

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).<sup>527</sup> The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1,500 employees.<sup>528</sup> We first discuss generally the total number of small telephone companies falling within both of those SIC categories. Then, we discuss the number of small businesses within the two subcategories, and attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

181. Although affected ILECs may have no more than 1,500 employees, we do not believe that such entities should be considered small entities within the meaning of the RFA because they either are dominant in their field of operations or are not independently owned and operated, and are therefore by definition not "small entities" or "small business concerns" under the RFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small ILECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately consider small ILECs within this analysis and use the term "small ILECs" to refer to any ILECs that arguably might be defined by SBA as "small business concerns."<sup>529</sup>

182. *Total Number of Telephone Companies Affected.* 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>530</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 because they are not "independently owned and operated."<sup>531</sup> For example, a PCS provider that is affiliated with an interexchange carrier having more than

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establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

527 Small Business Act, 15 U.S.C. § 632 (1996).

528 13 C.F.R. § 121.201.

529 13 C.F.R. § 121.210 (SIC 4813).

530 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*).

531 15 U.S.C. § 632(a)(1).

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 either small entities or small incumbent LECs that may be affected by this order.

183. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports there were 2,321 such telephone companies in operation for at least one year at the end of 1992.<sup>532</sup> According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons.<sup>533</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 incumbent LECs. 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 wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 2,295 small entity telephone communications companies other than radiotelephone companies are small entities or small ILECs that may be affected by this order.

184. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a definition of small providers of local exchange services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).<sup>534</sup> According to our most recent data, 1,371 companies reported that they were engaged in the provision of local exchange services.<sup>535</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, or are dominant we 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 small providers of local exchange service are small entities or small ILECs that may be affected by this order.

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532 1992 Census.

533 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

534 Federal Communications Commission, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Figure 2 (*Number of Carriers Paying into the TRS Fund by Type of Carrier*) (Nov. 1997).

535 *Id.*

185. *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's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 143 companies reported that they were engaged in the provision of interexchange services.<sup>536</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we 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 this order.

186. *Competitive Access Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 109 companies reported that they were engaged in the provision of competitive access services.<sup>537</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we 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 this order.

187. *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's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 27 companies reported that they were engaged in the provision of operator services.<sup>538</sup> Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that

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536 *Id.*

537 *Id.*

538 *Id.*

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 this order.

188. *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 the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of pay telephone operators nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 441 companies reported that they were engaged in the provision of pay telephone services.<sup>539</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we 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 this order.

189. *Wireless Carriers.* The 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>540</sup> According to the SBA's definition, a small business radiotelephone company is one employing no more than 1,500 persons.<sup>541</sup> The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer 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 the SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by this order.

190. *Cellular Service Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of cellular service carriers nationwide of which we are

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539 *Id.*

540 *1992 Census.*

541 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 804 companies reported that they were engaged in the provision of cellular services.<sup>542</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we 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 entity cellular service carriers that may be affected by this order.

191. *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. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 172 companies reported that they were engaged in the provision of mobile services.<sup>543</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under the SBA's definition. Consequently, we estimate that there are fewer than 172 small entity mobile service carriers that may be affected by this order.

192. *Broadband PCS Licensees.* 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 has defined small entity in the auctions 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>544</sup> 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 revenue of not more than \$15 million for the preceding three calendar years.<sup>545</sup> These regulations defining small entity in the context of broadband PCS auctions have been approved by the SBA. No small business 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 businesses won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. However, licenses for Blocks C through F have not been

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542 *Id.* This category includes PCS carriers.

543 *Id.*

544 *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, 11 FCC Rcd 7824 (1996).

545 *Id.*

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 bidders and the 93 qualifying bidders in the D, E, and F Blocks, for a total of 183 small PCS providers as defined by the SBA and the Commission's auction rules.

193. *Narrowband PCS Licensees.* The Commission does not know how many narrowband PCS licenses will be granted or auctioned, as it has not yet determined the size or number of such licenses. Two auctions of narrowband PCS licenses have been conducted for a total of 41 licenses, out of which 11 were obtained by small businesses owned by members of minority groups and/or women. Small businesses were defined as those with average gross revenues for the prior three fiscal years of \$40 million or less.<sup>546</sup> For purposes of this FRFA, the Commission is utilizing the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.<sup>547</sup> Not all of the narrowband PCS licenses have yet been awarded. There is therefore no basis to determine the number of licenses that will be awarded to small entities in future auctions. Given the facts that nearly all radiotelephone companies have fewer than 1,000 or fewer employees<sup>548</sup> and that no reliable estimate of the number of prospective narrowband PCS licensees can be made, we assume, for purposes of the evaluations and conclusions in this FRFA, that all the remaining narrowband PCS licenses will be awarded to small entities.

