of $40 million or less in the three previous calendar years.[512] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[513] These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[514] 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 percent of the 1,479 licenses for Blocks D, E, and F.[515] 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.

Cellular Licensees. Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of a 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.[516] According to the Bureau of the Census, only twelve radiotelephone firms from a total of 1,178 such firms that operated during 1992 had 1,000 or more employees.[517] 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 Trends in Telephone Service data, 808 carriers reported that they were engaged in the provision of either cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio Telephone (SMR) service, which are placed together in the data.[518] 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 808 or fewer small cellular service carriers that may be affected by any regulations adopted pursuant to this proceeding.

Fixed Microwave Services. Microwave services include common carrier,[519] private-operational fixed,[520] and broadcast auxiliary radio services.[521] At present, there are approximately 22,015 common

[512] *See* Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, GN Docket 90-314, *Report and Order*, 11 FCC Rcd 7824, 7850-52, ¶¶ 57-60 (1996) (*Cross Ownership Report & Order*); *see also* 47 C.F.R. § 24.720(b).

[513] *Cross Ownership Report & Order*, 11 FCC Rcd at 7852, ¶ 60.

[514] *See, e.g.*, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5581-84, ¶¶ 114-20 (1994).

[515] FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. Jan. 14, 1997).

[516] 13 C.F.R. § 121.201, SIC code 4812.

[517] *1992 Census,* Series UC92-S-1, at Table 5, SIC code 4812.

[518] FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

[519] 47 C.F.R. §§ 101 *et seq*. (formerly, part 21 of the Commission's Rules).

carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, we will utilize the SBA's definition applicable to radiotelephone companies -- i.e., an entity with no more than 1,500 persons.[522] We estimate, for this purpose, that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone companies.

Rural Radiotelephone Service. The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.[523] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).[524] We will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing no more than 1,500 persons.[525] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

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

The *Competitive Networks First Report and Order* requires incumbent LECs to respond promptly to requests by building owners to identify the location of the demarcation point. The *Competitive Networks First Report and Order* holds that if an incumbent LEC fails to produce this information within ten business days of the request, the premises owner may presume the demarcation point to be located at the minimum point of entry (MPOE).[526] The *Competitive Networks First Report and Order* further requires that where LECs do not establish a practice of placing the demarcation point at the MPOE, they fully inform building owners, at the time of installation, of their options regarding placement.

The *Competitive Networks First Report and Order* holds that in order to further competition, a request by a property owner to relocate the demarcation point to the MPOE must be addressed by an incumbent LEC in a reasonably timely and fair manner, so as not to unduly delay or hinder competitive

(Continued from previous page)

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

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

[522] 13 C.F.R. § 121.201, SIC 4812.

[523] The service is defined in Section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[524] BETRS is defined in Sections 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

[525] 13 C.F.R. § 121.201, SIC code 4812.

[526] The minimum point of entry is defined as "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." 47 C.F.R. § 68.3 (definition of demarcation point).

LEC access. The *Competitive Networks First Report and Order* therefore directs incumbent LECs to conclude negotiations with requesting building owners within 45 days of such a request. If the parties are unable to come to reasonably agreeable terms, they must submit to binding arbitration to settle the dispute.[527]

In addition, the *Competitive Networks First Report and Order* requires, as a condition of invoking protection under the OTARD rule from government, landlord and association restrictions, that licensees ensure that subscriber antennas be labeled to give notice of potential radiofrequency safety hazards of antennas used for fixed wireless transmissions. Labeling information should include minimum separation distances required between users and radiating antennas to meet the Commission's radiofrequency exposure guidelines. Labels should also include reference to the Commission's applicable radiofrequency exposure guidelines. In addition, the instruction manuals and other information accompanying subscriber transceivers should include a full explanation of the labels, as well as a reference to the applicable Commission radiofrequency exposure guidelines.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.

The rule changes adopted in this *Competitive Networks First Report and Order* are intended to promote competition in local communications markets by implementing measures to ensure that competing telecommunications providers are able to provide services to customers in MTEs. The actions taken today will benefit consumers, telecommunications carriers, and building owners, including small entities.

In the *Competitive Networks NPRM*, we sought comment on seven proposals: (1) the tentative conclusion that, to the extent that LECs or other utilities own or control rooftop and other rights-of-way or riser conduit in MTEs, Section 224 of the Act[528] requires that they permit competing providers access to such rights-of-way or conduit under just, reasonable and nondiscriminatory rates, terms, and conditions; (2) whether we should require incumbent LECs to make available to any requesting telecommunications carrier unbundled access to riser cable and wiring that they control within MTEs, subject to the Commission's future interpretation of the "necessary" and "impair" standards of Section 251 of the Act;[529] (3) whether we should require building owners, who allow access to their premises to any telecommunications provider, to make comparable access available to all such providers on a nondiscriminatory basis; (4) whether we should forbid telecommunications service providers, under some or all circumstances, from entering into exclusive contracts with building owners, and abrogate any existing exclusive contracts between these parties; (5) whether we should modify our rules governing determination of the demarcation point between facilities controlled by the telephone company and by the landowner on multiple unit premises; (6) whether the rules governing access to cable home wiring for multichannel video program distribution should be extended to benefit providers of telecommunications services; and (7) whether we should adopt rules similar to those adopted in the video context under Section 207 of the 1996 Act protecting the ability to place antennas to transmit and receive telecommunications signals and other signals that are not covered under Section 207. After careful

[527] We note that our cable inside wiring rules contain similar provisions for transferring ownership from the cable operator to the property owner. *See* 47 C.F.R. §§ 76.804(a)(2)-(3) & 76.804(b)(2).

[528] 47 U.S.C. § 224.

[529] 47 U.S.C. § 251.

review and analysis of the voluminous record developed in response to the *Competitive Networks NPRM*, we take action on four proposals today.

