

61. Finally, in the *UNE Remand Order*, the Commission defined “packet switching capability” as “routing or forwarding packets, frames, cells or other data units based on address or other routing information contained in the packets, frames, cells or other data units” as well as the functions performed by Digital Subscriber Line Access Multiplexers (DSLAMs).<sup>134</sup> The Commission required incumbent LECs, in limited circumstances, to provide access to “packet switching capability.”<sup>135</sup> We seek comment on whether, in light of changed circumstances, we should retain this unbundling requirement and, if so, whether we should modify this requirement or the existing definition for this network element. Specifically, some parties have asserted that the term “forwarding” in our current definition sweeps in fiber optic facilities in the loop used in the transmission (*i.e.*, “forwarding”) of packets. We seek comment on whether our current definition is correct as a technical matter. Should we alter our definition of packet switching to explicitly include or exclude the fiber optic facilities used in the transmission of packets to a central office termination point?

62. Similarly, we also seek comment on whether we should retain or modify our current definition of DSLAM functionality. Specifically, as a technical matter, should our definition include the “ability to forward voice channels, if present, to a circuit switch?”<sup>136</sup> Does this forwarding of voice channels encompass the fiber optic facilities in the loop used in such transmission? We seek comment on the benefits and burdens resulting from the packet switching unbundling requirement and seek comment on whether there are alternative, less burdensome options available to achieve the goals of the Act. In particular, we seek comment on whether we should alter the Commission’s standard for those circumstances in which incumbent LECs must unbundle packet switching. Is this standard still tailored to the actual impairment facing competitors seeking to access next-generation architecture? We seek comment on the level of competitive LEC demand for and use of unbundled packet switching under our existing standard and the impact of that standard on incumbent LEC investment in packet switching capability at remote terminal facilities.

#### 4. Interoffice Transmission Facilities

61. In the *UNE Remand Order*, the Commission found that requesting carriers are impaired without access to entrance facilities and interoffice facilities on a shared or dedicated basis.<sup>137</sup> We defined dedicated transport as “incumbent LEC transmission facilities . . . dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.”<sup>138</sup> The Commission defined shared transport as “transmission facilities shared by more than one carrier, including the incumbent

<sup>134</sup> *UNE Remand Order*, 15 FCC Rcd at 3833-34, paras. 302-04; see 47 C.F.R. § 51.319(c)(4).

<sup>135</sup> 47 C.F.R. § 51.319(c)(5). An incumbent LEC must provide access to unbundled packet switching only where the incumbent LEC has deployed digital loop carrier systems or otherwise deployed fiber optic facilities in the distribution part of the loop; has no spare copper loops capable of providing the xDSL service the requesting carrier seeks to offer; has not permitted the requesting carrier to collocate its own DSLAM at an appropriate subloop point; and has deployed packet switching for its own use. See *id.*

<sup>136</sup> 47 C.F.R. § 51.319(c)(4)(iii).

<sup>137</sup> *UNE Remand Order*, 15 FCC Rcd at 3842, para. 321; see 47 C.F.R. § 51.319.

<sup>138</sup> 47 C.F.R. § 51.319(d)(1)(i).

LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network.”<sup>139</sup> The Commission also found that requesting carriers were impaired without access to all available transport capacities (e.g., DS1, DS3, OC3) and dark fiber. We seek comment on whether, in light of changed circumstances, we should retain these unbundling requirements and if so, whether we should modify these requirements or the existing definitions for these network elements. For example, some CMRS carriers assert that incumbent LECs have refused to provide unbundled transport on the basis that a CMRS cell site (i.e., base station) is not a switch or wire center and therefore, transport to such location does not meet the definition for unbundled transport.<sup>140</sup> We seek comment on whether the facilities requested by CMRS carriers fit within our current definition for unbundled transport and if not, whether we should modify our definition of transport to include the unbundling of these facilities.<sup>141</sup> We also seek comment on the benefits and burdens resulting from continuing these unbundling requirements and whether there are alternative, less burdensome options available to achieve the goals of the Act.

62. We seek comment on whether we should apply to transport the more granular unbundling analysis we seek to develop in this proceeding. For example, given the prevalence of competitive transport providers, should we apply service, geographic, capacity or other distinctions to the availability of unbundled transport? Given the point-to-point nature of most transport facilities, how would we apply geographic disaggregation to this network element? Could we consider all potential routes originating and terminating in a specific geographic area, such as a MSA? For example, should we limit access to unbundled transport in geographic areas where sufficient levels of alternative transport facilities exist? Should we limit the availability of transport to certain capacity levels? Some parties assert that dedicated transport of a DS1 or greater capacity can be self-provisioned or acquired from third parties.<sup>142</sup> Others state that marketplace conditions still pose an impairment to requesting carriers.<sup>143</sup> In the *UNE Remand Order*, we required incumbent LECs to provide access to all technically feasible capacity levels of unbundled transport (i.e., DS1, DS3, OC3). We seek comment on whether application of a more refined impairment analysis would lead to different requirements for different levels of capacity. Should we distinguish by the services that the requesting carrier seeks to provide with access to unbundled transport? Are there distinctions we can and should make between classes of requesting carriers? For example, are there fewer transport alternatives available to CMRS

<sup>139</sup> 47 C.F.R. § 51.319(d)(1)(iii).

<sup>140</sup> See ATTWS & VoiceStream Petition for Declaratory Ruling.

<sup>141</sup> At least one incumbent LEC argues that section 51.319(d)(1)(i) of the Commission’s rules only requires incumbent LECs to provide unbundled transport if both the mobile switching center (MSC) and the cell site are switches or wire centers owned by the requesting CMRS carriers, which Verizon asserts they are not. See Letter from W. Scott Randolph, Director – Regulatory Affairs, Verizon Communications, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98, at 1-2 (filed Aug. 22, 2001). CMRS carriers, however, argue that channel terminations to base stations qualify as dedicated transport because base stations are switches and are the functional equivalent of a wire center. These issues, among others, are addressed in AT&T Wireless, Inc.’s and VoiceStream’s petition for a declaratory ruling. See ATTWS & VoiceStream Petition for Declaratory Ruling at 23-24.

<sup>142</sup> See, e.g., Comments of United States Telecom Ass’n, at 12, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed June 11, 2001).

<sup>143</sup> See, e.g., Joint Comments of Cbeyond, et al., at 30, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed June 11, 2001).

carriers than to other types of requesting carriers?<sup>144</sup> Some CMRS carriers assert that they obtain almost all of their high-capacity special access circuits from incumbent LEC tariffs.<sup>145</sup> What other alternatives are available to a CMRS carrier seeking to transport traffic between its MSC and base stations, and between base stations?

63. We also seek comment on the extent to which incumbent LECs have an obligation to modify their existing networks in order to provide access to network elements as required under rules prescribed by the Commission. The Commission previously concluded that because the incumbent LECs' networks were not initially constructed in a manner that provides for access to network elements, incumbent LECs have an obligation to modify those networks in order to comply with their unbundling requirements under the Act.<sup>146</sup> The Commission has also recognized that in at least some circumstances, incumbent LECs are not required to build new facilities in order to fulfill competitors' requests for network elements. For example, our current rules exempt incumbent LECs from any obligation "to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use."<sup>147</sup> In the *UNE Remand Order*, the Commission also prohibited the conversion of the entrance facility portion of a tariffed special access service to network element pricing to limit the ability of carriers to bypass access charges.<sup>148</sup> Should these policies be limited to interoffice transmission facilities, or are they equally applicable to loops and other network elements? Do special construction provisions of special access tariffs, such as non-recurring charges and term guarantees with termination liabilities, protect the incumbent LECs from uncompensated UNE conversions?<sup>149</sup> We seek comment on the extent of incumbent LECs' obligations to take reasonable steps to comply with their unbundling obligations and invite proposals for guidelines or bright line rules that would provide sufficient guidance all parties involved to minimize disputes arising from implementation of unbundling requirements adopted in this proceeding.<sup>150</sup>

63. In the *UNE Remand Order*, the Commission concluded that ring architecture transport was included within the definition of unbundled transport and that incumbent LECs

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<sup>144</sup> See ATTWS & VoiceStream Petition for Declaratory Ruling at 30.

<sup>145</sup> See *id.* at 10.

<sup>146</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15602-03, 15605, paras. 198, 202. The Commission has given further shape to this obligation in certain circumstances by more clearly delineating the activities necessary to fulfill this obligation. See, e.g., *UNE Remand Order*, 15 FCC Rcd at 3775, paras. 172-73.

<sup>147</sup> *UNE Remand Order*, 15 FCC Rcd at 3843, para. 324.

<sup>148</sup> *Id.* at 3912, para. 485 (citing BellSouth August 9, 1999 *Ex Parte* at 1).

<sup>149</sup> For example, incumbent LECs state that when requesting carriers order a special access circuit, the incumbent will build high-capacity circuits at the request of competitive carriers. See, e.g., Letter from John W. Kure, Executive Director -- Federal Policy and Law, Qwest, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed Sept. 26, 2001).