194. *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 SMR has been approved by the SBA.<sup>549</sup> The rules adopted in this order may apply to SMR

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546 *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, and Amendment of the Commission's Rules to Establish New Narrowband PCS*, GEN Docket No. 90-314, Third Memorandum Opinion and Order and Further Notice, 10 FCC Rcd 175, 208 (1994).

547 13 C.F.R. § 121.201, Standard Industrial Classification Code 4812.

548 The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. U.S. Bureau of the Census, U.S. Department of Commerce, *1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size*, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

549 *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*, PR Docket No. 89-583, 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*, PR Docket No. 93-144, First Report and Order, Eighth Report and Order,

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 of less 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 this order.

195. 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 rule adopted in this order includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Thus, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. The Commission, however, has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. Moreover, there is no basis on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this FRFA, that all of the licenses may be awarded to small entities who, thus, may be affected by this order.

196. *Resellers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under the SBA's rules is for all telephone communications companies. The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 339 companies reported that they were engaged in the resale of telephone services.<sup>550</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we 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 this order.

#### **IV. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.**

197. We recognize, in light of the new evidence presented to the Commission, that

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and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

550 *Id.*

the flagging and audit trail requirements promulgated in the *CPNI Order* might have a disparate impact on rural and small carriers. We have amended the flagging and audit trail requirements, and as more fully discussed in Section V, the amended rules leave it to the carrier's discretion to determine what sort of system is best for their circumstances. Thus, carriers whose records are not presently maintained in electronic form are not required to implement electronic systems if they do not wish to do so. We believe this modification of our rules will significantly minimize any adverse economic impact on small entities that our original rules may have had.

## V. Report to Congress

198. The Commission shall send a copy of this Supplemental Final Regulatory Flexibility Analysis, along with this Order on Reconsideration, in a report to Congress pursuant to the Small business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this SFRFA will also be published in the Federal Register.

## B. SUPPLEMENTAL FINAL PAPERWORK REDUCTION ANALYSIS

199. The *CPNI Order* from which this Order on Reconsideration issues proposed changes to the Commission's information collection requirements.<sup>551</sup> As required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13,<sup>552</sup> the *CPNI Order* invited the general public and the Office of Management and Budget (OMB) to comment on the proposed changes.<sup>553</sup> On June 23, 1998, OMB approved all of the proposed changes to our information collection requirements in accordance with the PRA.<sup>554</sup>

200. This Order on Reconsideration amends our rules to merely state that telecommunications carriers must implement a system by which the status of a customer's CPNI approval can be clearly established prior to the use of CPNI, and must maintain an audit mechanism that tracks CPNI usage. We have removed the requirements of sections 64.2009(a) and (c) that carriers must develop and implement software that flags a customer's CPNI approval status and must maintain an electronic audit mechanism that tracks access to customer accounts. These amendments are new collections of information within the meaning of the PRA.<sup>555</sup> Implementation of these requirements is subject to approval by the OMB, as

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551 *CPNI Order*, 13 FCC Rcd at 8193-200, ¶¶ 190-202.

552 44 U.S.C. §§ 3501 *et seq.*

553 *CPNI Order*, 13 FCC Rcd at 8215-16, ¶ 239-242.

554 *Notice of Office of Management and Budget Action*, OMB No. 3060-0715 (June 23, 1998).

555 44 U.S.C. §§ 3501-3520.

prescribed by the PRA.

## **XI. ORDERING CLAUSES**

201. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 10, 222 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 160, 222 and 303(r), the ORDER is hereby ADOPTED. The requirements in this Order shall become effective 30 days after publication of a summary thereof in the Federal Register.

202. IT IS FURTHER ORDERED that, pursuant to sections 1, 4(i) and 222 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and 222, the Petitions for Reconsideration, as listed in Appendix A hereto, ARE GRANTED to the extent indicated herein and otherwise DENIED.

203. IT IS FURTHER ORDERED that, pursuant to sections 1, 4(i), 10 and 222 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 160 and 222, the Petitions for Forbearance, as listed in Appendix A hereto, ARE DENIED.

