity, those situations for which there is impairment from those for which there is none. We also found that an even more granular analysis – loop by loop, for example – is neither administratively feasible nor required by the courts.²³²² We considered the differing needs of three classes of telecommunications customers: mass market customers (*i.e.*, residential customers and sometimes very small business customers), small and medium enterprise customers, and large enterprise customers.²³²³ Mass market customers typically generate lower revenue and tighter profit margins than the other classes and therefore require service providers to minimize costs. Small and medium business customers typically are willing to pay higher prices but are more sensitive to reliability and quality of service. Large enterprise customers tend to demand extensive and sophisticated service packages, and reliability and quality of service are essential to these customers.

784. In addition, because requiring unbundling in the absence of impairment imposes unnecessary costs – including for small or rural incumbent LECs – we considered whether impairment varies geographically throughout the country. We make unbundling decisions on a

²³¹⁷ 5 U.S.C. § 603(c).

²³¹⁸ *See supra* Part V.B.

²³¹⁹ *See id.*

²³²⁰ *See id.*

²³²¹ These include, for example, the essential facilities doctrine, an antitrust analysis, a market power analysis, and the approach to impairment the Commission took in the *UNE Remand Order*. *See supra* Part V.B.

²³²² *See supra* Part V.B.

²³²³ *Id.*

national scale where the record permits us to, but delegate some determining role to the states where it appears that impairment might exist in some regions of the country but not others.²³²⁴ In this regard, we note that Congress provided a mechanism – in section 251(f) of the Act – to exempt small and rural incumbent LECs from several of the Act’s obligations.²³²⁵ For example, unbundling rules shall not apply to a rural telephone company until it receives a bona fide request for interconnection and until the state commission determines that the request is technically feasible, not unduly economically burdensome, and consistent with section 254.²³²⁶ Or, a LEC with fewer than two percent of the nation’s subscriber lines may obtain relief from unbundling if the state commission decides, among other things, that relief is necessary to avoid imposing a economically burdensome requirement or other significant adverse economic impact.²³²⁷

785. Through our granular impairment analysis, we have considered the resources and needs of various carriers, including small businesses, and have examined the state of the marketplace to determine whether it was economically feasible for competitors to self-provision network elements or obtain them from competitive sources other than incumbent LECs.²³²⁸ We believe this approach strikes the appropriate balance between the needs of competitors – including small competitors – to access certain network elements, against the burdens unbundling imposes upon incumbent LECs – including small incumbents – and yields a more accurate picture of the state of competition for each of the varied network elements composing the local telephone network. For those network elements for which carriers may be impaired only in certain geographic markets, such as certain high-capacity loops and transport, we adopt an approach that permits localized determination – with a role for the states – as to where and whether impairment exists.²³²⁹ In this way, we have sought to take a more specific view of the needs of differently situated competitors.

786. We also have established service eligibility requirements for UNEs which are designed to ensure that carriers use UNEs primarily to provide local services in competition with incumbent LECs, “while avoiding burdensome administrative rules that serve as a drag on competitive entry.”²³³⁰ While we recognize that regulatory requirements may disproportionately impact smaller entities, we have adopted the least burdensome of several available alternatives in

²³²⁴ *Id.*

²³²⁵ *See* 47 U.S.C. § 251(f).

²³²⁶ *See id.* § 251(f)(1).

²³²⁷ *See id.* § 251(f)(2).

²³²⁸ *See, e.g., supra* Part VI.B.3. (Dedicated Interoffice Transmission Facilities).

²³²⁹ *See, e.g., supra* Parts V.E. (Role of the States), VI.B.3. (Dedicated Interoffice Transmission Facilities).

²³³⁰ *See, e.g., supra* Parts V.B.2. (Granularity of the Impairment Analysis), VI.B.6 (Service Eligibility to Access UNEs).

requiring competitors to satisfy certain service eligibility criteria.²³³¹ For example, rather than requiring carriers to certify to be the sole provider of local service in order to access certain elements (*e.g.*, high-capacity loops and transport) – an approach that might require frequent and costly assurance from a carrier’s customers – we permit carriers to certify that they are the primary providers of local service.²³³² In this regard, we find that being certified as a competitive LEC is probative of providing qualifying service.²³³³ We also adopt collocation and local interconnection requirements as less burdensome ways of assuring service eligibility.²³³⁴ By contrast, we have rejected a number of suggested approaches as unnecessarily burdensome, such as measuring minutes or traffic percentages, separately measuring voice and data use, or permitting UNEs only where a competitive carrier uses certain types of switches.²³³⁵ We find that our adopted indicia of service eligibility serve as adequate and less burdensome assurance that a carrier is using UNEs in a manner consistent with the local competition goals of the Act.²³³⁶