First, we prohibit telecommunications service providers from entering into exclusive contracts to serve commercial buildings. In the *Competitive Networks NPRM*, we solicited comment on this proposal as an alternative to our proposal to require building owners to provide nondiscriminatory access to their premises to telecommunications providers.[530] As noted above, we received comment opposed to this second alternative. We have not adopted the latter proposal in the *Competitive Networks First Report and Order*; however, we do seek additional comment on it in the *Competitive Networks FNPRM*.[531] In the *Competitive Networks NPRM*, we also inquired whether we should abrogate existing exclusive contracts.[532] Based on the record in this proceeding, we have determined that abrogating exclusive contracts may interfere with the investment-backed expectations of the parties to such contracts, including small entities, and thus we defer consideration of this issue to the *Competitive Networks FNPRM*.[533] We also find that the record is not sufficiently developed to determine whether the prohibition on exclusive contracts should apply to residential MTEs,[534] and therefore defer this issue to the *Competitive Networks FNPRM*.[535] We note that there was widespread support in the record for prohibiting future exclusive contracts in commercial MTEs.[536] We also note our expectation that small entities, including small telecommunications carriers and small building owners, will benefit from the competitive telecommunications environment that the ban on exclusive contracts will foster.

Second, with respect to modifying the Commission's demarcation point rules, we sought comment on, *inter alia*, establishing a uniform demarcation point at the minimum point of entry (MPOE) to multiple unit premises.[537] We have weighed the evidence in the record concerning this proposal carefully. We find that the potential financial burden of moving the demarcation point to the MPOE and the fact that it may hinder deployment of facilities by carriers, including small entities, which utilize unbundled local loops outweigh the potential benefits of adopting this proposal.[538] In the alternative, we take the following actions to promote access to telecommunications wiring by competing carriers, including small entities: (1) we clarify that the Commission's demarcation point rules govern the control of inside wiring and related facilities for purposes of competitive access, as well as the control of these

[530] *Competitive Networks NPRM*, 14 FCC Rcd at 12707, ¶ 64.

[531] *See Competitive Networks FNPRM,* Section V.A., *supra.*

[532] *Competitive Networks NPRM*, 14 FCC Rcd at 12707, ¶ 64.

[533] *See Competitive Networks First Report and Order*, at para. 36, and *Competitive Networks FNPRM,* Section V.A., *supra.*

[534] *See Competitive Networks First Report and Order*, at para. 33.

[535] *See Competitive Networks FNPRM,* Section V.B., *supra.*

[536] *See, e.g.*, AT&T Comments at 26; Qwest Comments at 11; SBC Comments at 7; and Teligent Comments at 17-19.

[537] *Competitive Networks NPRM,* 14 FCC Rcd at ¶¶ 67 & 68. The minimum point of entry is defined as "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." 47 C.F.R. § 68.3 (definition of demarcation point).

[538] *Competitive Networks First Report and Order*, at paras. 52-53.

facilities for purposes of installation and maintenance; (2) we require that incumbent LECs conclude negotiations with building owners to relocate the demarcation point to the MPOE within 45 days of the building owner's request and submit to binding arbitration if the parties are unable to agree upon the terms of relocation; and (3) we require that incumbent LECs fulfill their duty to disclose the location of the demarcation point, where it is not located at the MPOE, within ten business days of a building owner's request.[539] Collectively, these actions "will substantially reduce the potential for incumbent LECs to obstruct competitive access to MTEs,"[540] while imposing only minimal financial burdens. We expect that that many smaller carriers seeking competitive entry will benefit directly from these actions.

Third, we have adopted our proposal under Section 224 of the Act[541] to require LECs and other utilities which own or control poles, ducts, conduits and other rights-of-way in MTEs, to permit competing providers access to such facilities under just, reasonable and nondiscriminatory rates, terms, and conditions. We anticipate that this action will benefit many small entities, including property owners and managers. We emphasize that our proposal as adopted will not impair the authority under state law, of property owners and managers to exclude telecommunications carriers from their property.[542] Rather, building owners and managers, and their tenants, will benefit from our proposal because utilities, as defined in Section 224(a)(1) of the Act,[543] will no longer have the unfettered ability to exclude telecommunications carriers from their poles, ducts, conduits, and defined rights-of way in MTEs. Telecommunications carriers, including small entities, will benefit from increased access to MTEs. We note that, although it did not file comments on the IRFA, the National League of Cities expressed concern that our proposed implementation of Section 224 within buildings may preempt implementation or enforcement of state safety-related codes.[544] As we make clear in the *Competitive Networks First Report and Order*, "our actions taken today are not intended to preempt, or impede, in any way the implementation or enforcement of state safety-related codes."[545]

Fourth, we are amending Section 1.4000 of our rules (the "OTARD rule")[546] to protect the ability of customers to place antennas used for transmitting and receiving all forms of fixed wireless transmissions. Section 1.4000 currently prohibits any state or local law or regulation, private covenant, contract provision, lease provision, homeowners' association rule, or similar restriction that impairs the installation, maintenance, or use of certain antennas designed to receive video programming services on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property.

Currently, Section 1.4000 prohibits restrictions that impair the installation, maintenance or use of: (1) any antenna designed to receive direct broadcast satellite service, including direct-to-home

[539] *See Competitive Networks First Report and Order,* at paras. 54-57.

[540] *Id.*, at para. 58.

[541] 47 U.S.C. § 224.

[542] *See Competitive Networks First Report and Order*, at para. 87.

[543] 47 U.S.C. § 224(a)(1).

[544] National League of Cities, *et al.* Petition for EIS at 21-24.

[545] *Competitive Networks First Report and Order*, at para. 84.

[546] 47 C.F.R. § 1.4000.

satellite services, that is one meter or less in diameter or is located in Alaska; (2) any antenna designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, and local multipoint distribution services, and that is one meter or less in diameter; (3) any antenna designed to receive television broadcast signals; or (4) any mast supporting an antenna receiving any video programming described in the section. For the purposes of Section 1.4000, a law, regulation or restriction impairs installation, maintenance or use of an antenna if it unreasonably delays or prevents installation, maintenance or use, unreasonably increases the cost of installation, maintenance or use, or precludes reception of an acceptable quality signal. Section 1.4000 also includes provisions for waiver and declaratory ruling proceedings.

There is widespread support in the record for an extension of the OTARD rule to include all fixed wireless services.[547] Moreover, we believe that extending the OTARD rule to include all fixed wireless services is essential to meeting our obligation to promote the deployment of advanced telecommunications capability under Section 706(a) of the 1996 Act.[548] To the extent a restriction unreasonably limits a customer's ability to place antennas to receive communications services, that restriction may impede the development of advanced, competitive services.