204. IT IS FURTHER ORDERED that section 64.2005(b)(3) of Part 64 of the Commission's rules, 47 C.F.R. § 64.2005(b)(3), is REMOVED as set forth in Appendix B hereto.

205. IT IS FURTHER ORDERED that section 64.2007(f)(4) of Part 64 of the Commission's rules, 47 C.F.R. § 64.2007(f)(4), is REMOVED as set forth in Appendix B hereto.

206. IT IS FURTHER ORDERED, pursuant to sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), that we shall not seek enforcement against carriers regarding compliance with sections 64.2009(a) and (c) of Part 64 of the Commission's rules, 47 C.F.R. §§ 64.2009(a) and (c), as amended herein, until eight months after the release of this Order.

207. IT IS FURTHER ORDERED that Part 64 of the Commission's rules, 47 C.F.R. § 64, is AMENDED as set forth in Appendix B hereto, effective 30 days after publication of the text thereof in the Federal register, unless a notice is published in the Federal Register stating otherwise. The information collections contained within become effective 70 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

208. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Order, including the Final

Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary

**APPENDIX A****Petitions for Reconsideration  
Filed May 26, 1998**

ALLTEL Communications, Inc. (ALLTEL)  
AT&T Corp.  
BellSouth Corporation  
Comcast Cellular Communications, Inc.  
Competitive Telecommunications Association (CompTel)  
Independent Alliance (Alliance)  
LCI International Telecom Corp.  
MCI Telecommunications Corporation  
Metrocall, Inc. (Metrocall)  
Omnipoint Communications, Inc.  
Paging Network, Inc. (PageNet)  
Personal Communications Industry Association (PCIA)  
RAM Technologies, Inc. (RAM)  
SBC Communications Inc.  
Sprint Corporation  
TDS Telecommunications Corporation  
United States Telephone Association (USTA)  
Vanguard Cellular Systems, Inc. (Vanguard)

**Petitions for Forbearance**

Personal Communications Industry Association (PCIA)

**Petitions for Reconsideration/Forbearance**

360° Communications Company  
Ameritech  
Bell Atlantic Telephone Companies (Bell Atlantic)  
Cellular Telecommunications Industry Association  
CommNet Cellular Inc.  
GTE Service Corporation (GTE)  
National Telephone Cooperative Association (NTCA)  
Paging Network, Inc.  
PrimeCo Personal Communications, L.P.

United States Telephone Association

## Comments

AirTouch Communications, Inc. (AirTouch)  
Allegiance Telecom, Inc. (Allegiance)  
ALLTEL Communications, Inc. (ALLTEL)  
Ameritech  
Arch Communications, Inc. (Arch)  
Association for Local Telecommunications Services (ALTS)  
AT&T Corp.  
Bell Atlantic Telephone Companies  
Bell Atlantic Mobile, Inc.  
BellSouth Corporation  
Cable & Wireless, Inc. (CWI)  
Celpage, Inc.  
Commonwealth Telecom Services, Inc. (Commonwealth)  
e.spire Communications, Inc. (e.spire)  
Focal Communications Corp.  
Frontier Corporation (Frontier)  
GTE Service Corporation  
Intermedia Communications Inc. (Intermedia)  
KMC Telecom, Inc.  
MCI Telecommunications Corporation  
National Telephone Cooperative Association  
Public Utility Commission of Texas (PUCT)  
Rural Cellular Association  
SBC Communications Inc.  
Sprint Corporation  
Telecommunications Resellers Association (TRA)  
U S West, Inc.  
WorldCom, Inc.

## Reply Comments

Ameritech  
AT&T Corp.  
Bell Atlantic Telephone Companies  
BellSouth Corporation  
Celpage, Inc.  
Century Telephone Enterprises, Inc.  
Competitive Telecommunications Association (CompTel)  
Comcast Cellular Communications, Inc.  
GTE Service Corporation

Independent Alliance  
LCI International Telecom Corp. (LCI)  
MCI Telecommunications Corporation  
National Telephone Cooperative Association  
Omnipoint Communications, Inc.  
Personal Communications Industry Association  
PrimeCo Personal Communications, L.P  
RAM Technologies, Inc. (RAM)  
Rural Cellular Association (RCA)  
SBC Communications, Inc.  
Sprint Corporation  
Time Warner Telecom Inc.  
Vanguard Cellular Systems, Inc.