<sup>150</sup> See Letter from W. Scott Randolph, Director -- Regulatory Affairs, Verizon Communications, to Magalie Roman Salas, Secretary, Federal Communications Commission, at 1, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 01-138 (Aug. 21, 2001) (stating that where Verizon does not presently have facilities, but identifies new construction that would lead to its being able to fulfill a request, Verizon will provide the requested network element upon completion of that new construction).

must provide it on an unbundled basis.<sup>151</sup> The Commission also noted that incumbent LECs did not have to provide SONET capabilities to requesting carriers where the incumbent LEC did not already have SONET capabilities in place.<sup>152</sup> Some parties have interpreted language in the *UNE Remand Order* to mean that incumbent LECs have no obligation to provide SONET capabilities to requesting carriers, regardless of whether or not the facilities existed at the time of the request. We seek comment on the extent to which incumbent LECs should not have to provide ring architecture transport, particularly those facilities supporting SONET capabilities. Are there specific considerations about SONET technology or ring architectures that warrant exemption from unbundling?

## 5. Other Network Elements

64. In the *UNE Remand Order*, the Commission found requesting carriers were impaired without access to incumbent LECs' OSS functions, signaling networks and call-related databases.<sup>153</sup> The Commission defined OSS functions as consisting of "pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information."<sup>154</sup> The Commission defined signaling networks to include "signaling links and signaling transfer points"<sup>155</sup> and call-related databases as "databases, other than operations support systems, that are used in signaling networks for billing and collection, or the transmission, routing, or other provision of a telecommunications service."<sup>156</sup> We seek comment on whether, in light of changed circumstances, we should retain these unbundling requirements and if so, whether we should modify these requirements or the existing definitions for these network elements. We also seek comment on the benefits and burdens resulting from continuing these unbundling requirements and whether there are alternative, less burdensome options available to achieve the goals of the Act.

65. In the *UNE Remand Order*, the Commission noted that there were signaling alternatives available, but found that they were not sufficient to address the impairment to requesting carriers created by lack of access to the incumbent LEC's signaling system.<sup>157</sup> In particular, we seek comment on the deployment of signaling services that provide competitors with an alternative to the incumbent LEC's signaling system whether those services are obtained on a wholesale basis or as the result of self-deployment of facilities. What type of data should we consider to determine whether requesting carriers continue to be impaired without access to incumbent LECs' signaling systems?

66. In the *UNE Remand Order*, the Commission found that requesting carriers were impaired without access to incumbent LECs' call-related databases, "including, but not limited

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<sup>151</sup> *UNE Remand Order*, 15 FCC Rcd at 3843, para. 324.

<sup>152</sup> *Id.* ("Notwithstanding the fact that we require incumbents to unbundle high-capacity transmission facilities, we reject Sprint's proposal to require incumbent LECs to provide unbundled access to SONET rings.")

<sup>153</sup> *Id.* at 3867, 3875, 3887, paras. 383, 402, 433; see 47 C.F.R. §§ 51.319(e), (g).

<sup>154</sup> 47 C.F.R. § 51.319(g).

<sup>155</sup> *Id.* § 51.319(e)(1).

<sup>156</sup> *Id.* § 51.319(e)(2).

<sup>157</sup> *UNE Remand Order*, 15 FCC Rcd at 3869-70, paras. 389-90.

to, the Calling Name Database, 911 Database, E911 Database, Line Information Database, Toll Free Calling Database, Advanced Intelligent Network Databases, and downstream number portability databases.”<sup>158</sup> We seek comment on whether we need to apply our unbundling analysis more specifically to each call-related database. For example, should we apply service or customer distinctions to our existing requirements for call-related databases?

67. The Commission has found that requesting carriers are impaired without nondiscriminatory access to incumbent LECs’ OSS functions, including the pre-ordering function. The Commission has more specifically required incumbent LECs, as part of the pre-ordering function for loops supporting advanced services, to provide requesting carriers with access to line information necessary to determine whether advanced services can be provisioned to specific customers.<sup>159</sup> In contrast, we have set forth no such specific guidelines for the pre-ordering function for other loop types and our understanding is that no incumbent LEC provides similar information concerning facilities characteristics for other loop types during the pre-ordering function. Our experience in recent applications for section 271 authority indicates that at least two incumbent LECs do not provide information concerning facilities characteristics for high-capacity loops to competitors until after the OSS ordering function has been completed.<sup>160</sup> We request comment, therefore, on whether incumbent LECs, as part of the pre-ordering function for high-capacity loops, should provide requesting carriers with access to information concerning network infrastructure such that the requesting carrier can adequately determine whether to order the specific requested loop from the incumbent and when that order will be completed. Commenters should address whether, in light of changed circumstances, declining to provide such access impairs competitive LECs within the meaning of section 251(d)(2). We also seek comment on whether there are other aspects of access to OSS functions that might require further guidance or clarification from the Commission. Finally, we seek comment on whether any of our existing OSS requirements can be streamlined or modified to eliminate unnecessary regulatory burdens.

## 6. General Unbundling Issues

68. The Commission has previously concluded that Congress intended for the term “nondiscriminatory” in section 251 to impose a more stringent standard for prohibiting discrimination than the “unjust and unreasonable discrimination” standard in section 202 of the Act.<sup>161</sup> The Commission also interpreted the terms “just” and “reasonable” in section 251 to require incumbent LECs to provide competitors with access to network elements that provides “a meaningful opportunity to compete.”<sup>162</sup> In prior orders, the Commission has required incumbent

<sup>158</sup> *Id.* at 3875, 3878, paras. 402, 410; *see* 47 C.F.R. § 51.319(e)(2)(i).

<sup>159</sup> *UNE Remand Order*, 15 FCC Rcd at 3884-87, paras. 426-31.

<sup>160</sup> *See, e.g., Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, 20772-73 para. 107 (2001); *Pennsylvania Section 271 Order*, 16 FCC Rcd at 17468-69, para. 90.

<sup>161</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15612, paras. 217-18 (“We believe the term ‘nondiscriminatory’ as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself.”).

<sup>162</sup> *Id.* at 15660, para. 315.

LECs to provide all technically feasible methods of access to network elements. As an alternative, we seek comment on whether we should identify and require only those methods of access that fulfill the “just, reasonable and nondiscriminatory” standard of section 251(c)(3).

69. We also seek comment on the relationship between “services,” including both retail services and wholesale services (governed by sections 251(c)(4) and 251(b)(1)), and “network elements” (governed by sections 251(d)(2) and 251(c)(3)).<sup>163</sup> For example, several parties have requested that we require incumbent LECs to provide a requesting carrier with both network elements and wholesale services in order to serve a single customer.<sup>164</sup> In particular, competitive LECs propose to request access to a combination of network elements including the loop (*i.e.*, UNE-platform), in order to provide voice service to a customer while providing advanced telecommunications services, such as xDSL-based services, to the same customer via the resale of the incumbent LEC’s retail telecommunications offering. We seek comment on whether the Act *requires* incumbent LECs to provide such a combination of network elements and services and the underlying statutory analysis that supports such a requirement. Several parties have asserted that we should expressly allow co-mingling of network elements with access services.<sup>165</sup> Should we continue to impose limits on the ability of requesting carriers to combine certain network elements and services in order to serve a specific customer or class of customers?<sup>166</sup> We seek comment generally on the rights and obligations of all carriers in regards to the use and provision of services and network elements, particularly when combined over the same facilities or when used in combination to serve a specific customer or class of customers.

70. We also seek comment specifically on the co-mingling restrictions currently in place. In the safe harbor provisions of the *Supplemental Order Clarification*, the Commission articulated two specific prohibitions on the co-mingling of services and network elements: (1) requesting carriers may not “connect” loop-transport combinations to the incumbent LEC’s tariffed services, and (2) requesting carriers may not “combine” loop network elements or loop-transport combinations with tariffed special access services.<sup>167</sup> Since that time, some commenters have suggested that we should impose a general prohibition on “connecting” or “combining” any network elements or combinations with any access services. Incumbent LECs in particular, argue that their billing systems are not designed to treat a single circuit as part network element and part tariffed service, and that they have separate personnel to handle provisioning, repair, maintenance, billing and other functions for network elements as opposed to tariffed access services that would make it difficult to manage circuits that co-mingled network elements and tariffed services.<sup>168</sup> In contrast, competitive LECs state that the current co-mingling

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<sup>163</sup> In the *Local Competition First Report and Order*, the Commission explicitly left this question unresolved. *Id.* at 15671, para. 341.

<sup>164</sup> *Pennsylvania Section 271 Order*, 16 FCC Rcd at 17472, para. 97.

<sup>165</sup> See, e.g., Comments of Focal Communications Corporation, at 10-12, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Apr. 5, 2001) (Focal April 5, 2001 Comments).

<sup>166</sup> See *Supplemental Order Clarification*, 15 FCC Rcd at 9602, para. 28.

<sup>167</sup> *Id.* at 9598-99, 9602, paras. 22, 28.

<sup>168</sup> See, e.g., Opposition of SBC Communications, Inc. to ITC^DeltaCom Petition for Waiver, at 6, in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98

restrictions force them to build and operate two duplicate, inefficient networks (*i.e.*, one for network elements and one for tariffed services), thereby adding excessive cost and delay to their provision of competitive services.<sup>169</sup> We seek comment from all parties on these assertions and whether there are practical difficulties in co-mingling network elements with tariffed services. We also seek comment on methods to overcome such difficulties. Finally, are there any other legal or policy reasons for permitting or prohibiting co-mingling restrictions?