The *Competitive Networks First Report and Order* underscores the policy rationale for amending the OTARD rule:

> [D]istinguishing in the protection afforded based on the services provided through an antenna produces irrational results. Precisely the same antennas may be used for video services, telecommunications, and internet access. Indeed, sometimes a single company offers different packages of services using the same type of antennas. Under our current rules, a customer ordering a telecommunications/video package would enjoy protection that a customer ordering a telecommunications-only package from the same company using the same antenna would not. Thus, we conclude that the current rules potentially distort markets by creating incentives to include video programming service in many service offerings even if it is not efficient or desired by the consumer.[549]

We do not anticipate that today's rule change will have a significant adverse economic impact on small entities. To the contrary, we expect that small communications carriers that previously were unable to serve customers in MTEs may now be able to do so as a result of our rule change. However, we emphasize that "the action we take today does not confer a right as against the building owner in restricted or common use areas in commercial or residential buildings, like most rooftops."[550] Rather our extension of the OTARD rule to wireless services "applies only to areas within the exclusive use or control of the antenna user and in which the antenna user has a direct or indirect ownership or leasehold interest."[551]

---

[547] *See e.g.*, AT&T Comments; PCIA Comments; Fixed Wireless Communications Coalition Comments; and Teligent Comments.

[548] 47 U.S.C. § 157 note.

[549] *Competitive Networks First Report and Order*, at para. 98.

[550] *Id.*, at para. 124.

[551] *Id.*, at para. 100.

We also note that any impact on small entities is mitigated by our preservation of the exceptions to the OTARD rule permitting certain restrictions for safety and historic preservation purposes. Restrictions that would otherwise be forbidden are permitted if they are necessary to achieve certain safety or historic preservation purposes, are no more burdensome than necessary to achieve their purpose, and meet certain other conditions set forth in the OTARD rule. Finally, to address any potential concerns regarding transmitting antennas, we have determined that "[t]o the extent that local governments, associations, and property owners elect to require professional installation for transmitting antennas, the usual prohibition of such requirements under the OTARD rule will not apply."[552]

Report to Congress: The Commission will send a copy of the *Competitive Networks First Report and Order*, including this FRFA, 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 *Competitive Networks First Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Competitive Networks First Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

[552] *Id.*, at para. 119.

Appendix D

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),[553] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *Competitive Networks Further Notice of Proposed Rulemaking (FNPRM)*, WT Docket No. 99-217. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadline for comments on the *Competitive Networks FNPRM* provided above in paragraph 179 of the *Competitive Networks FNPRM.* The Commission will send a copy of the *Competitive Networks FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[554] In addition, the *Competitive Networks FNPRM* and IRFA (or summaries thereof) will be published in the Federal Register.[555]

A. Need for, and Objectives of, the Rules

In the *Competitive Networks FNPRM*, the Commission seeks comment on a number of proposals to further its ongoing efforts under the Telecommunications Act of 1996[556] to foster competition in local communications markets. Specifically, we seek comment on measures to ensure that competing telecommunications providers are able to provide services to customers in multiple tenant environments (MTEs). MTEs include apartment and office buildings, office parks, shopping centers, and manufactured housing communities. Each of the proposals in the *Competitive Networks FNPRM* is intended to benefit telecommunications carriers, building owners and their tenants by creating a more competitive MTE telecommunications service environment.

The *Competitive Networks FNPRM* seeks comment on: (1) whether we should require building owners, who allow access to their premises to any telecommunications provider, to make comparable access available to all providers on a nondiscriminatory basis; (2) whether we should prohibit local exchange carriers from serving buildings that do not afford nondiscriminatory access to all telecommunications service providers; (3) whether we should forbid telecommunications service providers, under some or all circumstances, from entering into exclusive contracts with residential building owners; (4) whether we should prohibit carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs; (5) whether we should phase out exclusive access provisions by establishing a future termination date for such provisions; (6) whether we should phase out exclusive access provisions for carriers that qualify as small entities and the timing of any such phase out; (7) whether, and to what extent, preferential agreements between building owners and LECs should be regulated by the Commission; (8) whether the Commission's rules governing access to cable

[553] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[554] *See* 5 U.S.C. § 603(a).

[555] *See id.*

[556] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (1996 Act). The 1996 Act amended the Communications Act of 1934 (the "Communications Act" or the "Act").

home run wiring for multichannel video program distribution should be extended to benefit providers of telecommunications services; and (9) the extent to which utility rights-of-way within MTEs are subject to access by telecommunications carriers (except incumbent LECs) and cable companies pursuant to Section 224 of the Act.[557]

B. Legal Basis

The potential actions on which comment is sought in this *Competitive Networks FNPRM* would be authorized under Sections 1, 2(a), 4(i), 201(b), 202(a), 205(a), 224(d), 224(e), 303(r), and 411(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 201(b), 202(a), 205(a), 224(d), 224(e), 303(r), and 411(a), and Sections 1.411 and 1.412 of the Commission's Rules, 47 C.F.R. §§ 1.411 and 1.412.

C. Description and Estimate of the Number of Small Entities to which the Rules Will Apply

The RFA requires that an IRFA be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[558] The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[559] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[560] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[561] For many of the entities described below, we utilize SBA definitions of small business categories, which are based on Standard Industrial Classification ("SIC") codes.

We have included small incumbent LECs in this present IRFA. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[562] The SBA contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[563] We have therefore

[557] 47 U.S.C. § 224.

[558] 5 U.S.C. § 605(b).

[559] 5 U.S.C. § 601(6).

[560] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[561] Small Business Act, 15 U.S.C. § 632.

[562] 5 U.S.C. § 601(3).

[563] SBA Reply Comments at 3-4 (filed Sept. 10, 1999). *See also* Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, *to* William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business (continued....)

included small incumbent LECs in this IRFA, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

This *Competitive Networks FNPRM* proposes rule changes that, if adopted, would impose requirements on local exchange carriers and other utilities, building owners and managers, neighborhood associations, and small governmental jurisdictions, as discussed below.

a. Local Exchange Carriers

Many of the potential rule changes on which comment is sought in this *Competitive Networks FNPRM*, if adopted, would affect small LECs. Neither the Commission nor the SBA has developed a definition for small providers of local exchange services. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[564] The SBA has defined establishments engaged in providing "Telephone Communications, Except Radiotelephone" to be small businesses when they have no more than 1,500 employees.[565] According to recent *Telecommunications Industry Revenue* data, 1,348 incumbent carriers reported that they were engaged in the provision of local exchange services.[566] 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 1,348 providers of local exchange service are small entities that may be affected by the potential actions discussed in this *Further Notice of Proposed Rulemaking*, if adopted.

b. Other Utilities

The proposals in the *Competitive Networks FNPRM* with respect to the application of Section 224 of the Act, if adopted, would affect utilities other than LECs. Section 224 defines a "utility" as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any state." The Commission anticipates that, to the extent its legal interpretation of Section 224 affects non-LEC utilities, the effect would be concentrated on electric utilities.

