

March 23, 1998, a total of 6,115,550 888 numbers were in use.<sup>24</sup> Although it seems certain that some of these subscribers either are not independently owned and operated businesses, or do not have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 6,987,063 small entity 800 subscribers and fewer than 6,115,550 888 subscribers that may be affected by the decisions adopted in this Fourth Report and Order.

### 3. Telephone and Wireless Entities

11. Total Number of Telephone Companies Affected. The provisions adopted herein may have a significant effect on a substantial number of the small telephone companies identified by SBA. The United States Bureau of the Census ("the Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.<sup>25</sup> This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small ILECs because they are not "independently owned and operated."<sup>26</sup> For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small ILECs that may be affected by the decisions adopted in this Fourth Report and Order.

12. Wireline Carriers and Service Providers. SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.<sup>27</sup> According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.<sup>28</sup> All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small ILECs. Although it

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<sup>24</sup> SMS/800 Management Team, Number Administration Summary Report (March 23, 1998).

<sup>25</sup> United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

<sup>26</sup> 15 U.S.C. § 632(a)(1).

<sup>27</sup> *1992 Census, supra*, at Firm Size 1-123.

<sup>28</sup> 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions adopted in this Fourth Report and Order.

13. Local Exchange Carriers. Neither the Commission nor the SBA has developed a definition for small providers of local exchange services ("LECs"). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.<sup>29</sup> According to the most recent *Telecommunications Industry Revenue* data, 1,371 carriers reported that they were engaged in the provision of local exchange services.<sup>30</sup> We do not have data specifying the number of these carriers that are either dominant in their field of operations, are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,371 providers of local exchange service are small entities or small ILECs that may be affected by the proposed rules, if adopted.

14. Interexchange Carriers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services ("IXCs"). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.<sup>31</sup> According to the most recent *Telecommunications Industry Revenue* data, 143 carriers reported that they were engaged in the provision of interexchange services.<sup>32</sup> We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 143 small entity IXCs that may be affected by the proposed rules, if adopted..

15. Competitive Access Providers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access services providers ("CAPs"). The closest applicable definition under the SBA rules is for telephone

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<sup>29</sup> *Id.*, SIC Code 4813.

<sup>30</sup> *Telecommunications Industry Revenue*, Figure 2.

<sup>31</sup> 13 CFR § 121.201, SIC code 4813.

<sup>32</sup> *Telecommunications Industry Revenue*, Figure 2.

communications companies other than except radiotelephone (wireless) companies.<sup>33</sup> According to the most recent *Telecommunications Industry Revenue* data, 109 carriers reported that they were engaged in the provision of competitive access services.<sup>34</sup> We do not have data specifying the number of these carriers that are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 109 small entity CAPs that may be affected by the proposed rules, if adopted.

16. Operator Service Providers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.<sup>35</sup> According to the most recent *Telecommunications Industry Revenue* data, 27 carriers reported that they were engaged in the provision of operator services.<sup>36</sup> We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 27 small entity operator service providers that may be affected by the proposed rules, if adopted.

17. Pay Telephone Operators. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.<sup>37</sup> According to the most recent *Telecommunications Industry Revenue* data, 441 carriers reported that they were engaged in the provision of pay telephone services.<sup>38</sup> We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 441 small entity pay telephone operators that may be affected by the proposed rules, if adopted.

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<sup>33</sup> 13 CFR § 121.201, SIC code 4813.

<sup>34</sup> *Telecommunications Industry Revenue*, Figure 2.

<sup>35</sup> 13 CFR § 121.201, SIC code 4813.

<sup>36</sup> *Telecommunications Industry Revenue*, Figure 2.

<sup>37</sup> 13 CFR § 121.201, SIC code 4813.

<sup>38</sup> *Telecommunications Industry Revenue*, Figure 2.

18. Resellers (including debit card providers). Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable SBA definition for a reseller is a telephone communications company other than radiotelephone (wireless) companies.<sup>39</sup> According to the most recent *Telecommunications Industry Revenue* data, 339 reported that they were engaged in the resale of telephone service.<sup>40</sup> We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 339 small entity resellers that may be affected by the proposed rules, if adopted.

19. Wireless (Radiotelephone) Carriers. SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.<sup>41</sup> According to SBA's definition, a small business radiotelephone company is one employing fewer than 1,500 persons.<sup>42</sup> The Census Bureau also reported that 1,164 of those radiotelephone companies had no more than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the decisions adopted in this Fourth Report and Order.

20. Cellular Licensees. Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons.<sup>43</sup> According to the Bureau of the Census, only twelve radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more

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<sup>39</sup> 13 CFR § 121.201, SIC code 4813.

<sup>40</sup> *Telecommunications Industry Revenue*, Figure 2.

<sup>41</sup> United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

<sup>42</sup> 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

<sup>43</sup> 13 C.F.R. § 121.201, SIC code 4812.

employees.<sup>44</sup> Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. In addition, we note that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. In addition, according to the most recent *Telecommunications Industry Revenue* data, 804 carriers reported that they were engaged in the provision of either cellular service or Personal Communications Service ("PCS") services, which are placed together in the data.<sup>45</sup> We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 804 small cellular service carriers that may be affected by the proposed rules, if adopted.

21. Private and Common Carrier Paging. The Commission has proposed a two-tier definition of small businesses in the context of auctioning licenses in the Common Carrier Paging and exclusive Private Carrier Paging services. Under the proposal, a small business will be defined as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million, or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than \$15 million. Because the SBA has not yet approved this definition for paging services, we will utilize the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.<sup>46</sup> At present, there are approximately 24,000 Private Paging licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Telecommunications Industry Revenue* data, 172 carriers reported that they were engaged in the provision of either paging or "other mobile" services, which are placed together in the data.<sup>47</sup> We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of paging carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 172 small paging carriers that may be affected by the proposed rules, if adopted. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

22. Mobile Service Carriers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. As noted above in the section concerning paging service carriers, the closest

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<sup>44</sup> 1992 Census, Series UC92-S-1, at Table 5, SIC code 4812.

<sup>45</sup> *Telecommunications Industry Revenue*, Figure 2.

<sup>46</sup> 13 C.F.R. § 121.201, SIC code 4812.