71. In addition, we note that the safe harbor provisions limit requesting carriers' access to EEL combinations in order to preserve the status quo with regard to the Commission's current access charge regime.<sup>170</sup> We seek comment on whether the Commission's safe harbor provisions, in practice, are effectively tailoring access to EEL combinations to those requesting carriers seeking to provide "significant local usage" to their end users. Based on practical experience, how many circuits eligible for conversion under the safe harbors have actually been converted? More broadly, do our safe harbors appropriately target competitive LEC impairment to local exchange service?

72. We seek comment on the relationship between section 271(c)(2)(B) and sections 251(d)(2) and 251(c)(3). The Act requires BOCs, as part of the application for authority to provide interLATA services, to demonstrate that they provide or generally offer local loop transmission, local transport, local switching, databases and signaling.<sup>171</sup> The Commission has previously considered these requirements to be informative in determining which network elements must be unbundled pursuant to section 251.<sup>172</sup> With respect to the potential limitation or removal of unbundling obligations that overlap the requirements of section 271(c)(2)(B), should we treat those network elements differently from other elements and, if so, how? In the *UNE Remand Order*, the Commission found that where there is no longer a requirement to unbundle a network element comparable to a section 271 checklist item, the market price for that checklist item should prevail.<sup>173</sup> We seek comment on how to evaluate a checklist item where there is no unbundling requirement for the network element that corresponds to that checklist item, and on the appropriateness of evaluating a tariffed service that corresponds to that network element.<sup>174</sup>

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(filed Sept. 18, 2001); Opposition of the Verizon Telephone Companies, at 9-10, in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Sept. 19, 2001).

<sup>169</sup> See, e.g., Comments of Cbeyond, *et al.*, at 14-16, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Apr. 5, 2001).

<sup>170</sup> *Supplemental Order Clarification*, 15 FCC Rcd at 9591-92, paras. 7-8.

<sup>171</sup> 47 U.S.C. § 271(c)(2)(B).

<sup>172</sup> "Although we do not conclude that the checklist determines definitively that all incumbent LECs are required, pursuant to section 251, to unbundle the items enumerated in section 271, we find that section 271 sheds some light on what elements Congress believed should be unbundled in order to open local markets to competition." *UNE Remand Order*, 15 FCC Rcd at 3748, para. 109.

<sup>173</sup> *Id.* at 3906, para. 473.

<sup>174</sup> See also *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 4126-27, para. 340 (1999).

73. Similarly, we seek comment on how, in the absence of a section 251 unbundling obligation for a network element, sections 201 and 202 of the Act may be applied to encourage broadband deployment and investment in facilities by both incumbents and competitors. For example, one incumbent LEC has asserted that mandatory unbundling of its broadband network is not necessary to incent facilities investment and ensure customer access, where other carriers can purchase a wholesale service at its central offices to reach their customers at a “commercially reasonable rate.”<sup>175</sup> We ask interested parties to comment on how commercially reasonable prices should be determined. Should they be established solely through private negotiation or is some regulation appropriate? At what level should prices be set to maximize investment in advanced telecommunications infrastructure, while still affording competitive access? Those parties advocating regulations should specify the method and degree of regulation, and how sections 201 and 202 of the Act or other statutory provisions provide authority for such regulation.

74. We seek comment on whether any specific quality or variation of a “network element” provided by an incumbent LEC to itself, to its customers or other carriers should be considered “superior” under the now invalidated Rule 51.311(c). There is very little evidence in CC Docket No. 96-98 concerning specific examples of “superior” network elements or “superior” access to network elements, and the Eighth Circuit opinion invalidating the rule also does not refer to specific examples.<sup>176</sup> We seek comment on whether the quality of a network element could be found to be something other than “superior” if it allows the provision of services that could not be provisioned using network elements of another quality. To the extent that a network element encompasses functionality, features and capabilities of an existing or prior offering of a service, or other arrangement of an incumbent LEC, we seek comment as to whether this is presumptive evidence that the quality of or access to a network element is not “superior.”

#### **E. The Role of the States**

75. We seek comment on the proper roles of state commissions in the implementation of unbundling requirements for incumbent LECs. Section 251(d)(3) of the Act permits state commissions to establish access obligations that are consistent with Commission unbundling rules.<sup>177</sup> In the *UNE Remand Order*, we interpreted section 251(d)(3) to grant authority to state commissions to impose additional obligations upon incumbent LECs so long as they met the requirements of section 251 and national policy framework of that order.<sup>178</sup> However, the Commission found that “state-by-state removal of elements from the national list would substantially prevent implementation of the requirements and purposes of this section and the Act,”<sup>179</sup> particularly with regard to uncertainty and frustration of business plans.<sup>180</sup> As a result of our attempt to apply the Act’s unbundling requirements more precisely here, it is not

<sup>175</sup> Verizon November 6, 2001 *Ex Parte* at 3.

<sup>176</sup> *Iowa Utils. Bd.*, 120 F.3d at 812-13.

<sup>177</sup> 47 U.S.C. § 251(d)(3); *UNE Remand Order*, 15 FCC Rcd at 3767, para. 154.

<sup>178</sup> 15 FCC Rcd at 3767, para. 154.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 3768-70, paras. 155-61

unreasonable to expect the administrative burden on the Commission to increase. We also recognize that state commissions may be more familiar than the Commission with the characteristics of markets and incumbent carriers within their jurisdictions, and that entry strategies may be more sophisticated in recognizing regional differences. We seek comment, therefore, on the extent to which state commissions can act in creating, removing, and implementing unbundling requirements and the statutory provisions that would provide authority for states to act, consistent with applicable limitations on delegations of authority to the states.

76. Specifically, should the Commission establish national standards that the states will apply to their incumbents' networks, much like the Commission has done with regard to setting network element pricing? For example, if the Commission determined that accessing end users (*i.e.*, "last mile") presented an impairment to requesting carriers, could each state commission adopt a definition of that element that specifically dealt with the unique architecture of its incumbent LECs and the impairment factors we have identified above? Or, more broadly, are states better situated to tailor unbundling rules that more precisely fit their markets? Do state commissions have the resources to conduct such an investigation? Should the development of federal unbundling standards rely on any of the federal performance standards that may be established in the *UNE Measurements and Standards Notice* and *Special Access Measurements and Standards Notice*? For example, where an incumbent is meeting the standard set forth for a particular UNE on a consistent basis, should the Commission rely on this performance as a factor in de-listing that element for that state?<sup>181</sup> We encourage state commissions in particular to comment on these issues. We also seek comment on a proposal to convene a Federal-State Joint Conference on UNEs pursuant to section 410(b) of the Act<sup>182</sup> to inform and coordinate our three-year review.<sup>183</sup>

#### F. Implementation Issues

77. We undertake this review of UNEs consistent with the Commission's pronouncement in the *UNE Remand Order* that it needed to reevaluate its national rules periodically to determine whether unbundling the incumbent's network meets the requirements of section 251 and the goals of the Act.<sup>184</sup> The Commission established a quiet period for the filing of petitions to remove elements prior to these reviews in order to provide a measure of certainty for competitors to design networks, attract investment capital, and carry out their business plans, as well as to prevent the administrative impracticality of entertaining numerous *ad hoc* petitions.<sup>185</sup> As for the length of the review cycle, the Commission chose a triennial review period for three reasons: (1) parties were expected to implement the new rules as they

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<sup>181</sup> One party has already proposed a framework where states would recommend to the Commission that unbundled switching obligations be relaxed, subject to incumbent LEC demonstration of the sufficiency of certain operational processes and other conditions. *See* AT&T April 2, 2001 *Ex Parte*.

<sup>182</sup> 47 U.S.C. § 410(b).

<sup>183</sup> CompTel Joint Conference Petition at 6-7; *see also* Letter from Joan Smith, Chair, NARUC Communications Committee, *et al.*, to Michael Powell, Chairman, Federal Communications Commission, CC Docket No. 96-98 (filed Dec. 5, 2001) (NARUC December 5, 2001 *Ex Parte*) (supporting CompTel's proposal for the Commission to convene a Federal-State Joint conference on UNEs pursuant to section 410(b) of the Communications Act).

<sup>184</sup> *UNE Remand Order*, 15 FCC Rcd at 3765, paras. 148-49.

<sup>185</sup> *Id.* at 3765-66, para. 150.

negotiated new interconnection agreements, which typically have three-year terms; (2) three years is generally sufficient time for competitors to implement their plans; and (3) the Modified Final Judgment used a triennial review process.<sup>186</sup> We request comment on the burden of proof that a party seeking to modify current rules and policies should bear.<sup>187</sup> In declining to adopt a sunset period for removing unbundling obligations, the Commission noted that the record before it did not provide a basis for making predictive judgments about when an unbundling standard will no longer be met.<sup>188</sup> We seek comment on this conclusion specifically. We invite interested parties to comment on whether we should continue with a fixed period review process that bars the filing of petitions to remove unbundling obligations between cycles, and on whether we should adopt a sunset period for removing unbundling obligations. We seek comment in particular on whether a sunset period for remaining unbundling obligations could create incentives for facilities deployment and investment. If not, the details of alternative plans should be provided. Commenters are also invited to provide guiding principles that should be employed to determine whether and how existing unbundling rules should be modified on an ongoing basis.