(1) Electric Utilities (SIC 4911, 4931 & 4939)

(Continued from previous page)
concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. *See, e.g.*, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket, 96-98, *First Report and Order*, 11 FCC Rcd 15499, 16144-45 (1996), 61 FR 45476 (Aug. 29, 1996).

[564] *See* 13 C.F.R. § 121.201, SIC Code 4813.

[565] 13 C.F.R. § 121.201. *See* Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987) (*1987 SIC Manual*).

[566] FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000)

Electric Services (SIC 4911). The SBA has developed a definition for small electric utility firms.[567] The Census Bureau reports that a total of 1,379 electric utilities were in operation for at least one year at the end of 1992. According to SBA, a small electric utility is an entity whose gross revenues do not exceed five million dollars.[568] The Census Bureau reports that 447 of the 1,379 firms listed had total revenues below five million dollars in 1992.[569]

Electric and Other Services Combined (SIC 4931). The SBA has classified this entity as a utility whose business is less than 95% electric in combination with some other type of service.[570] The Census Bureau reports that a total of 135 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small electric and other services combined utility is a firm whose gross revenues do not exceed five million dollars.[571] The Census Bureau reported that 45 of the 135 firms listed had total revenues below five million dollars in 1992.[572]

Combination Utilities, Not Elsewhere Classified (SIC 4939). The SBA defines this type of utility as providing a combination of electric, gas, and other services that are not otherwise classified.[573] The Census Bureau reports that a total of 79 such utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small combination utility is a firm whose gross revenues do not exceed five million dollars.[574] The Census Bureau reported that 63 of the 79 firms listed had total revenues below five million dollars in 1992.[575]

(2) Gas Production and Distribution (SIC 4922, 4923, 4924, 4925 & 4932)

Natural Gas Transmission (SIC 4922). The SBA's definition of a natural gas transmitter is an entity that is engaged in the transmission and storage of natural gas.[576] The Census Bureau reports that a total of 144 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small natural gas transmitter is an entity whose gross revenues do not exceed five million

---

[567] *1987 SIC Manual.*

[568] 13 C.F.R. § 121.201.

[569] U.S. Department of Commerce, Bureau of the Census, 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D (Bureau of Census data under contract to the Office of Advocacy of the SBA) (*1992 Economic Census Industry and Enterprise Receipts Size Report*).

[570] *1987 SIC Manual.*

[571] 13 C.F.R. § 121.201.

[572] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[573] *1987 SIC Manual.*

[574] 13 C.F.R. § 121.201.

[575] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[576] *1987 SIC Manual.*

dollars.[577] The Census Bureau reported that 70 of the 144 firms listed had total revenues below five million dollars in 1992.[578]

Natural Gas Transmission and Distribution (SIC 4923). The SBA has classified this type of entity as a utility that transmits and distributes natural gas for sale.[579] The Census Bureau reports that a total of 126 such entities were in operation for at least one year at the end of 1992. The SBA's definition of a small natural gas transmitter and distributor is a firm whose gross revenues do not exceed five million dollars.[580] The Census Bureau reported that 43 of the 126 firms listed had total revenues below five million dollars in 1992.[581]

Natural Gas Distribution (SIC 4924). The SBA defines a natural gas distributor as an entity that distributes natural gas for sale.[582] The Census Bureau reports that a total of 478 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small natural gas distributor is an entity whose gross revenues do not exceed five million dollars.[583] The Census Bureau reported that 267 of the 478 firms listed had total revenues below five million dollars in 1992.[584]

Mixed, Manufactured, or Liquefied Petroleum Gas Production and/or Distribution (SIC 4925). The SBA has classified this type of entity as a utility that engages in the manufacturing and/or distribution of the sale of gas.[585] These mixtures may include natural gas. The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small mixed, manufactured or liquefied petroleum gas producer or distributor is a firm whose gross revenues do not exceed five million dollars.[586] The Census Bureau reported that 31 of the 43 firms listed had total revenues below five million dollars in 1992.[587]

Gas and Other Services Combined (SIC 4932). The SBA has classified this entity as a gas company whose business is less than 95% gas, in combination with other services.[588] The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small gas and other services combined utility is a firm whose gross revenues do not exceed

[577] 13 C.F.R. § 121.201.

[578] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[579] *1987 SIC Manual.*

[580] 13 C.F.R. § 121.201.

[581] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[582] *1987 SIC Manual.*

[583] 13 C.F.R. § 121.201.

[584] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[585] *1987 SIC Manual.*

[586] 13 C.F.R. § 121.201.

[587] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[588] *1987 SIC Manual.*

five million dollars.[589] The Census Bureau reported that 24 of the 43 firms listed had total revenues below five million dollars in 1992.[590]

(3) Water Supply (SIC 4941)

The SBA defines a water utility as a firm who distributes and sells water for domestic, commercial and industrial use.[591] The Census Bureau reports that a total of 3,169 water utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small water utility is a firm whose gross revenues do not exceed five million dollars.[592] The Census Bureau reported that 3,065 of the 3,169 firms listed had total revenues below five million dollars in 1992.[593]

(4) Sanitary Systems (SIC 4952, 4953 & 4959)

Sewerage Systems (SIC 4952). The SBA defines a sewage firm as a utility whose business is the collection and disposal of waste using sewage systems.[594] The Census Bureau reports that a total of 410 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sewerage system is a firm whose gross revenues did not exceed five million dollars.[595] The Census Bureau reported that 369 of the 410 firms listed had total revenues below five million dollars in 1992.[596]

Refuse Systems (SIC 4953). The SBA defines a firm in the business of refuse as an establishment whose business is the collection and disposal of refuse "by processing or destruction or in the operation of incinerators, waste treatment plants, landfills, or other sites for disposal of such materials."[597] The Census Bureau reports that a total of 2,287 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small refuse system is a firm whose gross revenues do not exceed six million dollars.[598] The Census Bureau reported that 1,908 of the 2,287 firms listed had total revenues below six million dollars in 1992.[599]

Sanitary Services, Not Elsewhere Classified (SIC 4959). The SBA defines these firms as engaged in sanitary services.[600] The Census Bureau reports that a total of 1,214 such firms were in

[589] 13 C.F.R. § 121.201.