**APPENDIX B FINAL RULES**

For the reasons set out in the preamble, 47 C.F.R. Part 64 is amended as follows:

**PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS**

1. The authority citation for part 64 continues to read as follows: 47 U.S.C. 10, 201, 218, 226, 228, 332, unless otherwise noted.

2. § 64.2005(b)(1) is amended to read as follows:

(1) A wireless provider may use, disclose, or permit access to CPNI derived from its provision of CMRS, without customer approval, for the provision of CPE and information service(s). A wireline carrier may use, disclose or permit access to CPNI derived from its provision of local exchange service or interexchange service, without customer approval, for the provision of CPE and call answering, voice mail or messaging, voice storage and retrieval services, fax store and forward, and protocol conversions.

3. In § 64.2005 remove paragraph (b)(3).

4. In § 64.2005, add paragraph (d) to read as follows:

(d) A telecommunications carrier may use, disclose, or permit access to CPNI to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services.

5. In § 64.2007 remove paragraph (f)(4).

6. Paragraphs (a), (c) and (e) of § 64.2009 are amended to read as follows:

(a) Telecommunications carriers must implement a system by which the status of a customer's CPNI approval can be clearly established prior to the use of CPNI.

\* \* \*

(c) All carriers shall maintain a record, electronically or in some other manner, of their sales and marketing campaigns that use CPNI. The record must include a description of each campaign, the specific CPNI that was used in the campaign, the date and purpose of the campaign, and what products or services were offered as part of the campaign. Carriers shall retain the record for a minimum of one year.

\* \* \*

(e) A telecommunications carrier must have an officer, as an agent of the carrier, sign

a compliance certificate on an annual basis stating that the officer has personal knowledge that the company has established operating procedures that are adequate to ensure compliance with the rules in this subpart. The carrier must provide a statement accompanying the certificate explaining how its operating procedures ensure that it is or is not in compliance with the rules in this subpart.

**Statement of Commissioner Harold W. Furchtgott-Roth  
Concurring in Part**

Re: *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Information; Implementation of the Non-Accounting Safeguards Of Section 271 and 272 of the Communications Act of 1934, As Amended. CC Docket Nos. 96-45 and 96-149.*

I support today's Order to the extent that it provides the relief requested by the petitioners. I question, however, the approach that the Commission has taken with respect to certain of the forbearance petitions. While I concur in the result reached in today's Order, I would have preferred reaching it through action taken on these petitions.

I am troubled that the Commission has decided to provide regulatory relief through reconsideration and then use that proceeding as part of the justification for denying full regulatory forbearance as requested. The Commission has determined that the simplest method of dealing with these petitions is to deny the forbearance relief at issue while at the same time providing relief in a separate proceeding. In particular, I am troubled by the approach that the Commission has taken with respect to carriers' use of customer proprietary network information (CPNI) to market customer premises equipment (CPE) and information services. In this respect, I agree with the well-reasoned statement of my colleague, Commissioner Tristani, to the extent that she believes that the Commission's reading of section 222(c)(1)(B) of the Act is "contrary to the plain language of what the Commission previously found to be a 'clear and ambiguous' provision."<sup>1</sup> I only differ from Commissioner Tristani in that I would have reached the same conclusion as the Commission by granting the forbearance petitions on this issue.<sup>2</sup> I do not understand why the Commission chooses to reach this outcome through a strained interpretation of the statute when the same relief is warranted, and more justifiable, through the forbearance mechanism.

Finally, I write to repeat my position that it is the Commission that may, by the express terms of the statute, extend the initial one-year period for acting on a petition for

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<sup>1</sup> See Separate Statement of Commissioner Gloria Tristani, Dissenting in Part, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Information; Implementation of the Non-Accounting Safeguards Of Section 271 and 272 of the Communications Act of 1934, As Amended, CC Docket Nos. 96-45 and 96-149. I incorporate by reference Commissioner Tristani's persuasive position on the issue of the Commission's statutory interpretation of this section.

<sup>2</sup> In fact, I would have gone farther than the Commission in this respect. I would have supported forbearance from the statute for purposes of marketing Internet access services as well. The market for these services is competitive, and I am not convinced that the section 10 criteria are not satisfied with respect to these services.

forbearance by an additional 90 days if it finds that an extension is necessary to meet the requirements of section 10. I regret that, in the present matter, it was the Bureau and not the Commission that issued the order extending the deadline. Contrary to previous occasions, however, the Common Carrier Bureau, in this instance, consulted with the Commission prior to extending the deadline. Although I continue to believe that the Commission is charged with adopting an order extending the section 10 deadline, I refrain from dissenting on this ground, because in this case, the Bureau received a signal from a majority of the "Commission" that an extension of time is warranted under these particular circumstances.