78. Further, to the extent we retain a periodic review cycle, we request comment on whether three years is the appropriate length for the review cycle in light of competitors' experiences with network design, ability to attract investment, and execution of their business strategies. We also note that the Joint Petitioners questioned the consistency of a triennial UNE review with the requirement of section 11 of the Act to review in even-numbered years whether regulations in effect continue to serve the public interest.<sup>189</sup> Although our completion of the instant review in 2002 satisfies both review cycles, we seek comment on whether the Commission could wait until 2005 for a subsequent UNE review, or whether section 11 requires a UNE review in 2004.

79. We also seek comment on whether and to what extent we should specifically address the financial impact created by changes to UNE availability to all affected carriers and access providers. Such an examination is consistent with our prior actions in recognizing new unbundling obligations as well as introducing other regulations. For example, in the *UNE Remand Order*, the Commission acknowledged that making entrance facilities available on an unbundled basis could have a large impact on incumbent LECs, and sought comment on the extent any such impact should be taken into account.<sup>190</sup> In the *Supplemental Order Clarification*, the Commission identified a reason for a temporary constraint on the EEL independent from the

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<sup>186</sup> *Id.* at 3766, para. 151 & n.269.

<sup>187</sup> CompTel Joint Conference Petition at 13 (asking the Commission to make clear that parties seeking to modify existing rules and policies must show by a preponderance of the record evidence that the requested relief is justified); *see also* NARUC December 5, 2001 *Ex Parte* at 1-2 (supporting CompTel's proposal on the burden of proof for requested relief).

<sup>188</sup> *UNE Remand Order*, 15 FCC Rcd at 3766, para. 152.

<sup>189</sup> Opposition of Joint Petitioners at 2; *see also* Separate Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 16 FCC Rcd 1727, 1731 (1999) (stating that the three-year review period is illegal, because section 11 of the 1996 Act, 47 U.S.C. § 161, would require a biennial review in 2000).

<sup>190</sup> *UNE Remand Order*, 15 FCC Rcd at 3915, para. 496.

protection of universal service or access charges: “An immediate transition to unbundled network element-based special access could undercut the market position of many facilities-based competitive access providers.”<sup>191</sup> More recently, in correcting market distortions of the intercarrier compensation regimes for ISP-bound traffic, the Commission adopted a transitional interim regime to avoid a “flash cut” that would upset the “legitimate business expectations of carriers and their customers.”<sup>192</sup> Commenters should discuss whether the Commission should address the financial impact of changes to UNE availability in a similar manner for all affected carriers, or whether the Commission can and should target its concerns to facilities-based providers or other classes of carriers.

80. In addition, we note that the Commission has previously tied the offset of BOC loss of revenues from switching unbundling with increased revenues from section 271 approval,<sup>193</sup> and we encourage parties to identify cut-off dates and triggers that relate to the goals of the Act. Additionally, while the Commission has previously disallowed relief for competitors from termination liabilities for UNE conversions of special access circuits,<sup>194</sup> we seek comment on what bases competitors should be able to obtain a “fresh look” for long term commitments.<sup>195</sup>

#### IV. PROCEDURAL MATTERS

##### A. Ex Parte Presentations

81. These matters shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>196</sup> Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.<sup>197</sup> Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission’s rules.

##### B. Comment Filing Procedures

82. Pursuant to sections 1.415 and 1.419 of the Commission’s rules,<sup>198</sup> interested parties may file comments within 60 days after publication of this NPRM in the Federal Register

<sup>191</sup> *Supplemental Order Clarification*, 15 FCC Rcd at 9597, para. 18.

<sup>192</sup> *Inter-carrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket No. 96-98, CC Docket No. 99-68, FCC 01-132 at para. 77 (rel. Apr. 27, 2001).

<sup>193</sup> “BOCs shall not be permitted to recover these revenues once they are authorized to offer in-region interLATA service, because at that time the potential loss of access charge revenues faced by a BOC most likely will be able to be offset by new revenues from interLATA services.” *Local Competition First Report and Order*, 11 FCC Rcd at 15866, para. 724. We note that the Commission instituted a section 271 approval trigger date in conjunction with a temporal phase-in, and that the purpose of protecting revenues was to protect universal service and an unreformed access charge regime rather than the market position or business expectations of the BOCs. *Id.* at 15866, para. 725.

<sup>194</sup> *UNE Remand Order*, 15 FCC Rcd at 3912, para. 486 n.985.

<sup>195</sup> Focal April 5, 2001 Comments at 12-14.

<sup>196</sup> 47 C.F.R. §§ 1.1200-1.1216.

<sup>197</sup> See 47 C.F.R. § 1.1206(b)(2).

<sup>198</sup> 47 C.F.R. §§ 1.415, 1.419.

and may file reply comments within 105 days after publication of this NPRM in the Federal Register. All filings should refer to CC Docket No. 01-338. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.<sup>199</sup> Comments filed through ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, postal service mailing address, and the applicable docket numbers, which in this instance are CC Docket No. 01-338, CC Docket No. 96-98, and CC Docket No. 98-147. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message: "get form<your e-mail address>." A sample form and directions will be sent in reply.

83. Parties that choose to file by paper must file an original and four copies of each, and are hereby notified that effective December 18, 2001, the Commission's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at a new location in downtown Washington, DC. The address is 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location will be 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

84. This facility is the only location where hand-delivered or messenger-delivered paper filings for the Commission's Secretary will be accepted. Accordingly, the Commission will no longer accept these filings at 9300 East Hampton Drive, Capitol Heights, MD 20743. In addition, this is a reminder that, effective October 18, 2001, the Commission discontinued receiving hand-delivered or messenger-delivered filings for the Secretary at its headquarters location at 445 12th Street, SW, Washington, DC 20554.

85. Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service (USPS) Express Mail and Priority Mail), must be addressed to 9300 East Hampton Drive, Capitol Heights, MD 20743. This location will be open 8:00 a.m. to 5:30 p.m. The USPS first-class mail, Express Mail, and Priority Mail should continue to be addressed to the Commission's headquarters at 445 12th Street, SW, Washington, DC 20554. The USPS mail addressed to the Commission's headquarters actually goes to our Capitol Heights facility for screening prior to delivery at the Commission.

<b>If you are sending this type of document or using this delivery method . . .</b>	<b>It should be addressed for delivery to . . .</b>
Hand-delivered or messenger-delivered paper filings for the Commission's Secretary	236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002 (8:00 to 7:00 p.m.)
Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal	9300 East Hampton Drive, Capitol Heights, MD 20743 (8:00 a.m. to 5:30 p.m.)

<sup>199</sup> See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

Service Express Mail and Priority Mail)	
United States Postal Service first-class mail, Express Mail, and Priority Mail	445 12 <sup>th</sup> Street, SW Washington, DC 20554

Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to Janice Myles, Policy & Program Planning Division, Common Carrier Bureau, Federal Communications Commission, at the filing window at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Microsoft Word or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket numbers, in this case, CC Docket No. 01-338, CC Docket No. 96-98, and CC Docket No. 98-147), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: "Disk Copy -- Not an Original." Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12<sup>th</sup> Street S.W., CY-B402, Washington, D.C. 20554.

86. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex International, Portals II, 445 12<sup>th</sup> Street S.W., CY-B402, Washington, D.C. 20554 (telephone 202-863-2893; facsimile 202-863-2898) or via e-mail at [qualexint@aol.com](mailto:qualexint@aol.com).

87. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.48 and all other applicable sections of the Commission's rules.<sup>200</sup> We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. We also strongly encourage that parties track the organization set forth in the NPRM in order to facilitate our internal review process.

### C. Initial Regulatory Flexibility Analysis

88. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>201</sup> the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM provided above in Section IV.B. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business

<sup>200</sup> See 47 C.F.R. § 1.48.

<sup>201</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 857 (1996).

Administration.<sup>202</sup> In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.<sup>203</sup>

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

89. We initiate this proceeding to begin a comprehensive examination of the Commission's approach to UNEs, and the circumstances under which incumbent LECs must make UNEs available to requesting carriers pursuant to sections 251(c)(3) and 251(d)(2) of the 1996 Act. The Commission last reviewed its unbundling rules comprehensively in 1999 in the *UNE Remand Order*. Recognizing that market conditions would change and create a need for commensurate changes to the unbundling rules, the Commission determined to revisit its unbundling rules again in three years -- a schedule observed by issuing this NPRM. The NPRM also incorporates the records of several ongoing proceedings involving various UNE rules.

90. The NPRM seeks comment on all aspects of the Commission's unbundling framework. In particular, the NPRM seeks comment on the goals of the Act that should play a role in shaping unbundling policy, such as broadband deployment, investment in facilities, and others. The NPRM seeks comment on how the Commission could apply its unbundling analysis in a more sophisticated manner, by considering whether the unbundling rules should vary by type of service, facility, geography, or other factors. The NPRM then seeks comment on applying the unbundling approach to specific elements and resolving certain existing disputes or ambiguities in the unbundling rules. The NPRM also seeks comment on the proper role of the states, and how best to implement any new rules.