[590] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[591] *1987 SIC Manual.*

[592] 13 C.F.R. § 121.201.

[593] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[594] *1987 SIC Manual.*

[595] 13 C.F.R. § 121.201.

[596] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[597] *1987 SIC Manual.*

[598] 13 C.F.R. § 121.201.

[599] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[600] *1987 SIC Manual.*

operation for at least one year at the end of 1992. According to SBA's definition, a small sanitary service firm's gross revenues do not exceed five million dollars.[601] The Census Bureau reported that 1,173 of the 1,214 firms listed had total revenues below five million dollars in 1992.[602]

(5) Steam and Air Conditioning Supply (SIC 4961)

The SBA defines a steam and air conditioning supply utility as a firm who produces and/or sells steam and heated or cooled air.[603] The Census Bureau reports that a total of 55 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a steam and air conditioning supply utility is a firm whose gross revenues do not exceed nine million dollars.[604] The Census Bureau reported that 30 of the 55 firms listed had total revenues below nine million dollars in 1992.[605]

(6) Irrigation Systems (SIC 4971)

The SBA defines irrigation systems as firms who operate water supply systems for the purpose of irrigation.[606] The Census Bureau reports that a total of 297 firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small irrigation service is a firm whose gross revenues do not exceed five million dollars.[607] The Census Bureau reported that 286 of the 297 firms listed had total revenues below five million dollars in 1992.[608]

c. Building Owners and Managers

Our proposals in the this *Further Notice of Proposed Rulemaking* regarding the scope of in-building rights-of way under Section 224 of the Act, termination or phasing out of exclusive contracts between commercial MTEs and telecommunications carriers, and nondiscriminatory access to MTEs, if adopted, would affect multiple dwelling unit operators and real estate agents and managers.

(1) Multiple Dwelling Unit Operators (SIC 6512, SIC 6513, SIC 6514)

The SBA has developed definitions of small entities for operators of nonresidential buildings, apartment buildings, and dwellings other than apartment buildings, which include all such companies generating $5 million or less in revenue annually.[609] According to the Census Bureau, there were 26,960

[601] 13 C.F.R. § 121.201.

[602] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[603] *1987 SIC Manual.*

[604] 13 C.F.R. § 121.201.

[605] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[606] *1987 SIC Manual.*

[607] 13 C.F.R. § 121.201.

[608] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D.

[609] 13 C.F.R. § 121.601 (SIC 6512, SIC 6513, SIC 6514).

operators of nonresidential buildings generating less than $5 million in revenue that were in operation for at least one year at the end of 1992.[610] Also according to the Census Bureau, there were 39,903 operators of apartment dwellings generating less than $5 million in revenue that were in operation for at least one year at the end of 1992.[611] The Census Bureau provides no separate data regarding operators of dwellings other than apartment buildings, and we are unable at this time to estimate the number of such operators that would qualify as small entities.

(2) Real Estate Agents and Managers (SIC 6531)

The SBA defines real estate agents and managers as establishments primarily engaged in renting, buying, selling, managing, and appraising real estate for others.[612] According to SBA's definition, a small real estate agent or manager is a firm whose revenues do not exceed 1.5 million dollars.[613]

d. Neighborhood Associations

Section 601(4) of the Regulatory Flexibility Act, 5 U.S.C. § 601(4), defines "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." This definition includes homeowner and condominium associations that operate as not-for-profit organizations. We note that these groups would be indirectly affected by our proposals. The Community Associations Institute estimates that there are 205,000 such associations.[614]

e. Municipalities

Our proposals in the this *Competitive Networks FNPRM* regarding the scope of in-building rights-of way under Section 224 of the Act, termination or phasing out of exclusive contracts between commercial MTEs and telecommunications carriers, and nondiscriminatory access to MTEs would, if adopted, affect municipalities. The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than 50,000."615 As of 1992, there were approximately 85,006 governmental entities in the United States.616 This number includes such entities as states, counties, cities, utility districts and school districts. Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states. Of the 38,978 counties, cities and towns, 37,566, or 96%, have populations of fewer than 50,000.617 The Census

[610] 1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report, Table 4, SIC 6512 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration) (*1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report*).

[611] *1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report*, Table 4, SIC 6513.

[612] *1987 SIC Manual.*

[613] 13 C.F.R. § 121.201.

[614] CAI Response to *Competitive Networks NPRM* IRFA at 5 (filed Aug. 27, 1999).

[615] 5 U.S.C. § 601(5).

[616] U.S. Department of Commerce, Bureau of the Census, "1992 Census of Governments."

[617] *Id.*

Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,606 (96%) are small entities.

f. Cable Services or Systems

Our proposals in the this *Competitive Networks FNPRM* regarding the scope of in-building rights-of way under Section 224 of the Act, nondiscriminatory access to MTEs, and extension of the cable home run wiring rule to telecommunications carriers, would, if adopted, affect owners and operators of cable systems. The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating $11 million or less in revenue annually.[618] 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.[619]

The Commission has developed its own definition of a small cable system operator for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[620] Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.[621] 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.

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 1 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."[622] The Commission has determined that there are 66,690,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 666,900 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.[623] Based on available data, we find that the number of cable operators serving 666,900 subscribers or less totals 1,450.[624] We do not request nor do we collect information concerning whether cable system operators

[618] 13 C.F.R. § 121.201, SIC code 4841.

[619] *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).

[620] 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 7393 (1995), 60 FR 10534 (Feb. 27, 1995).

[621] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[622] 47 U.S.C. § 543(m)(2).

[623] 47 C.F.R. § 76.1403(b).

[624] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

are affiliated with entities whose gross annual revenues exceed $250,000,000,[625] 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.

g. Multipoint Distribution Service (MDS).

This service involves a variety of transmitters, which are used to relay programming to the home or office, similar to that provided by cable television systems.[626] In connection with the 1996 MDS auction, the Commission defined small businesses as entities that had annual average gross revenues for the three preceding years not in excess of $40 million.[627] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[628] These stations were licensed prior to implementation of Section 309(j) of the Communications Act of 1934, as amended.[629] Licenses for new MDS facilities are now awarded to auction winners in Basic Trading Areas (BTAs) and BTA-like areas.[630] The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 BTAs. Of the 67 auction winners, 61 meet the definition of a small business. There are 2,050 MDS stations currently licensed. Thus, we conclude that there are 1,634 MDS providers that are small businesses as deemed by the SBA and the Commission's auction rules.

h. Wireless Services

Many of the proposals in this *Competitive Networks FNPRM,* if enacted, could affect providers of wireless services regulated by the Commission.