\* \* \* \* \*

**Separate Statement of Commissioner Gloria Tristani,  
Dissenting in Part**

*Re: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended. CC Docket Nos. 96-45 and 96-149.*

I am forced to write separately, because I disagree with the majority in one major respect. I believe that the majority's reading of section 222(c)(1)(B) of the Act is contrary to the plain language of what the Commission previously found to be a "clear and unambiguous" provision.<sup>1</sup> Accordingly, I believe that the Commission should have denied the petitions for reconsideration of our conclusion that carriers may not use customer proprietary network information (CPNI) to market customer premises equipment (CPE) and most information services without first obtaining customer approval.<sup>2</sup>

Section 222(c)(1)(B) sets forth an exception to the general prohibition against the use of CPNI without customer approval for information related to "services necessary to, or used in, the provision of . . . telecommunications service, including the publishing of directories."<sup>3</sup> In the *CPNI Order*, the Commission concluded that CPE and most information services do not fall under section 222(c)(1)(B), because they are not "services necessary to, or used in, the provision of . . . telecommunications service."<sup>4</sup> I believe that this reading is compelled by the terms of the statute. Therefore, I must dissent from the majority's reading of section 222(c)(1)(B) to now include "*products and services* provisioned by the carrier *with* the underlying telecommunications service."<sup>5</sup>

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<sup>1</sup> 47 U.S.C. § 222(c)(1)(B). *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket Nos. 96-115 and 96-149, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8120, ¶ 75 (1998) (*CPNI Order*).

<sup>2</sup> I do not dissent from the majority's clarification that, like the provision of installation, repair, and maintenance of inside wiring in the wireline context, the tuning and retuning of CMRS units and repair and maintenance of such units is a service necessary to or used in the provision of CMRS service under section 222(c)(1)(B).

<sup>3</sup> 47 U.S.C. § 222(c)(1)(B).

<sup>4</sup> *CPNI Order*, 13 FCC Rcd at 8116, ¶ 71.

<sup>5</sup> *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC

The majority rests its interpretation on the grounds that such products and services are “related” to and “facilitate” the provision of an underlying telecommunications service and customers “expect” them to be jointly provisioned, a basis divorced from the language of section 222(c)(1)(B) itself.<sup>6</sup>

By reading the term “services” to include both products and services, the majority impermissibly expands the scope of the section 222(c)(1)(B) exception. I believe that had Congress intended the section 222(c)(1)(B) exception to extend to equipment, it would have said so explicitly, creating an exception for both services and equipment necessary to, or used in, the provision of telecommunications services. Instead, as the Commission held in the *CPNI Order*, the exception set forth in section 222(c)(1)(B), by its terms, is limited to “services.” CPE is by definition equipment, not a service.<sup>7</sup> I am puzzled by the majority’s assertion that “its previous interpretation construed the term ‘services’ in isolation from the phrase ‘necessary to, or used in.’”<sup>8</sup> Basic principles of statutory construction require that effect be given to every word of the statute, so that no word will be rendered meaningless.<sup>9</sup> Because petitioners have not presented any new arguments, facts, or evidence that persuades me that we incorrectly interpreted the text of this section, I continue to believe that the statutory language precludes the inclusion of equipment within section 222(c)(1)(B), even if the equipment is “necessary to, or used in, the provision of . . . telecommunications service.”<sup>10</sup>

I am not persuaded by the majority’s reliance on the only example that Congress included in section 222(c)(1)(B), “the publishing of directories,” as justification for its

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Docket Nos. 96-115 and 96-149, Order on Reconsideration and Petitions for Forbearance, \_\_ FCC Rcd \_\_, \_\_, ¶ 40 (1999) (*CPNI Recon*) (emphasis added).

<sup>6</sup> *Id.* at \_\_, ¶ 41. An administrative agency may deviate from the text of a statute in very limited circumstances, such as to harmonize conflicts between statutes. *See, e.g., Citizens to Save Spencer County et al. v. E.P.A.*, 600 F.2d 844 (D.C. Cir. 1979). Here, the majority seeks to extend the permissible use of CPNI beyond the plain meaning of section 222, yet does not demonstrate statutory conflict, evidence of congressional intent contrary to the conclusion we reached in the *CPNI Order*, or other extraordinary circumstances that would provide legitimate grounds on which to reconsider the Commission’s previous action.