### 2. Legal Basis

91. The legal basis for any action that may be taken pursuant to the NPRM is contained in sections 1-4, 157, 201-05, 251, 252, 254, 256, 271, 303(r), and 332 of the Communications Act, as amended, 47 U.S.C. §§ 151-54, 157, 201-05, 251, 252, 254, 256, 271, 303(r), and 332.

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

92. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.<sup>204</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>205</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>206</sup> A small business concern is one which: (1) is independently owned and

<sup>202</sup> See 5 U.S.C. § 603(a).

<sup>203</sup> See *id.*

<sup>204</sup> 5 U.S.C. §§ 603(b)(3), 604(a)(3).

<sup>205</sup> *Id.* § 601(6).

<sup>206</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an  
(continued....)

operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>207</sup>

93. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by rules adopted pursuant to this NPRM. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report.<sup>208</sup> In a news release, the Commission indicated that there are 4,822 interstate carriers.<sup>209</sup> These carriers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone service, providers of telephone exchange service, and resellers.

94. The SBA has defined establishments engaged in providing “Radiotelephone Communications” and “Telephone Communications, Except Radiotelephone” to be small businesses when they have no more than 1,500 employees.<sup>210</sup> Below, we discuss the total estimated number of telephone companies falling within the two categories, and the number of small businesses in each. We then attempt to further refine those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

95. We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”<sup>211</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>212</sup> We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

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

<sup>207</sup> 15 U.S.C. § 632.

<sup>208</sup> Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 16.3 (Dec. 2000) (*Trends in Telephone Service*).

<sup>209</sup> *Id.*

<sup>210</sup> See 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) codes 4812 and 4813, now NAICS codes 51331-34; see also Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual* (1987).

<sup>211</sup> 5 U.S.C. § 601(3).

<sup>212</sup> 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); 5 U.S.C. § 601(3). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

96. *Total Number of Telephone Companies Affected.* The U.S. Bureau of the Census (“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>213</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, covered specialized mobile radio providers, and resellers. It seems certain that some of these 3,497 telephone service firms may not qualify as small entities because they are not “independently owned and operated.”<sup>214</sup> For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It is reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms that may be affected by the new rules.

97. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telephone communications companies except radiotelephone (*i.e.*, wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.<sup>215</sup> According to the SBA’s definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.<sup>216</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. We do not have data specifying the number of these carriers that are not independently owned and operated, and thus 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 2,295 or fewer small telephone communications companies other than radiotelephone companies are small entities that may be affected by rules adopted pursuant to this *NPRM*.

98. *Local Exchange Carriers.* 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 (*i.e.*, wireless) companies.<sup>217</sup> According to the most recent *Telecommunications Industry Revenue* data, 1,335 incumbent carriers reported that they were engaged in the provision of local exchange services.<sup>218</sup> We do not have data specifying the number of these carriers that are either dominant in their field of operations, are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA’s definition.

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<sup>213</sup> U.S. Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) (*1992 Census*).

<sup>214</sup> See generally 15 U.S.C. § 632(a)(1).

<sup>215</sup> *1992 Census* at Firm Size 1-123.

<sup>216</sup> 13 C.F.R. § 121.201, NAICS code 513310.

<sup>217</sup> *Id.*

<sup>218</sup> *Trends in Telephone Service* at Table 16.3.

Consequently, we estimate that 1,335 or fewer providers of local exchange service are small entities or small incumbent LECs that may be affected by the new rules.

99. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (*i.e.*, wireless) companies.<sup>219</sup> According to the most recent *Trends in Telephone Service* data, 204 carriers reported that they were engaged in the provision of interexchange services.<sup>220</sup> We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 204 or fewer small-entity IXCs that may be affected by rules adopted pursuant to this *NPRM*.

100. *Competitive Access Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access services providers (CAPs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (*i.e.*, wireless) companies.<sup>221</sup> According to the most recent *Trends in Telephone Service* data, 349 CAP/CLEC carriers and 60 other LECs reported that they were engaged in the provision of competitive local exchange services.<sup>222</sup> We do not have data specifying the number of these carriers that are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 349 or fewer small-entity CAPs and 60 or fewer other LECs that may be affected by rules adopted pursuant to this *NPRM*.

101. *Operator Service Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (*i.e.*, wireless) companies.<sup>223</sup> According to the most recent *Trends in Telephone Service* data, 21 carriers reported that they were engaged in the provision of operator services.<sup>224</sup> We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 21 or fewer small-entity operator service providers that may be affected by rules adopted pursuant to this *NPRM*.

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<sup>219</sup> 13 C.F.R. § 121.201, NAICS code 513310.

<sup>220</sup> *Trends in Telephone Service* at Table 16.3.

<sup>221</sup> 13 C.F.R. § 121.201, NAICS code 513310.

<sup>222</sup> *Trends in Telephone Service* at Table 16.3.

<sup>223</sup> 13 C.F.R. § 121.201, NAICS code 513310.

<sup>224</sup> *Trends in Telephone Service* at Table 16.3.

102. *Pay Telephone Operators.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (*i.e.*, wireless) companies.<sup>225</sup> According to the most recent *Trends in Telephone Service* data, 758 carriers reported that they were engaged in the provision of pay telephone services.<sup>226</sup> We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 758 or fewer small-entity pay telephone operators that may be affected by rules adopted pursuant to this *NPRM*.

103. *Resellers (including debit card providers).* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable SBA definition for a reseller is a telephone communications company other than radiotelephone (*i.e.*, wireless) companies.<sup>227</sup> According to the most recent *Trends in Telephone Service* data, 454 toll and 87 local entities reported that they were engaged in the resale of telephone service.<sup>228</sup> We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 454 or fewer small-toll-entity resellers and 87 or fewer small-local-entity resellers that may be affected by rules adopted pursuant to this *NPRM*.

104. *Toll-Free 800 and 800-Like Service Subscribers.*<sup>229</sup> Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to 800 and 800-like service ("toll free") subscribers. The most reliable source of information regarding the number of these service subscribers appears to be data the Commission collects on the 800, 888, and 877 numbers in use.<sup>230</sup> According to our most recent data, at the end of January 1999, the number of 800 numbers assigned was 7,692,955; the number of 888 numbers that had been assigned was 7,706,393; and the number of 877 numbers assigned was 1,946,538. We do not have data specifying the number of these subscribers 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 toll free subscribers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 7,692,955 or fewer small-entity 800 subscribers, 7,706,393 or fewer small-entity 888 subscribers, and 1,946,538 or fewer small-entity 877 subscribers that may be affected by rules adopted pursuant to this *NPRM*.

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<sup>225</sup> 13 C.F.R. § 121.201, NAICS code 513310.

<sup>226</sup> *Trends in Telephone Service* at Table 16.3.

<sup>227</sup> 13 C.F.R. § 121.201, NAICS code 513330.

<sup>228</sup> *Trends in Telephone Service* at Table 16.3.

<sup>229</sup> We include all toll-free number subscribers in this category, including 888 number subscribers.

<sup>230</sup> *Trends in Telephone Service* at Table 19.2.

105. *Cellular Licensees.* Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (*i.e.*, wireless) companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.<sup>231</sup> According to the Bureau of the Census, only 12 radiotelephone firms out of a total of 1,178 such firms that operated during 1992 had 1,000 or more employees.<sup>232</sup> Therefore, even if all 12 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, we do not know the number of cellular licensees, since a cellular licensee may own several licenses. The most reliable source of information regarding the number of cellular service providers nationwide appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS). The report places cellular licensees and Personal Communications Service (PCS) licensees in one group. According to recent data, 808 carriers reported that they were engaged in the provision of either cellular or PCS services.<sup>233</sup> We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are no more than 808 small cellular service carriers.

106. *220 MHz Radio Service—Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and 4 nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the definition under the SBA rules applicable to radiotelephone communications companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.<sup>234</sup> According to a 1995 estimate by the Bureau of the Census, only 12 radiotelephone firms out of a total of 1,178 such firms that operated during 1992 had 1,000 or more employees.<sup>235</sup> Therefore, assuming that this general ratio has not changed significantly in recent years in the context of Phase I 220 MHz licensees, we estimate that nearly all such licensees are small businesses under the SBA's definition.

107. *220 MHz Radio Service—Phase II Licensees.* The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted criteria for defining small businesses and very small businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment

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<sup>231</sup> 13 C.F.R. § 121.201, NAICS code 513322.

<sup>232</sup> *1992 Census* at Firm Size 1-123.

<sup>233</sup> Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (Mar. 2000).

<sup>234</sup> 13 C.F.R. § 121.201, NAICS code 513322.

<sup>235</sup> *1992 Census* at Firm Size 1-123.

payments.<sup>236</sup> We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.<sup>237</sup> The SBA has approved these definitions.<sup>238</sup> An auction of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.<sup>239</sup> Nine hundred and eight (908) licenses were auctioned in three different-sized geographic areas: 3 nationwide licenses, 30 Regional Economic Area Group (REAG) licenses, and 875 Economic Area (EA) licenses. Of the 908 licenses auctioned, 693 were sold. Companies claiming small business status won: 1 of the Nationwide licenses, 67% of the Regional licenses, 47% of the REAG licenses and 54% of the EA licenses. As of January 22, 1999, the Commission announced that it was prepared to grant 654 of the Phase II licenses won at auction.<sup>240</sup> A second 220 MHz Radio Service auction began on June 8, 1999 and closed on June 30, 1999. This auction offered 225 licenses in 87 EAs and 4 REAGs. (A total of 9 REAG licenses and 216 EA licenses. No nationwide licenses were available in this auction.) Of the 215 EA licenses won, 153 EA licenses (71%) were won by bidders claiming small business status. Of the 7 REAG licenses won, 5 REAG licenses (71%) were won by bidders claiming small business status.