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 $40 million or less in the three previous calendar years.[631] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has

[625] 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 § 76.1403(b) of the Commission's rules. *See* 47 C.F.R. § 76.1403(d).

[626] For purposes of this item, MDS includes both the single channel Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS).

[627] 47 C.F.R. § 1.2110 (a)(1).

[628] Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 10 FCC Rcd 9589 (1995), 60 FR 36524 (Jul. 17, 1995).

[629] 47 U.S.C. § 309(j).

[630] *Id.* A Basic Trading Area (BTA) is the geographic area by which the Multipoint Distribution Service is licensed. *See* Rand McNally *1992 Commercial Atlas and Marketing Guide*, 123rd Edition, pp. 36-39.

[631] *See* Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, GN Docket 90-314, *Report and Order*, 11 FCC Rcd 7824, 7850-52, ¶¶ 57-60 (1996) (*Cross Ownership Report & Order*); *see also* 47 C.F.R. § 24.720(b).

average gross revenues of not more than $15 million for the preceding three calendar years.[632] These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[633] 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 percent of the 1,479 licenses for Blocks D, E, and F.[634] 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.

Cellular Licensees. Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of a 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.[635] According to the Bureau of the Census, only twelve radiotelephone firms from a total of 1,178 such firms that operated during 1992 had 1,000 or more employees.[636] 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 Trends in Telephone Service data, 808 carriers reported that they were engaged in the provision of either cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio Telephone (SMR) service, which are placed together in the data.[637] 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 808 or fewer small cellular service carriers that may be affected by any regulations adopted pursuant to this proceeding.

Fixed Microwave Services. Microwave services include common carrier,[638] private-operational fixed,[639] and broadcast auxiliary radio services.[640] At present, there are approximately 22,015 common

[632] *Cross Ownership Report & Order*, 11 FCC Rcd at 7852, ¶ 60.

[633] *See, e.g.*, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5581-84, ¶¶ 114-20 (1994).

[634] FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (released Jan. 14, 1997).

[635] 13 C.F.R. § 121.201, SIC code 4812.

[636] *1992 Census*, Series UC92-S-1, at Table 5, SIC code 4812.

[637] FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

[638] 47 C.F.R. §§ 101 *et seq.* (formerly, part 21 of the Commission's Rules).

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

carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, we will utilize the SBA's definition applicable to radiotelephone companies -- i.e., an entity with no more than 1,500 persons.[641] We estimate, for this purpose, that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone companies.

Rural Radiotelephone Service. The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.[642] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).[643] We will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing no more than 1,500 persons.[644] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

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

The *Competitive Networks FNPRM Rulemaking* proposes no additional reporting, recordkeeping or other compliance measures. We note *supra*, however, that the *Competitive Networks FNPRM* seeks comment on termination or phase out of exclusivity and preferential provisions in contracts between telecommunications providers and MTEs.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered.

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[645]

In this *Competitive Networks FNPRM,* we seek comment on proposals that are intended to promote competition in local communications markets by ensuring that competing telecommunications providers are able to serve customers in MTEs. We anticipate that the proposals, if enacted in whole or

(Continued from previous page)

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

[641] 13 C.F.R. § 121.201, SIC 4812.

[642] The service is defined in Section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[643] BETRS is defined in Sections 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

[644] 13 C.F.R. § 121.201, SIC code 4812.

[645] 5 U.S.C. § 603(c).

in part, would benefit consumers, telecommunications carriers and building owners, including small entities.

Specifically, we seek comment on the following proposals: (1) whether we should require building owners, who allow access to their premises to any telecommunications provider, to make comparable access available to all providers on a nondiscriminatory basis; (2) whether we should prohibit local exchange carriers from serving buildings that do not afford nondiscriminatory access to all telecommunications service providers; (3) whether we should forbid telecommunications service providers, under some or all circumstances, from entering into exclusive contracts with residential building owners; (4) whether we should prohibit carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs; (5) whether we should phase out exclusive access provisions by establishing a future termination date for such provisions; (6) whether we should phase out exclusive access provisions for carriers that qualify as small entities and the timing of any such phase out; (7) whether, and to what extent, preferential agreements between building owners and LECs should be regulated by the Commission; (8) whether the Commission's rules governing access to cable home run wiring for multichannel video program distribution should be extended to benefit providers of telecommunications services; and (9) the extent to which utility rights-of-way within MTEs are subject to access by telecommunications carriers (except incumbent LECs) and cable companies pursuant to Section 224 of the Act.[646]

In this *Competitive Networks FNPRM,* we seek comment on whether we should require building owners, who allow access to their premises to any telecommunications provider, to make comparable access available to all such providers on a nondiscriminatory basis. To enable us to evaluate the necessity of such a requirement, we have asked commenters to provide the Commission updated information on the market for telecommunications services in MTEs. Second, we seek comment on issues related to our legal authority to place the obligations attendant with a mandatory access requirement on local telecommunications providers and/or building owners. Third, we seek comment regarding how a nondiscriminatory access requirement, if adopted, should be implemented.

We recognize that certain aspects of a nondiscriminatory access requirement have the potential to burden small entities. In this *Competitive Networks FNPRM*, we note that "there may be some entities for which the burdens arising out of a nondiscriminatory access rule would outweigh the benefits to competition and customer choice."[647] Thus, we inquire whether it would be appropriate to differentiate between commercial and residential buildings if a nondiscriminatory access requirement is implemented and whether such a requirement should "be triggered only if a building meets some threshold number of square feet, number of tenants, or gross rental revenue?"[648] Further, in order to minimize any potential burden on building owners, including small entities, should they be subject to a nondiscriminatory access requirement, we seek comment on "accommodating building space limitations and ensuring building safety and security."[649]

[646] 47 U.S.C. § 224.

[647] *Competitive Networks FNPRM*, at para. 152.

[648] *Id.*

[649] *Id.*, at para. 156.