6. Report to Congress

787. The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.²³³⁷ In addition, the Commission will send a copy of the Order, including the FRFA, to the Chief Counsel for SBA Advocacy. The Order and FRFA, or summaries thereof, will also be published in the Federal Register.²³³⁸

B. Initial Regulatory Flexibility Analysis

788. As required by the RFA,²³³⁹ the Commission has prepared this IRFA of possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this FNPRM. Written public comments are sought on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the FNPRM, provided below in Part X.C. The Commission will send a copy of the FNPRM,

²³³¹ *Id.*

²³³² *See, e.g., supra* Part VI.B.6. (Service Eligibility to Access UNEs).

²³³³ *Id.*

²³³⁴ *Id.*

²³³⁵ *Id.*

²³³⁶ *Id.*

²³³⁷ *See* 5 U.S.C. § 801(a)(1).

²³³⁸ *See* 5 U.S.C. § 604(b).

²³³⁹ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the SBREFA, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

including this IRFA, to the Chief Counsel for SBA Advocacy.²³⁴⁰ In addition, the FNPRM and IRFA (or summaries thereof) will be published in the Federal Register.²³⁴¹

1. Need for, and Objectives of, the Proposed Rules

789. We initiate the FNPRM portion of this proceeding to ensure that market-based incentives exist for incumbent and competitive LECs to negotiate innovative commercial interconnection arrangements. The current pick-and-choose rules implementing section 252(i) may discourage give-and-take negotiation because incumbent LECs may be reluctant to make significant concessions (in exchange for negotiated benefit) if those concessions become automatically available – without any tradeoff – to every potential market entrant. We therefore seek comment on whether alternate approaches to implementing section 252(i), such as requiring third parties to opt into entire agreements, would promote more innovative and flexible arrangements between parties. Any changes to the current pick-and-choose rule, however, may raise concerns as to whether there is the potential for parties to interconnection agreements to include “poison pill” language that would deter third parties from opting into those agreements under section 252(i). This FNPRM proposes an approach that would eliminate the current pick-and-choose regime for incumbent LECs wherever the incumbent LEC has filed and received state approval of a statement of generally available terms and conditions (SGAT), and this FNPRM seeks to build a record from which to judge the wisdom of this approach.

2. Legal Basis

790. The legal basis for any action that may be taken pursuant to the FNPRM is contained in Sections 1, 3, 4, 201-205, 251, 256, 271, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, 303(r).

3. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Would Apply

791. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules.²³⁴² The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”²³⁴³ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²³⁴⁴ A

²³⁴⁰ See 5 U.S.C. § 603(a).

²³⁴¹ *Id.*

²³⁴² 5 U.S.C. §§ 603(b)(3), 604(a)(3).

²³⁴³ *Id.* § 601(6).

²³⁴⁴ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an (continued....)”

small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.²³⁴⁵

792. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by rules proposed in this FNPRM. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report.²³⁴⁶ The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,²³⁴⁷ Paging,²³⁴⁸ and Cellular and Other Wireless Telecommunications.²³⁴⁹ Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

793. We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a wired telecommunications carrier having 1,500 or fewer employees), and “is not dominant in its field of operation.”²³⁵⁰ SBA Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.²³⁵¹ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

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agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

²³⁴⁵ 15 U.S.C. § 632.

²³⁴⁶ *Trends in Telephone Service May 2002 Report* at Table 5.3.

²³⁴⁷ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (changed to 517110 in Oct. 2002).

²³⁴⁸ 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in Oct. 2002).

²³⁴⁹ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

²³⁵⁰ 5 U.S.C. § 601(3).

²³⁵¹ Letter from Jere W. Glover, Chief Counsel for SBA Advocacy, and Eric E. Menge, Assistant Chief Counsel for Telecommunications, SBA Advocacy, to William E. Kennard, Chairman, FCC, CC Docket Nos. 98-147, 99-68, 97-181 (filed May 27, 1999). The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” *See* 15 U.S.C. § 632(a); 5 U.S.C. § 601(3). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

794. *Wired Telecommunications Carriers.* The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.²³⁵² According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year.²³⁵³ Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more.²³⁵⁴ Thus, under this size standard, the great majority of firms can be considered small.