108. *Private and Common Carrier Paging.* The Commission has adopted a two-tier definition of small businesses in the context of auctioning licenses in the Common Carrier Paging and exclusive Private Carrier Paging services. A small business will be defined as either: (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million; or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than \$15 million. Because the SBA has not yet approved this definition for paging services, we will utilize the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.<sup>241</sup> At present, there are approximately 24,000 Private Paging licenses and 74,000 Common Carrier Paging licenses. According to recent data, 172 carriers reported that they were engaged in the provision of either paging or "other mobile" services, which are placed together in the data.<sup>242</sup> We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of paging carriers that would qualify as small business concerns under the SBA's

<sup>236</sup> *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, Third Report and Order, 12 FCC Rcd. 10943, 11068-70 paras. 291-95 (1997).

<sup>237</sup> *Id.* at 11068-69 para. 291.

<sup>238</sup> See Letter from A. Alvarez, Administrator, SBA, to D. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (filed Jan. 6, 1998).

<sup>239</sup> See generally *Phase II 220 MHz Service Auction Closes*, Auction No. 18, *Public Notice*, 14 FCC Rcd. 605 (1998).

<sup>240</sup> *Public Notice, FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made*, Auction No. 18, 14 FCC Rcd 1085 (1999).

<sup>241</sup> 13 C.F.R. § 121.201, NAICS code 513321.

<sup>242</sup> Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (Feb. 19, 1999).

definition. Consequently, we estimate that there are no more than 172 small paging carriers. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

109. *Mobile Service Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. As noted above in the section concerning paging service carriers, the closest applicable definition under the SBA rules is that for radiotelephone (*i.e.*, wireless) companies,<sup>243</sup> and recent data show that 172 carriers reported that they were engaged in the provision of either paging or "other mobile" services.<sup>244</sup> Consequently, we estimate that there are no more than 172 small mobile service carriers.

110. *Broadband Personal Communications Service (PCS).* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>245</sup> For block F, an additional classification for "very small business" was added and is defined as an entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>246</sup> These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.<sup>247</sup> No small businesses within the SBA-approved definition bid successfully for licenses in blocks A and B. There were 90 winning bidders that qualified as small entities in the C block auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for blocks D, E and F.<sup>248</sup> On March 23, 1999, the Commission held another auction (Auction No. 22) of C, D, E and F block licenses for PCS spectrum returned to the Commission by previous license holders. In that auction, 48 bidders claiming small business, very small business or entrepreneurial status won 272 of the 341 licenses (80%) offered. Based on this information, we conclude that the number of small broadband PCS licensees includes the 90 winning C block bidders, the 93 qualifying bidders in the D, E and F blocks, and the 48 winning bidders from Auction No. 22, for a total of 231 small-entity PCS providers as defined by the SBA and the Commission's auction rules.

111. *Narrowband PCS.* The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone

<sup>243</sup> 13 C.F.R. § 121.201, NAICS code 513321.

<sup>244</sup> *Trends in Telephone Service* at Table 19.3.

<sup>245</sup> *See Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd. 7824, 7850-53, paras. 57-60 (1996) (*CMRS Spectrum Cap Order*); 61 FR 33859 (Jul. 1, 1996); *see also* 47 C.F.R. § 24.720(b).

<sup>246</sup> *CMRS Spectrum Cap Order*, 11 FCC Rcd at 7852, para. 60.

<sup>247</sup> *See, e.g., In the Matter of 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 (1994).

<sup>248</sup> FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. Jan. 14, 1997).

companies. At present, there have been no auctions held for the major trading area (MTA) and basic trading area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licenses and 2,958 BTA licenses will be awarded by auction. Such auctions, however, have not yet been scheduled. Given that nearly all radiotelephone companies have no more than 1,500 employees, and no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume, for our purposes here, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

112. *Rural Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.<sup>249</sup> A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).<sup>250</sup> We will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.<sup>251</sup> 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.

113. *Air-Ground Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Air-Ground Radiotelephone Service.<sup>252</sup> Accordingly, we will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.<sup>253</sup> There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA definition.

114. *Specialized Mobile Radio (SMR).* The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to two tiers of firms: (1) "small entities," those with revenues of no more than \$15 million in each of the three previous calendar years; and (2) "very small entities," those with revenues of no more than \$3 million in each of the three previous calendar years. The regulations defining "small entity" and "very small entity" in the context of 800 MHz SMR (upper 10 MHz and lower 230 channels) and 900 MHz SMR have been approved by the SBA. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. We assume, for our purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz (upper 10 MHz) and 900 MHz SMR bands. There were 60 winning bidders that qualified as small and very small entities in the 900 MHz auction. Of the 1,020 licenses won in the 900 MHz auction, 263 licenses were won by bidders qualifying as small and very small entities. In the 800 MHz SMR auction, 38 of the 524 licenses won were won by small and very small entities.

<sup>249</sup> The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

<sup>250</sup> BETRS is defined in sections 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

<sup>251</sup> 13 C.F.R. § 121.201, NAICS code 513322.

<sup>252</sup> The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

<sup>253</sup> 13 C.F.R. § 121.201, NAICS code 513322.

115. *Marine Coast Service.* Between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of this auction, and for future public coast auctions, the Commission defines a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$15 million dollars. A "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$3 million dollars.<sup>254</sup> There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the Commission's definition, which has been approved by the SBA.

116. *Fixed Microwave Services.* Microwave services include common carrier,<sup>255</sup> private-operational fixed,<sup>256</sup> and broadcast auxiliary radio services.<sup>257</sup> At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For our purposes here, we will utilize the SBA's definition applicable to radiotelephone companies—*i.e.*, an entity with no more than 1,500 persons.<sup>258</sup> Under this definition, we estimate that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities.

117. *Local Multipoint Distribution Service.* The Commission held two auctions for licenses in the Local Multipoint Distribution Services (LMDS) (Auction No. 17 and Auction No. 23). For both of these auctions, the Commission defined a small business as an entity, together with its affiliates and controlling principals, having average gross revenues for the three preceding years of not more than \$40 million. A very small business was defined as an entity, together with affiliates and controlling principals, having average gross revenues for the three preceding years of not more than \$15 million. Of the 144 winning bidders in Auction Nos. 17 and 23, 125 bidders (87%) were small or very small businesses.

118. *24 GHz—Incumbent 24 GHz Licensees.* The rules that we may later adopt could affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The Commission has not developed a definition of small entities applicable to licensees in the 24 GHz band. Therefore, the applicable definition of small entity is the definition under the SBA rules for the

<sup>254</sup> *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

<sup>255</sup> 47 C.F.R. §§ 101 *et seq.* (formerly, part 21 of the Commission's Rules).

<sup>256</sup> 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.

<sup>257</sup> 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.

<sup>258</sup> 13 C.F.R. § 121.201, NAICS code 513322.

radiotelephone industry, providing that a small entity is a radiotelephone company employing fewer than 1,500 persons.<sup>259</sup> The 1992 Census of Transportation, Communications and Utilities, conducted by the Bureau of the Census, which is the most recent information available, shows that only 12 radiotelephone firms out of a total of 1,178 such firms that operated during 1992 had 1,000 or more employees.<sup>260</sup> This information notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent and TRW, Inc.<sup>261</sup> Both Teligent and TRW, Inc. appear to have more than 1,500 employees. Therefore, it appears that no incumbent licensee in the 24 GHz band is a small business entity.

119. *Future 24 GHz Licensees.* The rules that we may later adopt could also affect potential new licensees on the 24 GHz band. Pursuant to 47 C.F.R. § 24.720(b), the Commission has defined “small business” for Blocks C and F broadband PCS licensees as firms that had average gross revenues of less than \$40 million in the three previous calendar years. This regulation defining “small business” in the context of broadband PCS auctions has been approved by the SBA.<sup>262</sup> With respect to new applicants in the 24 GHz band, we shall use this definition of “small business” and apply it to the 24 GHz band under the name “entrepreneur.” With regard to “small business,” we shall adopt the definition of “very small business” used for 39 GHz licenses and PCS C and F block licenses: businesses with average annual gross revenues for the three preceding years not in excess of \$15 million. Finally, “very small business” in the 24 GHz band shall be defined as an entity with average gross revenues not to exceed \$3 million for the preceding three years. The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held. Even after that, the Commission will not know how many licensees will partition their license areas or disaggregate their spectrum blocks, if partitioning and disaggregation are allowed.

120. *39 GHz.* The Commission held an auction (Auction No. 30) for fixed point-to-point microwave licenses in the 38.6 to 40.0 GHz band (39 GHz Band).<sup>263</sup> For this auction, the Commission defined a small business as an entity, together with affiliates and controlling interests, having average gross revenues for the three preceding years of not more than \$40 million. A very small business was defined as an entity, together with affiliates and controlling principals, having average gross revenues for the three preceding years of not more than \$15 million. The SBA has approved these definitions.<sup>264</sup> Of the 29 winning bidders in Auction No. 30, 18 bidders (62%) were small business participants.