<sup>7</sup> *CPNI Order*, 13 FCC Rcd at 8116, ¶ 71 (stating that “CPE is by definition customer premises *equipment*, and as such historically has been categorized and referred to as equipment”).

<sup>8</sup> *CPNI Recon*, \_\_ FCC Rcd at \_\_, ¶ 41.

<sup>9</sup> *See, e.g., Carcamo-Flores v. INS*, 805 F.2d 60, 66 (2d Cir. 1986) (stating that “[t]here is a presumption against construing a statute as containing superfluous or meaningless words”) (quoting *United States v. Blasius*, 397 F.2d 203, 207 n. 9 (2d Cir. 1968)).

<sup>10</sup> *See* 47 U.S.C. § 222(c)(1)(B). Nor do I find merit in petitioners’ argument that inside wiring installation, maintenance, and repair services are tantamount to CPE under section 222(c)(1)(B). Comcast Petition at 13-14; CommNet Cellular Petition at 2-3; CTIA Petition at 25-29; Omnipoint Petition at 6-7; USTA Petition at 2-6; AT&T Comments at 9. While inside wiring is no more a service than CPE, it is not the inside wiring equipment itself that constitutes a service under section 222(c)(1)(B), but rather the installation, maintenance, and repair of the inside wire. *CPNI Order*, 13 FCC Rcd at 8124, ¶ 80.

reading of "services" to include "products and services."<sup>11</sup> The Commission previously expressly rejected the argument on which it now relies -- that the directory publishing example justifies a broader reading of section 222(c)(1)(B) -- in the *CPNI Order*. In that order, we stated that the publishing of directories is appropriately viewed as necessary to and used in the provision of complete and adequate telecommunications service.<sup>12</sup> I am baffled by the majority's new reading of the directory publishing example to sweep products, and equipment in particular, into the language of section 222(c)(1)(B).

In adopting the argument of several petitioners that information services are "services necessary to, or used in, the provision of . . . telecommunications service" for purposes section 222(c)(1)(B), the majority has read "necessary to, or used in, the provision of . . . telecommunications services"<sup>13</sup> to mean "provisioned by the carrier with the underlying telecommunications service."<sup>14</sup> We concluded in the *CPNI Order* that while information services, such as fax store and forward and Internet access services, constitute non-telecommunications "services," most such services are not "necessary to, or used in" the carrier's provision of telecommunications service. Rather, we reasoned that although telecommunications service is "necessary to, or used in, the provision of" any information services, information services generally are not "necessary to, or used in, the provision of" any telecommunications service.<sup>15</sup> While I acknowledge that

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<sup>11</sup> 47 U.S.C. § 222(c)(1)(B). *CPNI Recon*, \_\_ FCC Rcd at \_\_, ¶ 41. See also Comcast Petition at 13-14; Omnipoint Petition at 5 (arguing that the inclusion in the statute of this example requires a broader reading than the Commission adopted in the *CPNI Order*); PrimeCo Petition at 6-7 (asserting that for many CMRS customers voicemail is a more useful and more important feature than the availability of published directories).

<sup>12</sup> I am not persuaded by SBC's argument that the Commission failed to articulate a reasoned basis for its conclusion that services formerly characterized as "adjunct-to-basic," in contrast to information services, are covered under section 222(c)(1)(B). See *CPNI Order*, 13 FCC Rcd at 8118, ¶ 73 (stating that "[e]xamples of adjunct-to-basic services include speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller ID, call tracing, call blocking, call return, repeat dialing, call tracking, and certain centrex features") (citation omitted); SBC Petition at 7. See also NTCA Petition at 6-7. In drawing this distinction, the *CPNI Order* relied in part on Commission precedent. The Commission noted that it previously determined that the computer processing functions of adjunct-to-basic services are "used in conjunction with 'voice' service" and "help telephone companies provide or manage basic telephone services," as opposed to the information conveyed through enhanced services. *CPNI Order*, 13 FCC Rcd at 8118, ¶ 73 (emphasis in original) (citing *North American Telecommunications Association Petition for Declaratory Ruling under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, ENF No. 84-2, Memorandum Opinion and Order, 101 FCC 2d 349, 358, ¶ 23-24 (1985), recon., 3 FCC Rcd 4385 (1988)). Thus, the Commission interpreted the language of section 222(c)(1)(B) to reach these adjunct-to-basic services, which are "used in" the carrier's provision of its telecommunications service, to the exclusion of information services. I note that the Commission recently recognized adjunct-to-basic services as being telecommunications services, and our treatment of these services in the *CPNI Order* is consistent with that determination. *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21958, ¶ 107 (1996).