795. *Incumbent LECs.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²³⁵⁵ According to Commission data, 1,329 carriers reported that they were engaged in the provision of local exchange services.²³⁵⁶ Of these 1,329 carriers, an estimated 1,024 have 1,500 or fewer employees and 305 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted herein.

796. *Competitive LECs.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to providers of competitive exchange services or to competitive access providers or to “Other Local Exchange Carriers,” all of which are discrete categories under which TRS data are collected. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²³⁵⁷ According to Commission data, 532 companies reported that they were engaged in the provision of either competitive access provider services or competitive LEC services.²³⁵⁸ Of these 532 companies, an estimated 411 have 1,500 or fewer employees and 121 have more than 1,500 employees.²³⁵⁹ In addition, 55 carriers reported that they were “Other Local Exchange Carriers.” Of the 55 “Other Local Exchange Carriers,” an estimated 53 have 1,500 or fewer employees and two have more than 1,500 employees.²³⁶⁰ Consequently, the Commission estimates that most providers of competitive local

²³⁵² 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

²³⁵³ 1997 Economic Census, Establishment and Firm Size, Table 5, NAICS code 513310 (issued Oct. 2000).

²³⁵⁴ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”

²³⁵⁵ 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

²³⁵⁶ *Trends in Telephone Service May 2002 Report* at Table 5.3.

²³⁵⁷ 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

²³⁵⁸ *Trends in Telephone Service May 2002 Report* at Table 5.3.

²³⁵⁹ *Id.*

exchange service, competitive access providers, and “Other Local Exchange Carriers” are small entities that may be affected by the rules and policies adopted herein.

797. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²³⁶¹ According to Commission data, 229 companies reported that their primary telecommunications service activity was the provision of interexchange services.²³⁶² Of these 229 companies, an estimated 181 have 1,500 or fewer employees and 48 have more than 1,500 employees.²³⁶³ Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the rules and policies adopted herein.

798. *OSPs.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to OSPs. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²³⁶⁴ According to Commission data, 22 companies reported that they were engaged in the provision of operator services.²³⁶⁵ Of these 22 companies, an estimated 20 have 1,500 or fewer employees and two have more than 1,500 employees.²³⁶⁶ Consequently, the Commission estimates that the great majority of OSPs are small entities that may be affected by the rules and policies adopted herein.

799. *Prepaid Calling Card Providers.* The SBA has developed a size standard for a small business within the category of Telecommunications Resellers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.²³⁶⁷ According to Commission data, 32 companies reported that they were engaged in the provision of prepaid calling cards.²³⁶⁸ Of these 32 companies, an estimated 31 have 1,500 or fewer employees and one has more than 1,500 employees.²³⁶⁹ Consequently, the Commission estimates that the great

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²³⁶⁰ *Id.*

²³⁶¹ 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

²³⁶² *Trends in Telephone Service May 2002 Report* at Table 5.3.

²³⁶³ *Id.*

²³⁶⁴ 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

²³⁶⁵ *Trends in Telephone Service May 2002 Report* at Table 5.3.

²³⁶⁶ *Id.*

²³⁶⁷ 13 C.F.R. § 121.201, NAICS code 513330 (changed to 517310 in Oct. 2002).

²³⁶⁸ *Trends in Telephone Service May 2002 Report* at Table 5.3.

²³⁶⁹ *Id.*

majority of prepaid calling card providers are small entities that may be affected by the rules and policies adopted herein.

800. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to “Other Toll Carriers.” This category includes toll carriers that do not fall within the categories of interexchange carriers, OSPs, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²³⁷⁰ According to Commission’s data, 42 companies reported that their primary telecommunications service activity was the provision of payphone services.²³⁷¹ Of these 42 companies, an estimated 37 have 1,500 or fewer employees and five have more than 1,500 employees.²³⁷² Consequently, the Commission estimates that most “Other Toll Carriers” are small entities that may be affected by the rules and policies adopted herein.

801. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of Paging²³⁷³ and Cellular and Other Wireless Telecommunications.²³⁷⁴ Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1320 firms in this category, total, that operated for the entire year.²³⁷⁵ Of this total, 1303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.²³⁷⁶ Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications firms, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.²³⁷⁷ Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.²³⁷⁸ Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

²³⁷⁰ 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

²³⁷¹ *Trends in Telephone Service May 2002 Report* at Table 5.3.

²³⁷² *Id.*

²³⁷³ 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in Oct. 2002).

²³⁷⁴ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

²³⁷⁵ 1997 Economic Census, Employment Size of Firms, Table 5, NAICS code 513321 (issued Oct. 2000).