In the *Competitive Networks First Report and Order,* we enacted a prospective ban on exclusive contracts between commercial MTEs and telecommunications service providers. However, we found that the record was not sufficiently developed to determine whether the prohibition on exclusive contracts should apply to residential MTEs.[650] In the *Competitive Networks FNPRM*, we seek comment on whether we should forbid telecommunications service providers, under some or all circumstances, from entering into exclusive contracts with residential building owners. We also seek comment on prohibiting carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs. We recognize that abrogating exclusive contracts may interfere with the investment back expectations of the parties to such contracts, including small entities. Therefore, in the alternative, we seek comment on whether we should phase out exclusive access provisions by establishing a future termination date for these provisions. We believe that a future sunset or phase-out of exclusive contract provisions would have a lower likelihood of interfering with the investment back expectations of the parties to such contracts. We also seek comment on whether we should phase out exclusive access provisions for carriers that qualify as small entities and the timing of any such phase out. Finally, we expect that small entities, including small telecommunications carriers and small building owners, would benefit from the competitive telecommunications environment that a ban on and/or phase out of residential MTE exclusive contracts would foster.

We seek comment on whether, and to what extent, preferential agreements between building owners and LECs should be regulated by the Commission. Such agreements may lessen telecommunications service competition in MTEs by fostering discriminatory behavior. We believe that competition among telecommunications service providers and limiting the scope and/or duration of such agreements could enhance service options for customers within MTEs.

We also seek comment on whether the Commission's rules governing access to cable home run wiring for multichannel video program distribution should be extended to benefit providers of telecommunications services. Our proposal is intended to foster competitive entry of alternative telecommunications service providers, including small entities, by increasing their access to MTE inside wiring. We seek comment on whether our proposal, if adopted, would affect providers of multichannel video programming services, including small entities.

Finally, we seek comment on the extent to which utility rights-of-way within MTEs are subject to access by telecommunications carriers (except incumbent LECs) and cable companies pursuant to Section 224 of the Act.[651] Our proposals in this regard are intended to add clarity to the rights and obligations of utilities, including small entities, that are subject to Section 224 and to facilitate competitive entry by competing LECs, including small LECs. We anticipate that this action will benefit many small entities, including property owners and managers.

---

[650] *See Competitive Networks First Report and Order*, at para. 33.

[651] 47 U.S.C. § 224. In the *Competitive Networks First Report and Order* we found that LECs and other utilities which own or control poles, ducts, conduits and other rights-of-way in MTEs, must permit competing providers access to such facilities under just, reasonable and nondiscriminatory rates, terms, and conditions. *Competitive Networks First Report and Order*, Section IV.D., *supra.*

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

DISSENTING STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH

In the Matter of Promotion of Competitive Networks in Local Communications Markets, WT Docket No. 99-217; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket 88-57.

I respectfully dissent from this item, which purports: to prohibit exclusive or effectively exclusive contracts between common carriers and business customers[1]; to modify the rules governing access to inside wiring by competitive carriers[2]; to permit wireless service providers to invoke the benefit of our pole attachment rules[3]; to extend our rules governing over-the-air reception devices ("OTARD") to providers of telephone and other non-video telecommunications service[4]; and to engage in further rulemaking on, among other things, the issue of mandatory access for wireless providers to private property[5]. For the reasons stated below, I find each of these decisions to be ill-considered, from both legal and practical standpoints.

Ban On Exclusive Contracts

First, I question the ultimate efficacy of the new, extremely restrictive regulation of private contracts adopted today. While we likely have statutory authority under section 201 over the common carrier conduct at issue here, *see generally Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999), nothing in our regulations stops building owners from making their contracts *de facto* exclusive ones. That is, they remain free, even under our new rule, simply to decline to enter into contracts with providers other than the existing one. We certainly have no legal authority to force building owners to enter into contracts for service with other carriers.

Moreover, I question the evidentiary assumption that exclusive contracts between carriers and businesses are generally "unjust or unreasonable," as required by section 201. In many cases, such contracts may allow for the provision of service in buildings that would otherwise have gone unsaved or allow for higher quality service that it otherwise might have received from multiple providers. Contrary to the Commission's approach, the question is not whether there is sufficient evidence of these pro-competitive benefits to warrant rejection of the proposed rule, *see supra* at para. 32, but whether there is enough proof of harmful effects to justify its adoption. I submit that the record is devoid of such empirical support.

---

[1] *See supra* Part IV.B.

[2] *See id.* Part IV.C.

[3] *See id.* Part IV.D.

[4] *See id.*, Part IV.E.

[5] *See id.* Part V.

Inside Wiring

I likewise dissent from the changes to our inside wiring rules. Although the Commission is wise not to mandate a uniform demarcation point for all inside wiring, *supra* at para. 53, I would not have required the demarcation point to be moved to the minimum point of entry upon the request of the building owner. Instead, I would simply have relied on the section 251-based duty of non-discriminatory access to unbundled network elements that incumbent local exchange carriers might owe under their interconnection agreements to remedy any problems that competitive carriers face. We should allow markets, not federal regulation, to sort out where any particular demarcation point should be located and thus who will be responsible for this infrastructure. Nor do I think that the Commission should have taken the further step of regulating negotiations between owners and carriers as to the relocation of demarcation points. *See id.* at paras. 55-56.

Access to Conduits and Rights-of-Way

At this time, I can not support the use of section 224 of the Communications Act to allow attachments by wireless or internet service providers to poles, ducts, conduits, or rights-of-way owned or controlled by utilities. The legal uncertainty surrounding our statutory authority to do so makes this application of the statute highly imprudent.

In *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), the U.S. Court of Appeals for the Eleventh Circuit "h[e]ld that the FCC lacks authority [under section 224] to regulate the placement of wireless equipment on utility poles and attachments for Internet service." *Id.*at 1266. In fact, the Court went on to say that "Congress did not give the FCC authority to regulate the placement of wireless carriers' equipment under section 224 (*or any other section*) of the Telecommunications Act of 1996." *Id.* at 1275 (emphasis added).

The full Court has denied the Commission's petition for rehearing *en banc*. Although the Court recently granted a stay of its mandate while the Solicitor General decides whether to file a petition for certiorari in the Supreme Court, it is unlikely that these rules can ultimately apply to grant wireless carriers or providers of internet service a right of attachment.[6] The chances of obtaining review in the Supreme Court are always slim; and this case concerns, at bottom, a straightforward question of statutory construction – not the typical sort in which certiorari is granted. If the Supreme Court denies a future petition for certiorari in this case and the stay is lifted, the Commission will just have a larger body of unlawful regulations to deconstruct than it otherwise would have had. Moving ahead with these rules at now, with this legal cloud looming over the application of the rules to wireless carriers and internet service providers, is extremely imprudent. Regardless of the Eleventh Circuit's temporary stay, the most responsible course of action is first to establish the rules' legality in any further appellate processes and then adopt them, instead of the other way around.