<sup>13</sup> 47 U.S.C. § 222(c)(1)(B).

<sup>14</sup> *CPNI Recon*, \_\_ FCC Rcd at \_\_, ¶ 40 (emphasis added).

information services can be an important component of the services that a customer receives from a telecommunications carrier, this fact alone does not change the conclusion that is compelled by the terms of the statute.

As the Commission has concluded previously, “the meaning of the term ‘necessary’ depends on the purposes of the statutory provision in which it is found.”<sup>16</sup> The focus and placement of section 222 within the Act indicate Congress’s intent that the Commission augment consumer privacy protections. Section 222 reflects Congress’s view that with increased competition comes a risk that consumer privacy interests will not be protected by the marketplace. As a result, I continue to believe that control over the use of CPNI properly belongs in the hands of the customer. A narrow construction of the phrase “necessary to, or used in” best accomplishes the goals of the statute.<sup>17</sup>

In today’s decision, the majority also relies on what it concludes are customer expectations regarding how services will be provisioned as the touchstone of whether an offering falls within the section 222(c)(1)(B) exception, an approach that I believe cannot be squared with the language of that provision. For example, the majority’s reliance on the lack of record evidence showing that allowing wireline carriers to market CPE to their customers violates customer expectations is misplaced.<sup>18</sup> Ultimately, regardless of what customers expect, the language of the provision itself governs. Similarly, the “principle of customer convenience”<sup>19</sup> cannot be exalted above congressional intent in enacting the provision.

Accordingly, unlike the majority, I would decline to grant petitioners’ requests that, because of the integrated nature of certain information services with telecommunications service, we should distinguish among information services for purposes of section 222(c)(1)(B).<sup>20</sup> In my view, none of the parties has presented a

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<sup>15</sup> 47 U.S.C. § 222(c)(1)(B); *CPNI Order*, 13 FCC Rcd at 8116, ¶ 72.

<sup>16</sup> See, e.g., *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9100, ¶ 618 (1997) (finding that the phrase “necessary for the provision of health care services . . . including instruction relating to such services” of section 254(h) means reasonably related to the provision of health care services, because a broad reading of the phrase is consistent with the purpose of that section). See also *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979) (stating that a statute should be interpreted in light of the purposes that Congress sought to serve by its enactment).

<sup>17</sup> For similar reasons, I do not agree with SBC and GTE that the term “necessary to” in section 222(c)(1)(B) should not be interpreted restrictively because in other proceedings the Commission has used the term “necessary” not to mean “indispensable” but rather “used” or “useful.” See GTE Petition at 8; SBC Petition at 7.

<sup>18</sup> *CPNI Recon.*, \_\_ FCC Rcd at \_\_, ¶ 44.

<sup>19</sup> *Id.* at \_\_, ¶ 42.

<sup>20</sup> See Bell Atlantic Petition at 7-9; GTE Petition at 21-26; NTCA Petition at 6-7; SBC Petition at 7; TDS Petition at 6. See also PrimeCo Petition at 6-7 (asserting that voice mail enables CMRS customers to receive communications when the handset is temporarily out of service); Cable & Wireless Comments at

statutory basis for treating messaging services differently from other information services under section 222. As I note above, information services may well constitute an important component of the services a telecommunications carrier offers its customers. Nevertheless, these information services are not necessary to, or used in, the provision of the underlying telecommunications service.

In construing the phrase “services necessary to, or used in,”<sup>21</sup> the Commission must be guided by the statute’s focus on the protection of customer privacy and hence narrowly construe the statute in order to optimize consumer protections. A carrier need only obtain permission to use CPNI in order to market CPE or information services to its customers, a minimal burden when weighed against the purposes of section 222. I believe this approach best effectuates Congress’s intent by balancing competitive interests with the consumers’ interests in privacy and control over CPNI.

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10 (urging the Commission to allow use of CPNI only when the information service is an integral part of or otherwise related to the underlying telecommunications service).

<sup>21</sup> 47 U.S.C. § 222(c)(1)(B).