²³⁷⁶ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”

²³⁷⁷ 1997 Economic Census, Employment Size of Firms, Table 5, NAICS code 513322 (issued Oct. 2000).

²³⁷⁸ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”

802. *Broadband PCS.* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined “small entity” for Blocks C and F as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.²³⁷⁹ For Block F, an additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.²³⁸⁰ These standards defining “small entity” in the context of broadband PCS auctions have been approved by the SBA.²³⁸¹ No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.²³⁸² On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses. Subsequent events, concerning Auction 305, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In addition, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

803. *Narrowband PCS.* To date, two auctions of narrowband PCS licenses have been conducted. For purposes of the two auctions that have already been held, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.²³⁸³ A “small business” is an entity that,

²³⁷⁹ See *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824 (1996); see also 47 C.F.R. § 24.720(b).

²³⁸⁰ See *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824 (1996).

²³⁸¹ See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5332 (1994).

²³⁸² *Broadband PCS, D, E and F Block Auction Closes*, (rel. Jan. 14, 1997); see also *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, Second Report and Order, 12 FCC Rcd 16436 (1997).

²³⁸³ *In the Matter of Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS*, Docket Nos. ET 92-100, PP 93-253, Second Report and Order and Second Further Notice of Proposed Rulemaking, 15 FCC Rcd 10456 (2000).

together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million. A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million. The SBA has approved these small business size standards.²³⁸⁴ In the future, the Commission will auction 459 licenses to serve MTAs and 408 response channel licenses. There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future actions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined under the Commission’s Rules. The Commission assumes, for purposes of this analysis that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission’s partitioning and disaggregation rules.

804. *220 MHz Radio Service – Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to “Cellular and Other Wireless Telecommunications” companies. This standard provides that such a company is small if it employs no more than 1,500 persons.²³⁸⁵ According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.²³⁸⁶ Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.²³⁸⁷ If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA’s small business size standard.

805. *220 MHz Radio Service – Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²³⁸⁸ This small business size

²³⁸⁴ See SBA Dec. 2, 1998 *Ex Parte* Letter.

²³⁸⁵ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

²³⁸⁶ 1997 Economic Census, Employment Size of Firms, Table 5, NAICS code 513322 (issued Oct. 2000).

²³⁸⁷ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”

²³⁸⁸ *220 MHz Third Report and Order*, 12 FCC Rcd at 11068-70, paras. 291-295.

standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.²³⁸⁹ A “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years. The SBA has approved these small business size standards.²³⁹⁰ Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.²³⁹¹ In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional EAG Licenses, and 875 EA Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.²³⁹²

806. *800 MHz and 900 MHz SMR Licenses.* The Commission awards “small entity” and “very small entity” bidding credits in auctions for SMR geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than \$15 million in each of the three previous calendar years, or that had revenues of no more than \$3 million in each of the previous calendar years, respectively.²³⁹³ These bidding credits apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. The Commission assumes, for purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the Small Business Act. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz SMR bands. There were 60 winning bidders that qualified as small or very small entities in the 900 MHz SMR auctions. Of the 1,020 licenses won in the 900 MHz auction, bidders qualifying as small or very small entities won 263 licenses. In the 800 MHz auction, 38 of the 524 licenses won were won by small and very small entities. Consequently, the Commission estimates that there are 301 or fewer small entity SMR licensees in the 800 MHz and 900 MHz bands that may be affected by the rules and policies adopted herein.

²³⁸⁹ *Id.* at para. 291.

²³⁹⁰ See SBA Jan. 6, 1998 *Ex Parte* Letter.

²³⁹¹ See generally, *Phase II 220 MHz Service Auction Closes, Winning Bidders in the Auction of 908 Phase II 220 MHz Service Licenses, Down Payments Due November 6, 1998, FCC Form 601s Due November 6, 1998, Ten-Day Petition to Deny Period*, Report No. AUC-18-F, DA No. 98-2143, 14 FCC Rcd 605 (rel. Oct. 23, 1998).

²³⁹² *Phase II 220 MHz Service Spectrum Auction Closes*, Report No. AUC-24-E, DA 99-1287, 14 FCC Rcd 11218 (rel. July 1, 1999).

²³⁹³ 47 C.F.R. § 90.814(b)(1).