<sup>47</sup> *Telecommunications Industry Revenue*, Figure 2.

applicable definition under the SBA rules is that for radiotelephone (wireless) companies,<sup>48</sup> and the most recent *Telecommunications Industry Revenue* data shows that 172 carriers reported that they were engaged in the provision of either paging or "other mobile" services.<sup>49</sup> Consequently, we estimate that there are fewer than 172 small mobile service carriers that may be affected by the proposed rules, if adopted.

23. Broadband Personal Communications Service (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 less than \$40 million in the three previous calendar years.<sup>50</sup> For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>51</sup> These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.<sup>52</sup> No small businesses within the SBA-approved definition 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% of the 1,479 licenses for Blocks D, E, and F.<sup>53</sup> However, licenses for blocks C through F have not been awarded fully, therefore there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small entity PCS providers as defined by the SBA and the Commission's auction rules.

24. SMR Licensees. Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than \$15 million in the three previous calendar years. This definition of a "small entity" in the context of 800 MHz and 900 MHz

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<sup>48</sup> 13 C.F.R. § 121.201, SIC code 4812.

<sup>49</sup> *Telecommunications Industry Revenue*, Figure 2.

<sup>50</sup> See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, FCC 96-278, WT Docket No. 96-59, paras. 57- 60 (released June 24, 1996), 61 F 33859 (July 1, 1996); see also 47 C.F.R. § 24.720(b).

<sup>51</sup> See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, FCC 96-278, WT Docket No. 96-59, para. 60 (1996), 61 F 33859 (July 1, 1996).

<sup>52</sup> 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 Rad 5532, 5581-84 (1994).

<sup>53</sup> FCC News, Broadband PCS, D, E and F Block Auction Closes, No. 71744 (released January 14, 1997).

SMR has been approved by the SBA.<sup>54</sup> The decisions adopted in this Fourth Report and Order may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do 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 no more than \$15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities, which may be affected by the decisions adopted in this Fourth Report and Order.

25. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the decisions adopted in this Fourth Report and Order includes these 60 small entities. In the recently concluded 800 MHz SMR auction there were 524 licenses awarded to winning bidders, of which 38 were won by small or very small entities. We assume that all 38 may be affected by the decisions adopted in this Fourth Report and Order.

#### 4. Cable System Operators (SIC 4841)

26. SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than \$11 million in revenue annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were 1,788 total cable and other pay television services and 1,423 had less than \$11 million in revenue.<sup>55</sup>

27. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.<sup>56</sup> Based on our most

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<sup>54</sup> See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2693-702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463 (1995).

<sup>55</sup> 1992 *Economic Census Industry and Enterprise Receipts Size Report*, Table 2D, SIC code 4841 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

<sup>56</sup> 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. Implementation of Sections of the 1992 Cable Act: Rate Regulation, *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd

recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.<sup>57</sup> Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the decisions adopted in this Fourth Report and Order.

28. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>58</sup> The Commission has determined that there are 66,000,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 660,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.<sup>59</sup> Based on available data, we find that the number of cable operators serving 660,000 subscribers or less totals 1,450.<sup>60</sup> We do not request nor do we collect information concerning whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000,<sup>61</sup> and thus are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

#### **Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:**

29. In this Fourth Report and Order, we adopt a requirement that DSMI release vanity numbers in the 877 toll free code and in toll free codes beyond 877 at the same time as each code is deployed, to be made available on a first-come, first-served basis. In addition, we adopt a requirement that RespOrgs assign the 888 vanity numbers that were initially set aside, to their 800 customers holding the corresponding 800 vanity number, provided these 800 subscribers exercise an option to reserve the 888 set-aside number. Finally, we adopt a

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7393 (1995).

<sup>57</sup> Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>58</sup> 47 U.S.C. § 543(m)(2).

<sup>59</sup> *Id.* § 76.1403(b).

<sup>60</sup> Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>61</sup> We do receive such information on a case-by-case basis only if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.1403(b) of the Commission's rules. See 47 CFR § 76.1403(d).

requirement that DSMI release the 888 set-aside vanity numbers, to be made available on a first-come, first-served basis if the 800 subscriber chooses to refrain from exercising its option to reserve the number. We conclude that these requirements are consistent with our obligation under section 251(e) of the Act to ensure that numbers are made available on an equitable basis. We believe that these requirements will not unduly burden DSMI because the act of releasing numbers is part of DSMI's responsibility as administrator of the toll free database and will not require any additional recordkeeping. Furthermore, these requirements will reduce DSMI's burden by no longer requiring DSMI to ensure that these numbers remain unavailable. We also believe that these requirements will not unduly burden RespOrgs, including small business entities, because the act of assigning numbers to subscribers and releasing numbers to the spare pool is part of RespOrgs' responsibilities as managers of toll free subscribers' database records. We further believe that these requirements will not unduly burden subscribers, including small business entities, because the subscribers may decline to exercise the option. If however, the subscriber chooses to exercise the option, the necessary steps involved in reserving these numbers do not exceed the necessary steps involved in reserving any other toll free numbers. We anticipate that no new skills are necessary to comply with this requirement, and that no additional staff or other resources should be necessary to comply with this requirement. Furthermore, we adopt no new reporting or recordkeeping requirements for toll free subscribers, including small business entities.

**Significant Alternatives and Steps Taken by Agency to Minimize Significant Economic Impact on a Substantial Number of Small Entities Consistent with Stated Objectives:**

30. As stated, we conclude that releasing vanity numbers in the 877 code and codes beyond 877 as each code is deployed to be made available on a first-come, first-served basis, is consistent with our obligation under section 251(e) of the Act to ensure that numbers are made available on an equitable basis. This conclusion is in the public interest, and will not have an adverse impact on toll free subscribers, including small business entities, because it will open the toll free market to all toll free subscribers on an equal basis. Small toll free subscribers will be affected in the same manner as non-small business entities. We also conclude that allowing current 800 subscribers a right of first refusal to the corresponding 888 vanity numbers initially set aside is consistent with our obligation under Section 251(e) of the Act to ensure that numbers are made available on an equitable basis. This conclusion is also in the public interest, and will not have an adverse impact on toll free subscribers, including small business entities, because all toll free subscribers, including small business entities, with an 800 number corresponding to an 888 set-aside number will have a right of first refusal.