Extension of OTARD Rules

I dissent from the extension of OTARD rules to cover devices used to receive services other than video programming. We simply have no statutory authority to do so, whatever the policy reasons that the majority might have to favor that action. Section 207 of the 1996 Telecommunications Act applies only to "restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services," not restrictions of a person's ability to receive telecommunications services by way of fixed wireless technology.

---

[6] The *Gulf Power* Court consolidated appeals from the pole attachment Order filed in the Third, Fourth, Sixth, Eighth, and D.C. Circuits, *see* 208 F. 3d at 1270-1271, and, pursuant to 28 U.S.C. section 2342, its ruling is of nationwide applicability.

I do not think that Commission's invocation of ancillary jurisdiction can get it over this clear textual hurdle. As I have said repeatedly, when Congress has spoken specifically to the topic at hand, the Commission's oft-invoked theory of ancillary jurisdiction renders inoperable any "plain language" boundaries of a specific statutory provision:

> On [the Commission's] view of administrative law, Congress must expressly prohibit the Commission from going further than a particular provision authorizes it to go in order to make the textual limits of any provision stick. In an administrative scheme based on delegated powers -- where the Commission possesses only those powers granted by Congress, not all powers except those forbidden by Congress -- this approach to jurisdiction is clearly erroneous.

Statement of Commissioner Harold W. Furchtgott-Roth, Concurring in Part and Dissenting in Part, *In the Matter of Implementation of Video Description of Video Programming*, MM Docket No. 99-339 (rel. Aug. 7, 2000).[7]

The Commission's strained attempt to read section 207 as creating only a time deadline for the exercise of the substantive authority already possessed by the Commission under section 303, *see id.* at para. 107, is cute in the extreme. Section 303(r) is a purely procedural provision, giving the Commission authority to adopt regulations "necessary to carry out the provisions of this Act," 47 U.S.C. section 303(r), it is not an independent grant of substantive authority. Moreover, the Commission's understanding of section 207 renders it a largely useless exercise on the part of the Congress that passed it and the President who signed it into law: if the Commission already had the authority to extend OTARD rules to services other than those delineated in section 207, then everything in that section apart from the short introductory clause regarding the timing of the rulemaking was surplusage. Such a reading of the statute is contrary to venerable principles of statutory construction. *See, e.g., Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-116 (1879) ("We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times.")

Finally, I question the Commission's sweeping and conclusory assertion of authority to preempt all state and local laws governing the placement of fixed wireless devices. *See* Order at para. 108. Principles of comity and federalism teach that, just as state legislatures are beginning their work on the general question of building access for telecommunications carriers, we should not pull the rug out from under them by preemption. On top of that, we have no clear expression of Congressional intent in the Communications Act to oust States of regulatory jurisdiction over this class of zoning and contract decisions. *See generally Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 369 (1986) ("The critical question in *any* pre-emption analysis is always whether Congress intended that federal regulation supersede state law.") (emphasis added). Given that neither section 207 nor any other provision of the Act expressly grants the sort of regulatory authority at issue here, there is no clear legislative statement sufficient to justify federal preemption. Of course, zoning and the enforcement of basic contracts such as homeowners' covenants are classic examples of the sort of matters that have been traditionally reserved to

---

[7] I also note (with what at this point in my tenure I can only describe as weary bemusement) the dramatic inconsistency between the Commission's approach to the "plain language" of the OTARD and pole attachment statutes. *See supra* at paras. 80-81 (relying, in discussion of pole attachment regulations, on "plain meaning of Section 224(f)(I)" and arguing against "'resort to legislative history to cloud a statutory text that is clear'") (internal citation omitted). Here, of course, the unambiguous import of the OTARD section carries no weight at all with the Commission. *See id.* at paras. 102-106. It seems that a statute's "plain meaning" only controls when it allows for the exercise of Commission authority, not when it restricts the Commission's reach.

the States, and I thus think it doubtful that Congress meant to disable state and local governments in these areas.

Issuance of Further Notice of Proposed Rulemaking.

In my view, further rulemaking on the issue of rights of access for wireless service providers and others is unnecessary. Worse, it harms the private negotiations now taking place in the market. It is clear from the first notice and the comments received in response that we lack unambiguous statutory authority to impose a right of access, or even a or duty of "non-discrimination," on building owners, and the Commission points to none in its discussion of the matter. *See* Order at paras. 133-143.[8] Even if such authority existed on a discretionary basis, the exercise thereof would raise serious constitutional questions; I cannot set forth the reasons why this is so better than Professor Tribe did. *See* Comments of the Real Access Alliance, Memorandum of Laurence H. Tribe, "Takings Issues Raised by NPRM in FCC No. 99-141 (filed Aug. 24, 2000). There is no reason to continue to pursue a policy inquiry when this much is clear about the law.

Given my view that we lack clear authority in this area, I also would not leave open this proceeding and threaten future action. While I am pleased that the Commission declines to adopt a right of access today, the suggestion that it might do so in the future will itself influence private market behavior.

***

For the foregoing reasons, and notwithstanding my pleasure that the Commission does not today adopt a right of building access, I cannot vote to adopt this Report and Order and Further Notice of Proposed Rulemaking,

[8] Notably, the Senate passed on October 12 and the President now has before him legislation that would grant telecommunications service providers a right of access to government-owned buildings. *See* S. 1301, Competitive Access to Federal Buildings Act (106th Congress) (now contained in Treasury-Postal Appropriations Conference Report). This action suggests that, contrary to the Commission's argument, we do not currently possess statutory authority over the issue of access; if we did, there would have been no reason for the Senate to pass this bill. And if the bill is ultimately signed into law, it will be even more persuasive in terms of establishing our lack of authority in this area. *See FDA v. Brown & Williamson*, 120 S.Ct. 1291, 1306 (2000) (explaining that "'[t]he "classic judicial task of reconciling many laws enacted over time, and getting them to "make sense" in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute" and that this is "particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand") (internal quotation omitted)