807. *Common Carrier Paging.* In the Paging Third Report and Order, we developed a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²³⁹⁴ A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of MEA licenses commenced on February 24, 2000, and closed on March 2, 2000.²³⁹⁵ Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. At present, there are approximately 24,000 Private-Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the *Trends in Telephone Service May 2002 Report*, 471 carriers reported that they were engaged in the provision of either paging and messaging services or other mobile services.²³⁹⁶ Of those, the Commission estimates that 450 are small, under the SBA business size standard specifying that firms are small if they have 1,500 or fewer employees.²³⁹⁷

808. *700 MHz Guard Band Licensees.* In the 700 MHz Guard Band Order, we adopted a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²³⁹⁸ A “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of 52 MEA licenses commenced on September 6, 2000, and closed on September 21, 2000.²³⁹⁹ Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.²⁴⁰⁰

²³⁹⁴ *220 MHz Third Report and Order*, 12 FCC Rcd at 11068-70, paras. 291-95.

²³⁹⁵ *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, para. 98 (1999).

²³⁹⁶ *Trends in Telephone Service May 2002 Report* at Table 5.3.

²³⁹⁷ *Id.* The SBA size standard is that of Paging, 13 C.F.R. § 121.201, NAICS code 517211.

²³⁹⁸ *See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 99-168, Second Report and Order, 15 FCC Rcd 5299 (2000).

²³⁹⁹ *See generally, 220 MHz Service Auction Closes*, Report No. WT 98-36 (rel Oct. 23, 1998).

²⁴⁰⁰ *700 MHz Guard Band Auction Closes*, Report No. AUC-38-F, DA 01-478, 16 FCC Rcd 4590 (rel. Feb. 22, 2001).

809. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.²⁴⁰¹ A significant subset of the Rural Radiotelephone Service is the BETRS.²⁴⁰² The Commission uses the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.²⁴⁰³ There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

810. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.²⁴⁰⁴ We will use SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.²⁴⁰⁵ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard.

811. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a VHF marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.²⁴⁰⁶ Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$15 million dollars. In addition, a "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding

²⁴⁰¹ The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

²⁴⁰² BETRS is defined in sections 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

²⁴⁰³ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

²⁴⁰⁴ The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

²⁴⁰⁵ 13 C.F.R. § 121.201, NAICS codes 513322 (changed to 517212 in Oct. 2002).

²⁴⁰⁶ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

three years not to exceed \$3 million dollars.²⁴⁰⁷ There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards.

812. *Fixed Microwave Services.* Fixed microwave services include common carrier,²⁴⁰⁸ private operational-fixed,²⁴⁰⁹ and broadcast auxiliary radio services.²⁴¹⁰ At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.²⁴¹¹ The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

813. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.²⁴¹² There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for "Cellular and Other Wireless

²⁴⁰⁷ *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

²⁴⁰⁸ See 47 C.F.R. §§ 101 *et seq.* (formerly, Part 21 of the Commission's Rules) for common carrier fixed microwave services (except MDS).

²⁴⁰⁹ Persons eligible under Parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. See 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

²⁴¹⁰ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

²⁴¹¹ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

²⁴¹² This service is governed by Subpart I of Part 22 of the Commission's Rules. See 47 C.F.R. §§ 22.1001-22.1037.

Telecommunications” services.²⁴¹³ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.²⁴¹⁴

814. *WCS.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the WCS auction. A “small business” is an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” is an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these small business size standards.²⁴¹⁵ The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as “very small business” entities, and one that qualified as a “small business” entity. We conclude that the number of geographic area WCS licensees affected by this analysis includes these eight entities.

815. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of \$40 million or less in the three previous calendar years.²⁴¹⁶ An additional size standard for “very small business” is: an entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.²⁴¹⁷ The SBA has approved these small business size standards.²⁴¹⁸ The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and policies adopted herein.

816. *MDS, MMDS, and ITFS.* MMDS systems, often referred to as “wireless cable,” transmit video programming to subscribers using the microwave frequencies of the MDS and ITFS.²⁴¹⁹ In connection with the 1996 MDS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.²⁴²⁰ The MDS auctions resulted in 67 successful

²⁴¹³ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

²⁴¹⁴ *Id.*

²⁴¹⁵ See SBA Dec. 2, 1998 *Ex Parte* Letter.

²⁴¹⁶ See *Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, Report and Order and Second Notice of Proposed Rulemaking, 12 FCC Rcd 18600 (1997).

²⁴¹⁷ *Id.*

²⁴¹⁸ See SBA Feb. 4, 1998 *Ex Parte* Letter.