31. We considered providing a right of first refusal to subscribers that expressed interest in replicating their toll free numbers beyond the 888 toll free code.<sup>62</sup> We declined to

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<sup>62</sup> Notice paras. 41-43.

accept various proposals associated with a right of first refusal for future codes.<sup>63</sup> We concluded that such a requirement would have conflicted with our goal to allocate toll free numbers efficiently, fairly, and on an orderly basis. We found that a right of first refusal for future codes would have been discriminatory against new subscribers because it would have precluded them from obtaining certain desirable numbers. If incumbent subscribers were allowed to exercise a right of first refusal in future codes, they would have a decided advantage over entities by precluding them from obtaining these numbers to represent their businesses. The entities that would be placed at a disadvantage by such an approach would probably have included small business entities. New business entities are often small, and the new entities would have been the entities precluded from obtaining those desirable vanity numbers. By allowing a right of first refusal for the 888 set-aside only, new subscribers, including small business entities, will have the opportunity to reserve desirable numbers in 877 and codes beyond 877.

32. We also considered providing a right of first refusal with a fee. We declined to accept various proposals associated with a fee-based right of first refusal. We concluded that such a requirement would not solve the problems associated with discriminatory access to toll free numbers. In addition, such a requirement could place an undue financial burden on small business entities that may not have the financial resources to comply with such a fee requirement.

33. We also considered imposing a Standard Industrial Classification ("SIC") code requirement.<sup>64</sup> Under this option, an incumbent toll free subscriber with commercial concerns related to assignment of the corresponding vanity number in a subsequent toll free code would have reported its code to its toll free service provider or RespOrg, that in turn would have reported the code to DSMI. DSMI would have incorporated this SIC code into the subscriber's record and queried the database when applicants requested a corresponding number in another code to determine if their SIC code is the same as the current holder of the corresponding number in the previous toll free code. If the two parties shared the same SIC code and were, therefore, considered competitors, the applicant for the new number would have been prohibited from obtaining that number. We concluded that this option is inconsistent with our goal to allocate toll free numbers on an efficient, fair, and orderly basis. We determined that such a requirement would be administratively burdensome, difficult to apply because of a rapidly changing market, and subject to manipulation. Moreover, as with a right of first refusal, this option would have provided incumbent subscribers with a decided advantage over entities in the same line of business by precluding them from obtaining certain desirable numbers. The entities that would have been placed at a disadvantage by such an approach would have probably included small business entities. New business entities are

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<sup>63</sup> See, e.g., Telecommunications Resellers Association ("TRA") Comments at 17-18; Qwest Communications Corporation ("Qwest") Comments at 7-8; Communications Venture Services, Inc. ("CVS") Comments at 1-2; Network Telephone Services ("NTS") Comments at 2; LDDS Worldcom Comments 14.

<sup>64</sup> Notice paras. 44-45.

often small, and the new entities would have been the entities precluded from obtaining those 888 numbers.

34. The Office of Advocacy, U.S. Small Business Administration ("SBA"), filed a Written Ex Parte Presentation on March 17, 1998 requesting a delay in the opening of the 877 toll free code until the Commission has resolved the issue of vanity-number treatment and has analyzed alternatives that can ease the burden on small entities.<sup>65</sup>

This Fourth Report and Order addresses the issue of vanity-number assignment and in doing so considers the effects on small businesses. Furthermore, delaying 877 deployment would have adverse consequences on new RespOrgs planning their businesses around the April 5, 1998 date. New business entities are often small, and these entities would have been placed at a disadvantage by delaying 877 deployment.

**Report to Congress:**

35. The Commission will send a copy of the *Toll Free Service Access Codes*, Fourth Report and Order, including this Final Regulatory Flexibility Analysis, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Toll Free Service Access Codes*, Fourth Report and Order, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Toll Free Service Access Codes*, Fourth Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register. See 5 U.S.C. § 604(b).

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<sup>65</sup> USBA Written Ex Parte Presentation (March 17, 1998).

**Appendix C**  
**List of Commenters**

1.800.BALLOON  
1-800-Flowers  
800 Users Coalition ("Coalition")  
Aeronautical Radio, Inc. ("ARINC")  
AirTouch Paging ("AirTouch")  
Allnet Communication Services, Inc. ("Allnet")  
Ameritech  
American Car Rental Association ("ACRA")  
American Petroleum Institute ("API")  
American Telegram Corporation ("ATC")  
Americas Carrier Telecommunications Association ("ACTA")  
AT&T Corporation ("AT&T")  
Avis Rent A Car System, Inc. ("Avis")  
Bass Pro Shops ("Bass Pro")  
Bass Tickets, Inc. ("Bass Tickets")  
Bell Atlantic Telephone Companies ("Bell Atlantic")  
BellSouth Telecommunications, Inc. ("BellSouth")  
Cable & Wireless, Inc. ("CWI")  
Charter Medical Corporation ("Charter Medical")  
Communications Managers Association ("CMA")  
Communications Venture Services, Inc. ("CVS")  
Competitive Telecommunications Association ("CompTel")  
Crestar Bank ("Crestar")  
DeFabio, Joel ("Joel DeFabio")  
Del Webb Corporation ("Del Webb")  
Direct Marketing Association ("DMA")  
Enterprise Rent-A-Car, Inc. ("Enterprise")  
General Services Administration ("GSA")  
GTE Service Corporation ("GTE")  
INVESCO Funds Group, Inc. ("IFG")  
LCI, International ("LCI")  
LDDS WorldCom  
MCI Telecommunications Corporation ("MCI")  
MFS Communications Company, Inc. ("MFS")  
National Telephone Cooperative Association ("NTCA")  
NEXTLINK, Inc. ("NEXTLINK")  
Network Telephone Services, Inc. ("NTS")  
NIMA, International ("NIMA")  
Nissan Rosenthal ("Nissan")  
NYNEX Telephone Companies ("NYNEX")  
Office of Management and Budget ("OMB")