<sup>259</sup> See 13 C.F.R. § 121.201, NAICS code 513322.

<sup>260</sup> 1992 Census at Firm Size 1-123.

<sup>261</sup> Teligent has acquired the DEMS licenses of FirstMark, the only other licensee in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

<sup>262</sup> See Section 309(j) of the Communications Act—Competitive Bidding, Fifth Report and Order, 9 FCC Rcd. 5532, 5581-82 para. 115 (1994).

<sup>263</sup> See Public Notice, *39 GHz Band Auction Closes; Winning Bidders of 2,173 Licenses Announced*, DA 00-1035 (rel. May 10, 2000).

<sup>264</sup> See Letter from Aida Alvarez, Administrator, Small Business Administration, to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (filed Feb. 4, 1998).

121. *Multipoint Distribution Service (MDS)*. This service involves a variety of transmitters, which are used to relay data and programming to the home or office, similar to that provided by cable television systems.<sup>265</sup> 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.<sup>266</sup> This definition of a small entity in the context of MDS auctions has been approved by the SBA.<sup>267</sup> These stations were licensed prior to implementation of Section 309(j) of the Communications Act of 1934, as amended.<sup>268</sup> Licenses for new MDS facilities are now awarded to auction winners in Basic Trading Areas (BTAs) and BTA-like areas.<sup>269</sup> 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.

122. MDS is also heavily encumbered with licensees of stations authorized prior to the MDS auction. SBA has developed a definition of small entities for pay television services, which includes all such companies generating \$11 million or less in annual receipts.<sup>270</sup> This definition includes MDS systems, and thus applies to incumbent MDS licensees and wireless cable operators which may not have participated or been successful in the MDS auction. Information available to us indicates that there are 832 of these licensees and operators that do not generate revenue in excess of \$11 million annually. Therefore, for purposes of this analysis, we find there are approximately 892 small MDS providers as defined by the SBA and the Commission's auction rules.

123. *Offshore Radiotelephone Service*. This service operates on several UHF TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico.<sup>271</sup> At present, there are approximately 55 licensees in this service. We are unable at this time to estimate the number of licensees that would qualify as small under the SBA's definition for radiotelephone communications.

124. *Wireless Communications Services (WCS)*. This service can be used for fixed, mobile, radio-location and digital audio broadcasting satellite uses. The Commission defined "small business" for the WCS auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of \$15 million for each of the three preceding years. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders

<sup>265</sup> For purposes of this item, MDS includes both the single channel Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS).

<sup>266</sup> 47 C.F.R. § 1.2110 (a)(1).

<sup>267</sup> *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; Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd. 9589 (1995), 60 FR 36524 (Jul. 17, 1995).

<sup>268</sup> 47 U.S.C. § 309(j).

<sup>269</sup> *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 36-39 (123rd ed. 1992).

<sup>270</sup> 13 C.F.R. §121.201.

<sup>271</sup> This service is governed by subpart I of Part 22 of the Commission's Rules. See 47 C.F.R. §§ 22.1001-22.1037.

that qualified as very small business entities, and one winning bidder that qualified as a small business entity. We conclude that the number of geographic area WCS licensees affected includes these eight entities.

125. *General Wireless Communication Service (GWCS)*. This service was created by the Commission on July 31, 1995<sup>272</sup> by transferring 25 MHz of spectrum in the 4660-4685 MHz band from the federal government to private sector use. The Commission sought and obtained SBA approval of a refined definition of "small business" for GWCS in this band.<sup>273</sup> According to this definition, a small business is any entity, together with its affiliates and entities holding controlling interests in the entity, that has average annual gross revenues over the three preceding years that are not more than \$40 million.<sup>274</sup> By letter dated March 30, 1999, NTIA reclaimed the spectrum allocated to GWCS and identified alternative spectrum at 4940-4990 MHz. On February 23, 2000, the Commission released its *Notice of Proposed Rulemaking* in WT Docket No. 00-32 proposing to allocate and establish licensing and service rules for the 4.9 GHz band.<sup>275</sup>

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

126. In this NPRM, we seek comment on crafting unbundling rules that promote the goals of the Act and on a more granular approach to unbundling.<sup>276</sup> In addition, we ask for comment on how to involve the experience and expertise of state commissions.<sup>277</sup> As a result, our unbundling regulations may require incumbent LECs to unbundle their networks by facility, service, or geography, rather than on a national basis for an entire element as they currently do. However, to identify which factors advancing the goals of the Act are relevant to an unbundling analysis, we ask about the weight to assign to reducing regulatory obligations as alternatives to the incumbent's network becomes available, and whether the unbundling obligations are administratively practical.<sup>278</sup>

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

127. The RFA requires an agency to describe any significant small business, 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

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<sup>272</sup> See *Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, ET Docket No. 94-32, Second Report and Order, 11 FCC Rcd. 624 (1995).

<sup>273</sup> See Letter from Aida Alvarez, Administrator, Small Business Administration, to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (filed May 19, 1998).

<sup>274</sup> See 47 C.F.R. § 26.4.

<sup>275</sup> See *The 4.9 GHz Band Transferred From Federal Government Use*, WT Docket No. 00-32, Notice of Proposed Rulemaking, 15 FCC Rcd. 4778 (2000).

<sup>276</sup> See *supra*, e.g., Section III.C.

<sup>277</sup> See *supra* Section III.E.

<sup>278</sup> See *supra* Section III.B.

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.<sup>279</sup>

128. In this NPRM, we seek comment on refining our unbundling rules by examining whether we should consider the type of customer that a requesting carrier seeks to serve.<sup>280</sup> In particular, we ask whether the availability of UNEs should differ on the basis of whether the requesting carrier serves business or residential customers, and whether to have different rules for facilities serving larger business customers.<sup>281</sup> We ask questions in considerable depth with regard to the carve-out for the residential market for local switching, and seek comment on the practical experience of the carve-out has worked in practice and whether a substantially revised approach is warranted.<sup>282</sup> The size of the entity as a subscriber to telecommunications services is therefore an important component of our unbundling analysis.

129. In addition to examining the economic impact on customers, we also examine the economic impact on carriers. We especially seek comment from small entities on these issues. As we consider undertaking a more granular approach, we recognize that the resulting rules could be more administratively burdensome on carriers because it would be more difficult to keep track of where and under what circumstances certain elements must be unbundled. Accordingly, we ask for comment about balancing any administrative burden against the benefits of a refined approach to unbundling.<sup>283</sup> Particularly with regard to definitions of different network elements, we ask whether there are less burdensome alternatives available to achieve the goals of the Act.<sup>284</sup>

#### **6. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules**

130. None.

### **V. ORDERING CLAUSES**

131. Accordingly, IT IS ORDERED that pursuant to sections 1-4, 157, 201-05, 251, 252, 254, 256, 271, 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-54, 157, 201-05, 251, 252, 254, 256, 271, 303(r), and 332, this NOTICE OF PROPOSED RULEMAKING IS HEREBY ADOPTED.

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<sup>279</sup> 5 U.S.C. § 603(c).

<sup>280</sup> See *supra* Section III.C.2.

<sup>281</sup> See *supra* Section III.C.3.

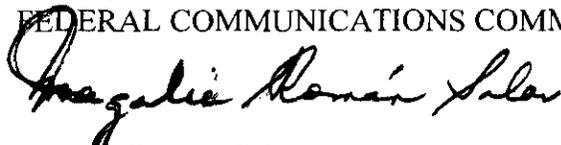
<sup>282</sup> See *supra* Section III.D.3.

<sup>283</sup> See *supra* Section III.C.1.

<sup>284</sup> See *supra* Section III.D.

132. IT IS FURTHER ORDERED that the Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this NOTICE OF PROPOSED RULEMAKING, including the INITIAL REGULATORY FLEXIBILITY ANALYSIS, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary

**SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL**

*Re: Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services et al., CC Docket No. 01-337 et al.*

*Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al., CC Docket Nos. 01-338 et al.*

In this combined statement, I write separately to underscore my support for these two *Notices of Proposed Rulemaking*, which comprise the second and third in a series of notices the Commission recently announced that will begin Phase II of our local competition implementation and enforcement efforts under the 1996 Act.<sup>1</sup>

**Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services**

I vigorously support the *Notice* we hereby adopt that initiates a review of the regulatory requirements applicable to incumbent LEC provision of high-speed telecommunications services. In this proceeding, the Commission will ask whether potentially robust competition among multiple types of broadband service providers suggests that we should avoid subjecting incumbents to the same regulatory burdens that we impose on these carriers with respect to their provision of local telephone service. That is, we ask whether incumbent LECs, which are so clearly dominant in the provision of local phone service, must also be treated as dominant as they use DSL and other technologies to provide high-speed telecommunications services in competition with cable modem service providers and other types of platforms. I would point out that this item focuses on traditional Title II common carrier regulation, historically arising out of the section 201 and 202 of the Communications Act of 1934, as applied to incumbent LEC provision of high-speed *telecommunications services*. In contrast, the aforementioned proceeding regarding regulation of incumbent LEC broadband information services will address the question whether Title I should apply when incumbent LECs provide a bundled high-speed *information service* offering.