²⁴¹⁹ *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Docket Nos. MM 94-131, PP 93-253, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

²⁴²⁰ 47 C.F.R. § 21.961(b)(1).

bidders obtaining licensing opportunities for 493 BTAs. Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in annual receipts.²⁴²¹ According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.²⁴²² Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard also appears applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.²⁴²³ Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

817. *LMDS*. LMDS is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.²⁴²⁴ The auction of the 1,030 LMDS licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.²⁴²⁵ An additional small business size standard for “very small business” was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.²⁴²⁶ The SBA has approved these small business size standards in the context of LMDS auctions.²⁴²⁷ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses consists of the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers.

²⁴²¹ 13 C.F.R. § 121.201, NAICS code 513220 (changed to 517510 in Oct. 2002).

²⁴²² 1997 Economic Census, Establishment and Firm Size, Table 4, NAICS code 513220 (issued Oct. 2000).

²⁴²³ In addition, the term “small entity” within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

²⁴²⁴ See *Local Multipoint Distribution Service*, CC Docket No. 92-297, Second Report and Order, 12 FCC Rcd 12545 (1997).

²⁴²⁵ *Id.*

²⁴²⁶ *Id.*

²⁴²⁷ See SBA Jan. 6, 1998 *Ex Parte* Letter.

818. *218-219 MHz Service.* The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 MSA licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry-over losses), has no more than \$2 million in annual profits each year for the previous two years.²⁴²⁸ In the 218-219 MHz Report and Order and Memorandum Opinion and Order, we established a small business size standard for a “small business” as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed \$15 million for the preceding three years.²⁴²⁹ A “very small business” is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed \$3 million for the preceding three years.²⁴³⁰ We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum.

819. *24 GHz – Incumbent Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of “Cellular and Other Wireless Telecommunications” companies. This category provides that such a company is small if it employs no more than 1,500 persons.²⁴³¹ According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.²⁴³² Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.²⁴³³ Thus, under this size standard, the great majority of firms can be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent and TRW, Inc.²⁴³⁴ It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

²⁴²⁸ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

²⁴²⁹ *Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999).

²⁴³⁰ *Id.*

²⁴³¹ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

²⁴³² 1997 Economic Census, Employment Size of Firms, Table 5, NAICS code 513322 (issued Oct. 2000).

²⁴³³ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”

²⁴³⁴ Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

820. *24 GHz – Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for “small business” is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of \$15 million.²⁴³⁵ “Very small business” in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.²⁴³⁶ The SBA has approved these small business size standards.²⁴³⁷ These size standards will apply to the future auction, if held.

821. *ISPs.* While ISPs are only indirectly affected by our present actions, and ISPs are therefore not formally included within this present IRFA, we address them informally to create a fuller record. The SBA has developed a small business size standard for Online Information Services, which consists of all such companies having \$21 million or less in annual receipts.²⁴³⁸ According to Census Bureau data for 1997, there were 2,751 firms in this category, total, that operated for the entire year.²⁴³⁹ Of this total, 2,659 firms had annual receipts of \$9,999,999 or less, and an additional 67 had receipts of \$10 million to \$24,999,999.²⁴⁴⁰ Thus, under this size standard, the great majority of firms can be considered small.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

822. In this FNPRM, we seek comment on proposed rules that would eliminate the current pick-and-choose rules under some circumstances.²⁴⁴¹ The proposed changes may restrict competitive LECs’ choices to opt into specific terms and conditions of existing interconnection agreements, perhaps requiring competitors to opt into entire agreements or negotiate their own agreements with incumbents. The proposed rules may encourage incumbent LECs to seek approval from state public utility commissions for statements of generally available terms and conditions.

²⁴³⁵ *Amendments to Parts 1,2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967 (2000); *see also* 47 C.F.R. § 101.538(a)(2).

²⁴³⁶ *Amendments to Parts 1,2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967 (2000); *see also* 47 C.F.R. § 101.538(a)(1).

²⁴³⁷ *See* SBA July 28, 2000 *Ex Parte* Letter.

²⁴³⁸ 13 C.F.R. § 121.201, NAICS code 514191 (changed to 518111 in Oct. 2002).

²⁴³⁹ 1997 Economic Census, Receipts Size of Firms, Table 4, NAICS code 514191 (issued Oct. 2000).

²⁴⁴⁰ *Id.*

²⁴⁴¹ *See supra* Part IX.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

823. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.²⁴⁴²

824. In this FNPRM, we seek comment on amending the pick-and-choose rules in a manner that encourages more customized contracts between competitive and incumbent LECs, as envisioned by the Act. The FNPRM proposes to remove disincentives to the ability of incumbent LECs and competitive LECs to negotiate more customized agreements, including agreements that may include significant concessions in exchange for negotiated benefits. In doing so, the FNPRM also seeks to minimize the potential for discrimination against third parties that may seek to opt into the entire agreement by proposing that incumbent LECs first file and receive state approval for a statement of generally available terms and conditions (SGAT) before the incumbent LEC may file other interconnection agreements not subject to the pick-and-choose rules.