Olson, Mark D. ("Mark Olson")  
Organization for the Protection and Advancement of Small Telephone Companies  
("OPASTCO")  
Pacific Bell and Nevada Bell ("Pacific")  
Page, Joseph Edward ("Joseph Page")  
Paging Network, Inc. ("PageNet")  
Personal Communications Industry Association ("PCIA")  
Promoline, Inc. ("Promoline")  
Puerto Rico Telephone Company ("PRTC")  
Qwest Communications Corporation ("Qwest")  
Scherers Communications Group, Inc. ("Scherers")  
Service Management System/800 Number Administration Committee of the Ordering and  
Billing Forum ("SNAC")  
Service Merchandise Company, Inc. ("Service Merchandise")  
Southern New England Telephone Company ("SNET")  
Southwestern Bell Telephone Company ("SWBT")  
Sprint Corporation ("Sprint")  
Telco Planning, Inc. ("Telco Planning")  
Telecommunications Resellers Association ("TRA")  
Telecompute Corporation ("Telecompute")  
Telemation International, Inc. ("Telemation")  
Telephone Express  
Telco Planning, Inc. ("Telco Planning")  
Time Warner Communications Holdings, Inc. ("TWC")  
TLDP Communications, Inc. ("TLDP")  
United States Telephone Association ("USTA")  
Unitel Communications, Inc. ("UniTel")  
U S West Communications, Inc. ("U S West")  
Vanity International  
World Savings and Loan Association ("World Savings")  
Weather Channel, Inc. ("Weather Channel")  
Wise Telecommunications ("Wise")

List of Reply Commenters

1-800-Flowers  
American Automobile Association ("AAA")  
AirTouch Paging and Arch Communications Group ("AirTouch")  
Ameritech  
AT&T Corporation ("AT&T")  
Austin, John ("John Austin")  
Bass Pro Shops ("Bass Pro")  
BellSouth Telecommunications, Inc. ("BellSouth")  
British Airways Plc ("British Airways")  
Cable & Wireless, Inc. ("CWI")  
Communications Venture Services, Inc. ("CVS")  
Competitive Telecommunications Association ("CompTel")  
Dial 800, L.P. ("Dial 800")  
Eastern Tel Long Distance Service, Inc. ("Eastern Tel")  
Enterprise Rent-A-Car, Inc. ("Enterprise")  
General Communication, Inc. ("GCI")  
General Services Administration ("GSA")  
GTE Service Corporation ("GTE")  
Interactive CallBrand ("CallBrand")  
LDDS WorldCom  
MCI Telecommunications Corporation ("MCI")  
MFS Communications Company ("MFS")  
National Telephone Cooperative Association (NTCA")  
New York Clearing House Association ("NYCHA")  
NYNEX Telephone Companies ("NYNEX")  
Pacific Bell and Nevada Bell ("Pacific")  
Paging Network, Inc. ("PageNet")  
Personal Communications Industry Association ("PCIA")  
Promoline, Inc. ("Promoline")  
Qwest Communications Corporation ("Qwest")  
Scherers Communications Group, Inc. ("Scherers")  
Southwestern Bell Telephone Company ("SWBT")  
Sprint Corporation ("Sprint")  
Telecommunications Resellers Association ("TRA")  
TLDP Communications, Inc. ("TLDP")  
United States Telephone Association ("USTA")  
U S West Communications, Inc. ("US West")  
Vanity International  
Weather Channel, Inc. ("Weather Channel")

**List of Further Commenters**

800 Users Coalition ("Coalition")  
ArtSnob Inc. ("ArtSnob")  
Car Rental Association ("CRA")  
Dame Olcott, Linda ("Linda Dame Olcott")  
Communications Venture Services, Inc. ("CVS")  
Direct Marketing Association ("DMA")  
Enterprise Rent-A-Car, Inc. ("Enterprise")  
ICB, Inc. ("ICB")  
Lerman, Joshua ("Joshua Lerman")  
MCI Telecommunications Corporation ("MCI")  
National Association of Telecommunication End-Users ("NATE")  
New England 800 Company ("New England")  
National Electronics Warranty Corporation ("NEW")  
Palnik, Paul ("Paul Palnik")  
RCN Telecom Services, Inc. ("RCN")  
Sprint Corporation ("Sprint")  
U S West Communications, Inc. ("U S West")  
Vanity International

**List of Further Reply Commenters**

Direct Marketing Association ("DMA")  
ICB, Inc. ("ICB")  
MCI Telecommunications Corporation ("MCI")  
National Association of Telecommunications End-Users ("NATE")  
Sprint Corporation ("Sprint")  
TLDP Communications, Inc. ("TLDP")  
Vanity International

## Appendix D Comments Summary

1. First-Come, First-Served Assignment. Most commenters assert that a first-come, first-served reservation policy is the most equitable way to allocate toll free numbers. For example, Scherers supports a first-come, first-served reservation policy because it is consistent with the method by which non-vanity toll free numbers are allocated.<sup>1</sup> National Electronics Warranty Corporation ("NEW") urges the Commission to employ a first-come, first-served process to allow small and new businesses to enter the market.<sup>2</sup>

2. With respect to the 888 vanity numbers originally set aside, many commenters support releasing these "unavailable" 888 vanity numbers at the end of the 888 assignment pool.<sup>3</sup> Although they agree that an aging process for 888 vanity numbers is necessary to allow 800 subscribers a greater opportunity to engage in public-education efforts, most of these commenters differ on the appropriate time and method for release.<sup>4</sup> Bell Atlantic Telephone Companies ("Bell Atlantic"), however, opposes any delay in assigning 888 numbers because, it argues, that approach will only defer misuse, not prevent it.<sup>5</sup>

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<sup>1</sup> Scherers Communications Group, Inc. ("Scherers") Comments at 15; *see also* BellSouth Telecommunications, Inc. ("BellSouth") Comments at 17-18; ArtSnob, Inc. ("ArtSnob") Comments at 2-4 (Comments filed late).

<sup>2</sup> NEW Comments at 1; *see also* Letter from Joshua Lerman to Bill Caton, Secretary, Federal Communications Commission at 3 (August 13, 1997) ("Lerman Ex Parte Letter") (arguing that all companies deserve the opportunity to obtain the 888 version of an 800 vanity number, otherwise the Commission would not be fulfilling its role of promoting growth, encouraging competition, serving the public interest and protecting consumers).

<sup>3</sup> *See, e.g.*, SouthWestern Bell Telephone Company ("SWBT") Comments at 17-18 (supporting a set-aside procedure); Service Management System/800 Number Administration Committee of the Ordering and Billing Forum ("SNAC") Comments at 13-14; MCI Telecommunications Corporation ("MCI") Comments at 15.

<sup>4</sup> An aging process sets a period of time during which the numbers would remain unavailable in order to minimize misdialing and confusion among the public. *See, e.g.*, Sprint Corporation ("Sprint") Comments at 18-19; NYNEX Telephone Companies ("NYNEX") Comments at 8; BellSouth Comments at 15-16; U S West Communications, Inc. ("U S West") Comments at 20; Telephone Express Comments at 2; The 800 Users Coalition ("Coalition") Comments at 19-20 (supporting holding 888 vanity numbers until the end of the assignment pool in conjunction with a right of first refusal at that time); 1-800-Flowers Comments at 11-12 (maintaining that holding numbers until the end of the 888 assignment pool is not a sufficient substitute for a right of first refusal and should only apply to those numbers that vanity-number holders declined to replicate); Enterprise Rent-A-Car, Inc. ("Enterprise") Supplemental Comments at 3.

<sup>5</sup> Bell Atlantic Comments at 9; *see also* Telecommunications Resellers Association ("TRA") Comments at 19; Bass Pro Shops ("Bass Pro") Comments at 6; Weather Channel, Inc. ("Weather Channel") Comments at 6-7; Service Merchandise Company, Inc. ("Service Merchandise") Comments at 6; Promoline, Inc. ("Promoline") Reply Comments at 6-7; Time Warner Communications Holdings, Inc. ("TWC") Reply Comments at 3.

3. Right of First Refusal. Most commenters oppose a right of first refusal for toll free vanity numbers. Many of these commenters assert that telephone numbers are a finite numbering resource and that a right of first refusal would lead to an accelerated exhaust of toll free numbers.<sup>6</sup> Sprint argues that a right of first refusal would lead to "underutilization" of a scarce resource because some 800 subscribers may want to replicate numbers simply to prevent others from obtaining that number, and not because it will generate more business.<sup>7</sup> Similarly, Paging Network, Inc. ("PageNet") notes that 800 users cannot claim they require additional numbers to expand their business because additional circuits and trunks can be installed to meet increased demand.<sup>8</sup> Furthermore, several commenters contend that a right of first refusal discriminates against new subscribers to toll free services by reducing the chances that they can obtain those corresponding numbers.<sup>9</sup>

4. Some commenters state that a right of first refusal is inconsistent with the concept that holders of telephone numbers do not acquire property rights in those numbers.<sup>10</sup> Scherers argues that a right of first refusal would create a "faulty perception of ownership."<sup>11</sup> USTA maintains that a right of first refusal would encourage the public to ignore essential differences between numbers and urges the Commission to recognize the uniqueness of numbers.<sup>12</sup> NYNEX argues that the Commission's failure to treat each 10-digit number as

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<sup>6</sup> See, e.g., United States Telephone Association ("USTA") Comments at 7; Pacific Bell and Nevada Bell ("Pacific") Comments at 12; Southern New England Telephone Company ("SNET") Comments at 12; U S West Comments at 18-24; UniTel Communications, Inc. ("UniTel") Comments at 3-4; LCI International ("LCI") Comments at 8-9; AirTouch Paging ("AirTouch Paging") Comments at 14; Cable & Wireless, Inc. ("CWI") Comments at 6-7; TRA Comments at 17-18; Qwest Communications Corporation ("Qwest") Comments at 7; Paging Network, Inc. ("PageNet") Comments at 13; and Competitive Telecommunications Association ("CompTel") Reply Comments at 7-9; TLDP Communications, Inc. ("TLDP") Comments at 1-2 (asserting that denying a right of first refusal will not result in number conservation because subscribers will instruct their RespOrgs to reserve equivalent 888 numbers as soon as they become available).

<sup>7</sup> Sprint Comments at 20; see also BellSouth Comments at 15; SNET Comments at 12; and Bell Atlantic Comments at 7-8.

<sup>8</sup> PageNet Comments at 13; see also LCI Comments at 8-9.

<sup>9</sup> Pacific Comments at 10-13; GTE Service Corporation ("GTE") Comments at 9; Joseph Page Comments at 2-6 (extending monopoly of current 800 holders); SWBT Comments at 17 (numbers may be used to spell a different word); Scherers Comments at 15; Telephone Express Comments at 2.

<sup>10</sup> USTA Comments at 4-6; Bell Atlantic Comments at 7-8; LCI Comments at 8-9; Scherers Comments at 15; CompTel Comments at 12-14. But see Vanity International Further Ex Parte Comments at 3 and National Association of Telecommunication End-Users ("NATE") Further Comments and Reply at 1 (Comments filed late).

<sup>11</sup> Scherers Comments at 15.

<sup>12</sup> USTA Comments at 4-6, 8. See, e.g., NYNEX Comments at 7-8.

distinct and separate from every other 10-digit number would increase consumer confusion.<sup>13</sup> Similarly, U S West asserts that a right of first refusal is likely to cause greater consumer confusion and increased misdials because to the extent that vanity-number holders exercise their option to obtain the corresponding number in subsequent toll free codes, consumers may treat all 800 and 888 numbers as interchangeable.<sup>14</sup> BellSouth also opposes a right of first refusal and argues that consumer confusion caused by the existence of multiple toll free codes should be minimized through public education and advertising campaigns.<sup>15</sup>

5. Several commenters support a right of first refusal.<sup>16</sup> Certain commenters assert that a right of first refusal would minimize confusion and avoid misdialing by the public.<sup>17</sup> Another group of commenters argues that a right of first refusal would allow current 800 holders to protect their investment in their 800 numbers.<sup>18</sup> ICB, Inc. ("ICB") and New England claim that, because subscribers have a property interest in numbers, they should be permitted to exercise a right of first refusal.<sup>19</sup> MCI argues that 800 subscribers should have a

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<sup>13</sup> NYNEX Comments at 7-8; *see also* U S West Further Comments at 3.

<sup>14</sup> U S West Comments at 18-24; *see also* Telephone Express Comments at 2.

<sup>15</sup> BellSouth Comments at 15; *See also* Bell Atlantic Comments at 8 (arguing that customer confusion will subside as additional toll free codes open).

<sup>16</sup> *See, e.g.*, Telco Planning, Inc. ("Telco Planning") Comments at 5; Coalition Comments at 14-15; Bass Pro Comments at 3 n.4; Enterprise Comments at 1; Weather Channel Comments at 3 n.3; British Airways Plc ("British Airways") Reply Comments at 2; New York Clearing House Association ("NYCHA") Reply Comments at 5; New England 800 Company ("New England") Comments at 2; Paul Palnik Comments at 1; Cable & Wireless, Inc. ("CWI") Reply Comments at 2.

<sup>17</sup> AT&T Corporation ("AT&T") Comments at 24-26; Avis Rent A Car System, Inc. ("Avis") Comments at 7; Americas Carrier Telecommunications Association ("ACTA") Comments at 18; Weather Channel Comments at 2-3; INVESCO Funds Group, Inc. ("IFG") Comments at 1-2; American Petroleum Institute ("API") Comments at 3-5. Crestar Bank ("Crestar") Comments at 1-2; Promoline Comments at 6-8; Bass Pro Comments at 2-3; Coalition Comments at 18-19; TLDP Reply Comments at 7; American Car Rental Association ("ACRA") Supplemental Comments at 3; and Coalition Supplemental Comments at 4-10 (arguing that despite extensive public education efforts over the past year, misdialing continues).

<sup>18</sup> Coalition Comments at 6; MCI Comments at 15; Direct Marketing Association ("DMA") Comments at 10-11; Nissan Rosenthal ("Nissan") Comments at 1; American Telegram Corporation ("ATC") Comments at 3 (supporting a 90-day window to exercise the option and recommending that the Commission establish separate guidelines for vanity numbers); Vanity International Reply Comments at 1; ICB Further Comments at 6 (supporting replication as an interim measure and claiming that the Commission must correct its conclusions regarding property rights in telephone numbers).

<sup>19</sup> ICB Further Comments at 2 (arguing that number portability implies private interest in numbers because it recognizes that toll free subscribers have a legally protected right to maintain their toll free numbers); New England Comments at 2 (asking the Commission to recognize that telephone numbers are private property of subscribers and not in the public domain).

right of first refusal in all toll free codes to be able to protect its investment.<sup>20</sup> 1-800-Flowers asserts that businesses must be able to protect themselves against unfair competition.<sup>21</sup> It maintains that a right of first refusal is the least regulatory, litigious, and burdensome way for businesses to protect themselves.<sup>22</sup>

6. Weather Channel states that denying a right of first refusal would allow competitors to benefit from the reputation and goodwill of the 800 holder.<sup>23</sup> Similarly, Coalition asserts that a right of first refusal would enable subscribers to protect themselves from infringement and unfair business practices.<sup>24</sup> General Services Administration ("GSA") supports a right of first refusal because some 800 numbers procured by GSA effectively perform a public service by virtue of their ease of recognition and should be made available pursuant to a right of first refusal.<sup>25</sup> Although Sprint and U S West generally oppose a right of first refusal, they state they could support it only for 888 numbers because, given the length of time 888 vanity numbers have been unavailable, subscribers may believe that they have acquired some right to replicate their number in the 888 code.<sup>26</sup>

7. Some commenters offer variations on a limited right of first refusal.<sup>27</sup> TWC and IFG recommend requiring a subscriber to establish a need for the second number before

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<sup>20</sup> MCI-Comments at 15 and Reply Comments at 1-2.

<sup>21</sup> 1-800-Flowers Comments at 1-11; *see also* TLDP Comments at 1-2.

<sup>22</sup> 1-800-Flowers Comments at 1-11.

<sup>23</sup> Weather Channel Comments at 2-3; *see also* Crestar Comments at 1-2; Bass Pro Comments at 2-3; DMA Supplemental Comments at 2.

<sup>24</sup> Coalition Supplemental Comments at 12-13 (*citing Holiday Inns, Inc. v. 800 Reservation, Inc.*, 86 F.3d 619, 625 (6th Cir. 1996) ("*Holiday Inns*"). In *Holiday Inns*, the Court of Appeals held that, despite ownership of trademark rights in a vanity number, the trademark holder cannot claim rights in complementary numbers. The Court, in dicta, noted that "*Holiday Inns* neglected to take the simple precaution of reserving its complementary number-- a practice which many of its competitors have chosen to take." Complementary numbers are those numbers that are frequently misdialed when a customer dials a vanity number. For example, "1-800-H[0]L[1]DAY is a complementary number to "1-800-HOLIDAY" because customers frequently substitute the number zero for the letter "O" and the number one for the letter "I."

<sup>25</sup> GSA Comments at 2-3; *see also* Charter Medical Corporation ("*Charter*") Comments at 1-2.

<sup>26</sup> Sprint Comments at 2; U S West Further Comments at 4; *see also* LDDS WorldCom Comments at 14-15.

<sup>27</sup> *See, e.g.*, TRA Comments at 17-18; MCI Further Comments at 7 (endorsing a rule that provides right of first refusal only to current holders of 800 numbers, not the subscribers holding numbers at the time the numbers were set aside); RCN Telecom Service, Inc. ("*RCN*") Further Comments at 3 (the right of first refusal should belong to the current holder of the 800 vanity numbers rather than the holder at the time the number was set aside).

exercising its right of first refusal.<sup>28</sup> 1-800-Flowers asserts that the subscriber should be required to use the number that it obtains by exercising a right of first refusal.<sup>29</sup> Direct Marketing Association ("DMA") supports a two-part approach: (1) all 800 vanity-number holders should be given the right to reserve the equivalent 888 number; and (2) these holders should be allowed to release the 888 number on the condition that an associated acronym not be used.<sup>30</sup> Qwest opposes an unrestricted right of first refusal but supports the following three-part approach: (1) customers that trademarked their numbers could automatically receive the corresponding 888 number; (2) current 800 holders could elect, at their option, to install a transitional gateway intercept; and (3) for a limited period of time, the remaining 800 vanity-number holders could exercise a right of first refusal for a fee.<sup>31</sup> Although CompTel opposes a right of first refusal, it suggests that, if the Commission adopts this policy, it should expire after a brief interval (e.g., 45 days).<sup>32</sup> Ameritech proposes allowing RespOrgs to reserve up to 10 percent of their toll free numbers as vanity numbers with a right of first refusal.<sup>33</sup> Similarly, Network Telephone Service, Inc. ("NTS") supports a right of first refusal provided that each RespOrg is granted the same percentage of their current base in conjunction with a circuit breaker built into the database system, which would prevent the RespOrg from reserving a vanity number once it reaches its cap.<sup>34</sup>

8. Fees for Exercising a Right of First Refusal. Most commenters support imposing a fee for exercising a right of first refusal for vanity numbers.<sup>35</sup> DMA suggests a fee-based use-or-lose rule under which, by failing to exercise its right of first refusal, the 800

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<sup>28</sup> TWC Comments at 7-8; IFG Comments at 1-2.

<sup>29</sup> 1-800-Flowers Comments at 10-11; *see also* Aeronautical Radio, Inc. ("ARINC") Comments at 4-5; Service Merchandise Comments at 1-3 (supporting right of first refusal to 800 holders who meet a certain threshold of use to qualify as "significant users"); American Petroleum Institute ("API") Comments at 3-5.

<sup>30</sup> DMA Comments at 12-17; *see also* NIMA, International ("NIMA") Comments at 7-9.

<sup>31</sup> Qwest Comments at 7-8; *see also* John Austin Reply Comments at 1-3; Communications Venture Services, Inc. ("CVS") Comments at 1-2 (opposing a right of first refusal but supporting replication rights only for trade names protectible by trademark laws).

<sup>32</sup> CompTel Comments at 12-14.

<sup>33</sup> Ameritech Reply Comments at 5-8.

<sup>34</sup> NTS Comments at 2 (circuit breaker would act as a trigger to prevent number reservation when the percentage of toll-free numbers unassigned fell to a certain level); *see also* Vanity International Reply Comments at 4 (suggesting creation of a distinctive domain for pagers, personal, and other major uses); ICB Further Comments at 9-10 and Reply Comments (Reply Comment filed late) at 5 (suggesting that the Commission look to the Internet domain assignment system as a model for a toll free number allocation system, categorize toll free number uses, consider using PIN numbers, and use grandfathering).

<sup>35</sup> *See, e.g.*, Dial 800, L.P. ("Dial 800") Reply Comments at 4; Bass Pro Reply Comments at 7; LDDS Worldcom Reply Comments at 8; NATE Informal Objection and Complaint at 2 (Complaint and Objection was filed late); 1-800-Flowers Comments at 10-11.

subscriber would waive its right with respect to numbers in any codes subsequently opened.<sup>36</sup> LDDS Worldcom supports a one-time fee of \$1,000 and a recurring fee of at least \$200 per month for every 888 vanity number for which an 800 number holder exercised its right of first refusal.<sup>37</sup> Americas Carrier Telecommunications Association ("ACTA") supports a non-recurring charge based on a sliding scale corresponding to the assets and income of the end user, with a minimum charge of \$1,000 per number.<sup>38</sup> 1-800-Flowers supports a one-time fee based on usage, under which the fee would be reduced as the call volume increased.<sup>39</sup> Nissan supports a small one-time fee and a nominal monthly fee to maintain service under replicated codes.<sup>40</sup> Several commenters, while opposing a right of first refusal, assert that a fee should be imposed if a right of first approval is adopted.<sup>41</sup> GSA supports a monthly recurring rate and a nominal fee for 800 subscribers that merely wish to block another's use.<sup>42</sup>

9. Several commenters oppose a fee-based right of first refusal.<sup>43</sup> AT&T argues that a fee would simply reward the party willing to pay most for the number.<sup>44</sup> Avis asserts that it would be inequitable to require payment for the logical extension of an 800 holder's investment.<sup>45</sup>

10. In response to the Commission's questions regarding the disposition of the money resulting from a fee-based right of first refusal, commenters provide a variety of suggestions. LDDS Worldcom suggests that the money be given to a neutral administrator

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<sup>36</sup> DMA Supplemental Comments at 1-4.

<sup>37</sup> LDDS Worldcom Comments at 14; *see also* Promoline Comments at 7-8 (supporting a one-time fee of \$5,000); Bass Pro Comments at 3; Weather Channel Comments at 3 (supporting a one-time fee of \$10,000).

<sup>38</sup> ACTA Comments at 18.

<sup>39</sup> 1-800-Flowers Comments at 10-11; *see also* Enterprise Comments at 4-5 (supporting an annual fee to maintain reservation of an equivalent number only when subscriber failed to meet a minimum use requirement); ACRA Comments at 6-7; Coalition Comments at 20-21 (generally opposing a fee but supporting a use-based fee if the Commission adopts a fee-based right of first refusal).

<sup>40</sup> Nissan Comments at 1.

<sup>41</sup> GTE Comments at 10 (supporting a significant fee for exercising the right); Scherers Comments at 15-16; CompTel Comments at 13-14; TRA Comments at 18 (supporting fee imposed every time a potential subscriber is blocked from reserving the preempted number in order to reflect the true value of the number for the potential subscribers).

<sup>42</sup> GSA Comments at 3.

<sup>43</sup> *See, e.g.*, NYCHA Reply Comments at 1-3; TLDP Reply Comments at 8; Vanity International Reply Comments at 3.

<sup>44</sup> AT&T Comments at 27.

<sup>45</sup> Avis Comments at 7-8.

and used for ongoing consumer education campaigns or SMS database service enhancements.<sup>46</sup> Similarly, TRA suggests that the money be used to defray the cost of administering the SMS.<sup>47</sup> Scherers supports using the money for early implementation of new toll free codes.<sup>48</sup>

11. International Law. With regard to whether a right of first refusal would be consistent with international law, DMA argues that it is unnecessary to consider the impact of a right of first refusal on foreign laws because the overwhelming majority of 800 calls are made within the United States to entities within the United States.<sup>49</sup> SWBT questions "how vanity numbers arising from NXX codes used in the Caribbean countries would be protected in 888."<sup>50</sup>

12. Trademark Law. Most commenters assert that trademark and unfair competition laws will adequately protect the investment current holders of 800 numbers have made in their 800 numbers.<sup>51</sup> GTE argues that a subscriber harmed by the holder of the corresponding number in a different code can seek relief from the courts.<sup>52</sup> Similarly, Allnet Communications Service, Inc. ("Allnet") maintains that existing unfair trade and intellectual property laws provide the necessary protections and that, therefore, the "Commission does not need to delve into this arena."<sup>53</sup>

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<sup>46</sup> LDDS Worldcom Comments at 14; *see also* Promoline Comments at 8 n.17; Bass Pro Comments at 3 n.5; Weather Channel Comments at 3 n.4; Enterprise Comments at 5 (fees should go into an escrow account from which fees can be refunded to exempt subscribers); ACRA Comments at 7 (suggesting using money to fund NANPA).

<sup>47</sup> TRA Comments at 18; *see also* Enterprise Comments at 5 (suggesting that fees be used to fund the administration of the SMS database).

<sup>48</sup> Scherers Comments at 1.

<sup>49</sup> DMA Comments at 12 n.3.

<sup>50</sup> SWBT Comments at 17.

<sup>51</sup> *See, e.g.*, Sprint Comments at 21-22 n.11; BellSouth Comments at 16-17; SNET Comments at 6; Bell Atlantic Comments at 7; AirTouch Paging ("AirTouch") Comments at 14-15; PageNet Comments at 14-15; CompTel Comments at 13; LCI Comments at 8; USTA Reply Comments at 4.

<sup>52</sup> GTE Comments at 9-10 n.15.

<sup>53</sup> Allnet Comments at 9; Joseph DeFabio Comments at 1 (asserting that the Commission should not attempt to preempt trademark law).

13. Other commenters disagree, stating that trademarks or service marks do not adequately protect the investment current 800 holders have made in their 800 numbers.<sup>54</sup> AT&T maintains that not all vanity-number customers are eligible for trademark or service-mark registration.<sup>55</sup> DMA asserts that the Commission must consider trademark protections, but must also harmonize number allocation rules with principles of trademark and unfair competition.<sup>56</sup> Others argue that, regardless of whether trademark law adequately protects 800 subscribers, the Commission does not have the authority to draft new trademark law or inject itself into the field of trademark law.<sup>57</sup>

14. SIC Codes. Most commenters generally oppose the use of SIC codes to protect incumbent toll free subscribers' financial interests in their toll free vanity numbers. They argue that implementing such a system would be administratively burdensome.<sup>58</sup> Additionally, commenters cite the difficulties involved with identifying the proper classifications for conglomerates.<sup>59</sup> SWBT states that implementation of the SIC code proposal would be "an administrative and legal nightmare" for the database administrator.<sup>60</sup> U S West asserts that the addition of a company's SIC code to the SMS record is inappropriate because such information has been considered proprietary.<sup>61</sup> AT&T maintains that such a system would be difficult to monitor and subject to abuse by current vanity-number holders possessing an incentive to claim multiple classifications in order to preempt anyone else from obtaining an 888 number they want to protect.<sup>62</sup> Similarly, MCI asserts that self-assignment invites

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<sup>54</sup> U S West Comments at 21-22; 1-800-Flowers Comments at 14-15; Coalition Comments at 21-22; AT&T Comments at 26; Enterprise Reply Comments at 1; NYCHA Reply Comments at 11; Promoline Reply Comments at 7; TWC Reply Comments at 1-3; British Airways Reply Comments at 3-5; Bass Pro Reply Comments at 2; Paul Palnik Comments at 2.

<sup>55</sup> AT&T Comments at 26; Service Merchandise Comments at 6; 1-800-Flowers Comments at 14-15; Bass Pro Comments at 8 n.15 & n.16; Weather Channel Comments at 8-9; Coalition Comments at 21-22.

<sup>56</sup> DMA Comments at 11-14.

<sup>57</sup> See generally Lisa Dame Olcott, *Confusingly Dissimilar Applications of Trademark Law to Vanity Telephone Numbers*, Catholic University of America Law Review, at 143 (This article was filed by the author as Informal Comments). But see New England Comments at 2 (suggesting that the Commission act as the courts with respect to trademark law).

<sup>58</sup> See, e.g., Sprint Comments at 21; LDDS Worldcom Comments at 15; TWC Comments at 8; Enterprise Supplemental Comments at 3.

<sup>59</sup> See, e.g., MCI Comments at 15; CWI Comments at 3; Ameritech Comments at 32; GTE Comments at n.17; Service Merchandise Comments at 6; CompTel Comments at 13 n.17; ACRA Comments at 8.

<sup>60</sup> SWBT Comments at 18; see also API Comments at 5; NYNEX Comments at 8.

<sup>61</sup> U S West Comments at 24-25.

<sup>62</sup> AT&T Comments at 27 n. 54; see also MFS Communications Company, Inc. ("MFS") Comments at 10; Telecompute Comments at 3; DMA Comments at 14 n.5.

misrepresentation.<sup>63</sup> Bell Atlantic, citing the Department of Commerce, opposes the proposal because not all businesses have SIC Codes, especially service businesses.<sup>64</sup> The Office of Management and Budget ("OMB") notes that use of SIC codes may result in legal action if questions arise as to the applicability of the SIC code to a particular firm and questions who would adjudicate complaints about a company's "classification."<sup>65</sup> OMB suggests that the Commission consider the use of a dispute resolution service to resolve issues related to "800" and "888" number overlap.<sup>66</sup>

15. Others argue that SIC codes are not designed to identify competitors and would not provide the protection the proposal is intended to give.<sup>67</sup> Coalition notes that problems associated with the assignment of SIC codes are magnified by a dynamic economy because the codes cannot keep pace with the market.<sup>68</sup> Coalition illustrates the unreliability of SIC codes for identifying competitors by noting that UPS is defined as a trucking company while Federal Express is defined as an airline.<sup>69</sup> Pacific notes that the proposal places RespOrgs in the position of prohibiting one customer from obtaining a number used by another customer and ultimately hurts their business relationship with their customers.<sup>70</sup> U S West maintains that modifying the database to perform this function would require significant programming.<sup>71</sup> Other commenters note that using SIC codes to limit assignments would not reduce misdialing and would lead to subscriber confusion and frustration.<sup>72</sup>

16. Avis supports the SIC code proposal because it provides some measure of protection against competitors trafficking in toll free numbers.<sup>73</sup> Avis notes that, if the proposal is adopted, it may be necessary to ensure that a company's subsidiaries are assigned

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<sup>63</sup> MCI Further Comments at 6.

<sup>64</sup> Bell Atlantic Comments at 8-9 (*citing* Department of Commerce, 1994 U.S. Industrial Outlook, at 1).

<sup>65</sup> OMB Comments at 4.

<sup>66</sup> *Id.*

<sup>67</sup> *See, e.g.*, NIMA Comments at 8-9.

<sup>68</sup> Coalition Comments at 23.

<sup>69</sup> Coalition Comments at 22-23; *see also* Bass Pro Comments at 5 and Weather Channel Comments at 5-6 (giving examples of potential competitors who do not have the same SIC code).

<sup>70</sup> Pacific Comments at 13.

<sup>71</sup> U S West Further Comments at 4.

<sup>72</sup> *See, e.g.*, 1-800-Flowers Reply Comments at 7; British Airways Reply Comments at 5.

<sup>73</sup> Avis Comments at 5-6.