I would emphasize that our initiation of this proceeding should not suggest a grand departure from our ongoing efforts to implement unbundling, collocation and other market-opening requirements with respect to incumbent LECs pursuant to section 251(c)(3) of the Act. These other requirements are intended to allow competing carriers, particularly facilities-based

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<sup>1</sup> The first of these items was the *Notice of Proposed Rulemaking* regarding performance requirements for UNE provisioning that we adopted at the November agenda meeting. *Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al.*, CC Docket No. 01-318, Notice of Proposed Rulemaking, FCC 01-331 (rel. Nov. 19, 2001). In addition to that *Notice* and the two items captioned above, we will in the coming weeks seek comment on the appropriate regulatory framework for incumbent LEC provision of broadband information services.

carriers, to provide new and innovative telecommunications services. By the express terms of the statute, the Commission is duty-bound to continue our implementation and enforcement of these provisions, and we will.

Rather, this *Notice of Proposed Rulemaking* is intended to develop further one more avenue of thinking about how regulation can serve to help (or hinder) broadband deployment. It is, in that sense, not a signpost heralding a new direction but an attempt to add yet another arrow to the regulatory quiver we will use to attack and, in conjunction with other forces outside our purview, eventually subdue the broadband beast.

Notwithstanding my enthusiasm for our decision to initiate this inquiry, I for one have an open mind as to how these questions should be answered. For example, it may prove too unwieldy for both carriers and the Commission to treat incumbents as dominant for their provision of traditional local service but non-dominant for their provision of high-speed telecommunications services. I also acknowledge that declaring incumbent LEC provision of broadband telecommunications services non-dominant could have consequences in other areas of regulation that the Commission has not yet fully anticipated. Yet the importance of broadband deployment to the public interest and welfare is too great to disregard any potential method of facilitating that deployment. In sum, we must ensure that we leave no stone unturned in our pursuit of this important goal.

### **Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers**

I similarly and wholeheartedly support the *Notice* we adopt here that initiates our scheduled triennial review of UNE obligations imposed on incumbent LECs pursuant to sections 251(c)(3) and 251(d)(2). Taking our cues from the Supreme Court in its opinion remanding to the Commission the task of giving meaningful effect to these provisions, my former colleagues and I determined that the agency would, in three years, revisit its decisions regarding the availability of UNEs.<sup>2</sup> The purpose of this triennial review would be to keep those decisions current with ongoing market and regulatory developments. That was in 1999, and now the year 2002 fast approaches.

Not surprisingly, however, I support this item for reasons other than the fact that it will put the Commission in a position to deliver on the commitment it made in 1999. First, it underscores the Commission's ongoing commitment to the promotion of facilities-based competition, which was pronounced most clearly by my former colleagues and I in the 1999 *UNE Remand Order*.<sup>3</sup> I believe this commitment should focus, in particular, on both so-called "full facilities-based" competition and competition from newer entrants who supplement their own facilities with network elements leased from the incumbent. As I have demonstrated in my

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<sup>2</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), ¶ 151.

<sup>3</sup> *UNE Remand Order*, ¶ 14.

decisions and public statements over my four years at the Commission, I fully support the use of facilities and individual UNEs as means to promote local competition while simultaneously furthering the related goals of encouraging deregulation and innovation. The 1996 Act and our experience since its passage demand no less.

Second, I support this item because it emphasizes further an area of inquiry begun in the *UNE Remand Order*. Specifically, in that *Order*, we considered how the Act's goals of encouraging broadband deployment and investment in competing facilities should shape unbundling policy.<sup>4</sup> I support our decision here to continue and to expand this area of inquiry.

Third, I support the Commission's decision, in seeking comment here on whether to unbundle aspects of the incumbent's network, to ask whether and the extent to which we should take note of the availability of technologies other than circuit-switched telephony provided by traditional common carriers. In particular, this *Notice* expressly focuses on the roles that cable and wireless companies have begun and will continue to play in the market for telephony and broadband telecommunications services. This emphasis may also be viewed as expansion of an avenue of inquiry begun by the previous Commission. Specifically, in the *UNE Remand Order*, my former colleagues and I appropriately followed the Supreme Court's demand that we not blind ourselves to the availability of self-provisioned or other alternative facilities in determining whether to unbundle elements of the incumbent LEC's network.<sup>5</sup>

To my mind, it seems premature to suggest that the availability of such technologies should be fully dispositive of the question whether to require the availability of specific UNEs. Yet it does stand to reason that such availability may give us some indication of the alternative tools newer entrants could use to serve customers if the Commission were to decline to unbundle any particular element of the network. I encourage parties to provide detailed and well-supported comments in order to help us determine whether this line of reasoning is, in fact, sound.

As this *Notice* itself reminds us, the Commission now has the benefit of two years of experience with the current unbundling rules and almost six years of experience with promoting competition since the 1996 Act was passed. These are no doubt merely the opening chapters of a regulatory epic that will take many years to rewrite a near century-long history of legally sanctioned monopoly in the telephone market. But I believe it is critical that we take stock of the lessons we have learned so far and make any changes that may be necessary to ensure that our rules remain faithful to the statute and its goals of promoting competition, deregulation and innovation in telecommunications markets.

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<sup>4</sup> *UNE Remand Order*, ¶¶ 107-113.

<sup>5</sup> *UNE Remand Order*, ¶ 8.

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I thank the Common Carrier Bureau staff and my colleagues for their enormous work on these *Notices* and look forward to working with them, as well as my state commission colleagues, in carrying out both of these important "Phase II" proceedings.

**SEPARATE STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

*Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Notice of Proposed Rulemaking; and Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Notice of Proposed Rulemaking.*

I will vote to approve these Notices of Proposed Rulemaking because I think they have been significantly improved, and given more balance, during the discussions preceding today's meeting. These Notices recognize the importance of competition and, importantly, do not reach tentative conclusions. Nevertheless, I do not vote for these Notices without some concern for the competition framework laid out by Congress in the 1996 Act.

I understand the need to ask questions. In particular, the Commission indicated in 1999 that it would reexamine every three years the list of network elements that need to be unbundled pursuant to section 251(c)(3). I generally do not mind asking questions, but we must be sensitive to the larger context.

This is a time of great uncertainty in the economy, for the telecommunications industry, and for competition for both telecommunications and Internet services. The years since passage of the Act have seen high-flying expectations, and lately, descent into worry and trepidation. I hear from competitors and incumbents alike the desire for certainty and stability in the regulatory environment. I fear that these broad Notices may not be meeting this need.

Some parties may read these Notices and conclude that the Commission has a predetermined agenda to remake the competition framework. Whether accurate or not, this perception, coupled with the uncertainty created by these broad Notices, can damage competition as surely as any final rules adopted by this Commission.

We must recognize that setting competition policy is the exclusive jurisdiction of Congress. I approach these proceedings optimistic that the Commission will show proper restraint and will not presume to question the statutory competitive framework. Instead, the Commission should use these proceedings to understand the marketplace better in our role as policy implementers and not policy makers. And we should not create concern, even unwittingly, that our zeal to deregulate before meaningful competition develops might cripple the very competition that Congress sought to engender.

Let the record show, however, that if our proceedings should ever turn into an attempt to undermine the competitive framework that Congress adopted in the 1996 Act, I will – without hesitation – oppose such overreaching.

**SEPARATE STATEMENT OF  
COMMISSIONER KEVIN J. MARTIN**

*Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Notice of Proposed Rulemaking*

I am pleased to join in approving this item, which initiates our first triennial review of the Commission's policies on unbundled network elements (UNEs). In this proceeding, we will revisit the circumstances under which incumbent local exchange carriers must make parts of their networks available to requesting carriers.

This proceeding goes hand-in-hand with our inquiries on national performance measures in terms of promoting facilities-based competition. See Separate Statement of Commissioner Kevin J. Martin, *Performance Measurements and Standards for Unbundled Network Elements And Interconnection*, Notice of Proposed Rulemaking, FCC 01-331, 2001 WL 1461061 (rel. Nov. 19, 2001). As I have stated, the promotion of facilities-based competition should be a fundamental priority of this Commission. The goal of the Telecommunications Act of 1996 was to establish an environment that promotes meaningful competition and allows for deregulation. To get to true deregulation, we need facilities-based competition. Without such competition, we will always need a regulatory body to set wholesale and retail prices.

This proceeding presents an important opportunity for the Commission to consider carefully how our rules affect facilities deployment. In particular, we inquire how the necessary and impair standard, which is used to determine what elements must be unbundled, should apply to elements that are readily available and to new facilities and infrastructure being built by the ILECs. Any changes we make to our rules – if, indeed, any are necessary – should ensure there are adequate incentives for both ILECs and CLECs to invest in new equipment.

At the same time, I reiterate my commitment to making sure that CLECs are able to obtain, in a reasonable and timely manner, those facilities of the ILECs that are truly essential. No one expects CLECs to build entire networks from scratch overnight. Enabling CLECs to gain meaningful access to essential facilities controlled by ILECs thus remains crucial to promoting facilities-based competition. Accordingly, I view our inquiries on establishing national performance measures for UNEs and special access as equally important to the proceeding we initiate today. In all of these proceedings, I look forward to furthering our goal of making meaningful facilities-based competition a reality.