825. Changing the current rules, in favor of an approach where competitive LECs – including small entities – must opt into entire agreements, rather than individual terms and conditions, may impose additional burdens on these parties than they currently bear. We will consider, therefore, maintaining the current pick-and-choose rules. The current rules, however, may expose incumbent LECs to the risk that subsequent entrants may reap a one-sided benefit from negotiated concessions made between the incumbent LEC and the actual contracting competitive LEC, and this may form a disincentive to negotiation to both negotiating parties. This may, in turn, impose additional burdens on competitors and incumbents as the parties attempt to reach agreements and resolve disputes, often through arbitration and litigation, in a regulatory environment that creates disincentives for either party to compromise. For this reason, we do not propose to establish a separate pick-and-choose regime to govern small business incumbents or competitors. We believe the alternative advanced in the FNPRM – by proposing to modify the application of the pick-and-choose rule for any incumbent LEC that files and receives state approval of a statement of generally available terms and conditions (SGAT) – would serve the Commission’s goal of encouraging negotiation while protecting the rights and interests of competitors, including small businesses. We invite comment on this approach, and we plan to review the record assembled in response to the FNPRM with a view to considering the least burdensome way to achieve market-driven contract negotiations.

²⁴⁴² 5 U.S.C. § 603(c).

6. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

826. None.

C. Other Procedural Matters

1. Ex Parte Presentations

827. This matter shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.²⁴⁴³ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.²⁴⁴⁴ Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission’s rules.

2. Comment Filing Procedures

828. Pursuant to sections 1.415 and 1.419 of the Commission's rules,²⁴⁴⁵ interested parties may file comments not later than 30 days after publication of this Notice in the Federal Register and may file reply comments not later than 30 days after the date for filing comments. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.²⁴⁴⁶ Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and five copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service

²⁴⁴³ 47 C.F.R. § 1.1200 *et seq.*

²⁴⁴⁴ *See* 47 C.F.R. § 1.1206(b)(2).

²⁴⁴⁵ 47 C.F.R. §§ 1.415, 1.419,

²⁴⁴⁶ *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

mail). The Commission's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

3. Scope of Written *Ex Parte* Presentations Included in This Proceeding

829. The Commission adopted the substance of this Order at an open meeting on February 20, 2003. Originally, this meeting was scheduled for February 13, 2003 by a notice issued February 6, 2003, which initiated the Sunshine period prohibition on *ex parte* presentations to the Commission and staff. The Commission lifted this Sunshine restriction late on February 10, 2003, but reimposed it on February 13, 2003 by releasing a public notice announcing inclusion of this proceeding on the Sunshine agenda for a Commission meeting on February 20, 2003. In light of these facts and the widespread interest in this proceeding, we find it in the public interest to include in the record *ex parte* presentations that were made on February 10, but prior to the lifting of the Sunshine restriction. We also include in the record *ex parte* presentations made during the imposition of the Sunshine restriction in direct response to an express request by a Commissioner or Commission staff.

XI. ORDERING CLAUSES

830. Accordingly, IT IS ORDERED that pursuant to Sections 1, 3, 4, 201-205, 251, 256, 271, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, the *Report and Order on Remand and Further Notice of Proposed Rulemaking* in CC Docket No. 01-338 IS ADOPTED, and that Part 51 of the Commission's Rules, 47 C.F.R. Part 51, is amended as set forth in Appendix B. The requirements of this Order shall become effective 30 days after publication in the Federal Register, pending Office of Management and Budget (OMB) approval.²⁴⁴⁷ The Commission will publish a document in the Federal Register announcing the effective date of these rules.

831. IT IS FURTHER ORDERED that the collection of information contained herein is contingent upon approval by the OMB.

832. IT IS FURTHER ORDERED, pursuant to sections 1, 3, 4, 201-205, 251, 256, 271, and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, and 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt. that the petitions for reconsideration of the *UNE Remand Order* filed in CC

²⁴⁴⁷ In light of the importance of these rules, the Commission is seeking emergency approval from OMB.

Docket No. 96-98 by Low Tech Designs, Inc. on February 15, 2000 and by the Telecommunications Resellers Association on February 18, 2000; the petition for partial reconsideration of the *UNE Remand Order* filed in CC Docket No. 96-98 by Birch Telecom, Inc. on February 17, 2000; the petition for reconsideration and clarification of the *UNE Remand Order* filed in CC Docket No. 96-98 by Sprint Corporation on February 17, 2000; the petition for clarification on reconsideration of the *UNE Remand Order* filed in CC Docket No. 96-98, 95-185 by MGC Communications, Inc., d/b/a Mpower Communications, Corp. on February 17, 2000; the joint petition filed in CC Docket No. 96-98 by BellSouth Corporation and BellSouth Telecommunications, Inc., SBC Communications, Inc., and Verizon Telephone Companies on April 5, 2001; the petitions for waiver of the supplemental order clarification filed in CC Docket No. 96-98 by WorldCom, Inc. on September 12, 2000 and ITC^DeltaCom Communications, Inc. on August 16, 2001; the petition filed in CC Docket Nos. 01-338, 96-98, 98-147 by Promoting Active Competition Everywhere (PACE) Coalition on February 6, 2002; and the petition for declaratory ruling filed in CC Docket No. 01-338 by WorldCom, Inc. on August 8, 2002 ARE DISMISSED AS MOOT.

833. IT IS FURTHER ORDERED, pursuant to sections 1, 3, 4, 201-205, 251, 256, 271, and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, and 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt. that the joint petition for declaratory ruling filed in CC Docket No. 96-98 by AT&T Wireless Services, Inc. and VoiceStream Wireless, Corp. on November 19, 2001 IS GRANTED to the extent indicated herein and otherwise IS MOOT.

834. IT IS FURTHER ORDERED, pursuant to sections 1, 3, 4, 201-205, 251, 256, 271, and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, and 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt. that the petition for reconsideration/clarification of the *UNE Remand Order* filed in CC Docket No. 96-98 by BellSouth Corporation and BellSouth Telecommunications, Inc. on February 17, 2000 IS GRANTED to the extent indicated herein and otherwise ARE DENIED.

835. IT IS FURTHER ORDERED, pursuant to sections 1, 3, 4, 201-205, 251, 256, 271, and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, and 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt. that the petitions for reconsideration of the *UNE Remand Order* filed in CC Docket Nos. 96-98, 95-185 by Rhythms Netconnections Inc. and Covad Communications Co. on January 21, 2000, @Link Networks, Inc., DSL.net, Inc. and MGC Communications, Inc., d/b/a Mpower Communications Corp. on February 17, 2000, McLeodUSA Telecommunications Services, Inc. and the petition for reconsideration of the *UNE Remand Order* filed in CC Docket No. 96-98 by RCN Telecom Services, Inc. on February 17, 2000 ARE DENIED.

836. IT IS FURTHER ORDERED, pursuant to sections 1, 3, 4, 201-205, 251, 256, 271, and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, and 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt. that the petition of the *UNE Remand Order* filed in CC Docket No. 96-98 by Competitive Telecommunications Association on November 26, 2001; and the petitions for

reconsideration of the *UNE Remand Order* filed in CC Docket No. 96-98 by Intermedia Communications, Inc. and by MCI WorldCom, Inc. on February 17, 2000 ARE DENIED to the extent indicated herein and otherwise ARE DISMISSED AS MOOT.

837. IT IS FURTHER ORDERED, pursuant to sections 1, 3, 4, 201-205, 251, 256, 271, and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, and 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt. that the petition for clarification of the *UNE Remand Order* filed in CC Docket No. 96-98 by MCI WorldCom, Inc. on February 17, 2000; the petition for reconsideration of the *UNE Remand Order* filed in CC Docket No. 96-98 by the Competitive Telecommunications Association on February 17, 2000; the petition for reconsideration and clarification of the *UNE Remand Order* filed in CC Docket No. 96-98 by Bell Atlantic on February 17, 2000; and the petition for reconsideration and clarification of the *UNE Remand Order* filed in CC Docket No. 96-98 by AT&T Corp. on February 17, 2000 ARE GRANTED to the extent indicated herein and otherwise ARE DENIED or DISMISSED AS MOOT.

838. IT IS FURTHER ORDERED that the Public Notice, *Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service*, CC Docket No. 96-98, DA 01-169 (rel. Jan. 24, 2001); *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, and Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 16 FCC Rcd 2101 (2001); *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, CC Docket Nos. 96-98 and 95-185, 12 FCC Rcd 12460 (1997); and *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 15 FCC Rcd 3696 (1999) ARE TERMINATED.

839. IT IS FURTHER ORDERED, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order and Order on Remand*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

840. IT IS FURTHER ORDERED, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary