interpretation advanced by competitive carriers, finding that "incumbent LECs must permit third parties to obtain access under section 252(i) to any *individual* interconnection, service or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252."[2121] This decision has allowed competitive carriers to "pick and choose" any provision in an approved interconnection agreement between another competitor and the incumbent LEC.

716. On review, the U.S. Court of Appeals for the Eighth Circuit vacated the pick-and-choose rule, holding that it would unreasonably deter voluntarily negotiated agreements "by making incumbent LECs reluctant to grant quids for quos, so to speak, for fear that they would have to grant others the same quids without receiving quos."[2122] The Supreme Court reversed the Eighth Circuit and reinstated the rule. The Court agreed with the incumbent LECs that it would be "eminently fair" if "[a] carrier who wants one term from an existing agreement . . . [were] required to accept *all* the terms in the agreement."[2123] The Court held, however, that the Commission's interpretation of section 252(i) was reasonable (and indeed the "most readily apparent" reading of section 252(i)), because it closely tracked the statutory text.[2124] Ultimately, the Court concluded that the question of "whether the Commission's approach will significantly impede negotiations (by making it impossible for favorable interconnection- service or network-element terms to be traded off against unrelated provisions) is a matter eminently within the expertise of the Commission and eminently beyond our ken."[2125]

717. In its petition, Mpower Communications, a competitive LEC, seeks relief from the pick-and-choose requirement, arguing that the rule "inhibit[s] innovative deal-making."[2126] Mpower observes that the existing rule has produced "a great sameness and very little meaningful choice."[2127] In an effort to "'add an arrow to the quiver' of ILECs and CLECs who want to make competition work,"[2128] Mpower proposes authorizing "FLEX contracts" as an alternative to the pick-and-choose regime. A FLEX contract would be a voluntarily negotiated wholesale agreement between an incumbent LEC and a competitive LEC that other carriers could opt into only as a "package deal" – that is, they would be required to accept the entire agreement "rather than be able to pick just 'the best parts' of the deal."[2129] To accomplish this goal, Mpower

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[2121] *Id.* at 16139, para. 1314 (emphasis added); *see also* 47 C.F.R. § 51.809.

[2122] *Iowa Utils. Bd.*, 525 U.S. at 377 (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 801).

[2123] *Id.* at 395-96.

[2124] *Id.* at 396.

[2125] *Id.*

[2126] Mpower May 25, 2001 Petition at 9.

[2127] *Id.*

[2128] *Id.* at 4.

[2129] *Id.* at 8.

argues that the Commission should forbear from section 252(i), as well as from the requirement in section 252(e) to submit interconnection agreements for state commission approval.[2130] Only the Commission would be permitted to enforce the terms of FLEX contracts, and such terms would not be admissible in any "unrelated proceeding."[2131] Creating this safe harbor from the pick-and-choose rule, Mpower argues, would pave the way toward improved wholesale relationships between incumbent LECs and competitive carriers.[2132]

718. Several parties filed comments in response to the Mpower May 25, 2001 Petition. Incumbent LECs support the Petition, arguing that the pick-and-choose rule undermines the regime of commercial negotiations envisioned by Congress.[2133] Commenters opposing the Mpower May 25, 2001 Petition object to circumventing the requirement of state commission approval of interconnection agreements, arguing that the forbearance standard is not satisfied.[2134] These commenters also express the concern that requiring competitors to opt into an entire FLEX contract would enable incumbent LECs to create "poison pills" – "provisions that do not negatively affect the contracting parties but that would make the contract unpalatable to other carriers."[2135]

719. In a January 17, 2003 *ex parte* letter, Verizon, joined by BellSouth, SBC and Qwest, press for the abandonment of the pick-and-choose rule, arguing that it permits a competitive LEC "to cherry-pick individual provisions of any approved interconnection agreement previously negotiated under § 252 between an [ILEC] and another CLEC, without any obligation to accept the remaining provisions of the agreement."[2136] These carriers contend that "[e]liminating the pick-and-choose rule entirely, not merely for Mpower's proposed flexible contract mechanism, would encourage mutually beneficial business relationships between ILECs and CLECs, as opposed to the adversarial, regulation-based relationships that are more typical today."[2137]

[2130] *Id.* at 14-15.

[2131] *Id.* at 16.

[2132] *Id.* at 17.

[2133] *See, e.g.*, Verizon Comments on Mpower May 25, 2001 Petition at 2; BellSouth Comments on Mpower May 25, 2001 Petition at 2; Qwest Comments on Mpower May 25, 2001 Petition at 1.

[2134] *See, e.g.*, AT&T Comments on Mpower May 25, 2001 Petition at 3-4; Focal Comments on Mpower May 25, 2001 Petition at 5-6; Sprint Comments on Mpower May 25, 2001 Petition at 3; ASCENT Comments on Mpower May 25, 2001 Petition at 8.

[2135] AT&T Comments on Mpower May 25, 2001 Petition at 3.

[2136] *See* Verizon Jan. 17, 2003 *Ex Parte* Letter at 1.

[2137] Verizon Jan. 17, 2003 *Ex Parte* Letter at 3.

B. Request for Comment

720. We seek comment on whether the Commission should eliminate the pick-and-choose rule and substitute an alternative interpretation of section 252(i). We agree with commenters that, as the Commission implements a granular analysis under which some network elements will no longer be available on an unbundled basis in all markets, it will be especially important for the Commission "to provide market-based incentives for incumbents and CLECs to negotiate innovative commercial alternatives to the UNE platform"[2138] and other network elements and interconnection arrangements.

721. As an initial matter, we seek comment on the Commission's legal authority to alter its interpretation of the statute. As the Supreme Court observed, the pick-and-choose rule "tracks the pertinent language almost exactly" and is the "most readily apparent" reading of the statute.[2139] The Court also stated, however, that judging whether the pick-and-choose rule "will significantly impede negotiations (by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions) is a matter eminently within the expertise of the Commission and eminently beyond our ken."[2140] Reading these statements together, we tentatively conclude that the Commission may adopt a different rule pursuant to section 252(i), provided the Commission's modified rule remains a reasonable interpretation of the statutory text.[2141] We seek comment on this analysis.

722. We next seek comment on the extent to which the pick-and-choose rule impedes meaningful negotiations. Mpower contends that, "[f]rom the standpoint of innovative and effective contracting," negotiations under the pick-and-choose regime are "reminiscent of the Gobi Desert."[2142] Incumbent LECs generally echo this sentiment, stating that "the pick-and-choose rule has produced one-size-fits-all agreements that function much like generally applicable tariffs."[2143] We tentatively conclude based on our experience since 1996 that Mpower and other commenters are correct that the pick-and-choose rule discourages the sort of give-and-take negotiations that Congress envisioned. The record produced in response to the Mpower May 25, 2001 Petition indicates that incumbent LECs seldom make significant concessions in return for some trade-off for fear that third parties will obtain the equivalent benefits without

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[2138] *Id.* at 2.

[2139] *Iowa Utils. Bd.*, 525 U.S. at 396.

[2140] *Id.*

[2141] *See* Verizon Jan. 17, 2003 *Ex Parte* Letter at 4 (citing *Clinchfield Coal Co. v. Federal Mine Safety & Health Review Comm'n*, 895 F.2d 773, 777-78 (D.C. Cir. 1990) (holding that agency may replace previously affirmed reasonable interpretation of statute with a different reasonable interpretation, even if a reviewing court assumes that the previous view "was the better one.").

[2142] Mpower May 25, 2001 Petition at 9.

[2143] Verizon Jan. 17, 2003 *Ex Parte* Letter at 3.

making any trade-off at all.[2144] Parties that disagree with this assessment should provide concrete evidence that meaningful negotiations in fact occur under the pick-and-choose rule.

723. Competitive carriers identify two primary concerns with Mpower's proposal to allow voluntary FLEX contracts as an alternative to the existing pick-and-choose process — concerns that would apply equally to any proposal to replace the existing rule with a requirement to opt into entire agreements as package deals. First, commenters argue that if competitive carriers were required to opt into an entire agreement rather than individual provisions, incumbent LECs would insert "poison pills" into agreements to make them unsuitable for adoption by third parties.[2145] The Commission credited this argument in the *Local Competition Order*, where it observed that "failure to make provisions available on an unbundled basis could encourage an incumbent LEC to insert into its agreement onerous terms for a service or element that the original carrier does not need, in order to discourage subsequent carriers from making a request under that agreement."[2146] The Commission accordingly opined that "requiring requesting carriers to elect an entire agreement would appear to eviscerate the obligation Congress imposed in section 252(i)."[2147] Second, in response to Mpower's suggestion that FLEX contracts exist alongside the pick-and-choose rule, commenters argue that there is no valid basis for exempting carriers from the requirement to submit interconnection agreements for state commission approval or from other requirements in section 252.[2148]

724. We believe that the concerns expressed in the *Local Competition Order* remain valid, but, in light of the shortcomings of the pick-and-choose regime, we seek comment on whether an alternative interpretation of section 252(i) could restore incentives to engage in give-and-take negotiations while maintaining effective safeguards against discrimination. We ask commenters to address whether concerns expressed previously by the Commission about "poison pills" and other types of discrimination could be addressed through narrower means than the current pick-and-choose rule. We also seek comment on whether any new rule adopted pursuant to an alternative interpretation of section 252(i) should be applied to all existing approved interconnection agreements or only those interconnection agreements approved prior to the adoption of such new rule.

725. We seek comment on the following proposal and whether it would address the criticisms of the current pick-and-choose rule without undermining competitors' rights under the Act. If incumbent LECs do not file and obtain state approval for a SGAT, the current pick-and-choose rule would continue to apply to all approved interconnection agreements between the

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[2144] *See, e.g.*, Verizon Comments on Mpower May 25, 2001 Petition at 2; Qwest Comments on Mpower May 25, 2001 Petition at 1-2; BellSouth Comments on Mpower May 25, 2001 Petition at 2-3; USTA Reply on Mpower May 25, 2001 Petition at 3-4.

[2145] *See, e.g.*, AT&T Reply on Mpower May 25, 2001 Petition at 3.

[2146] *Local Competition Order*, 11 FCC Rcd at 16138, para. 1312.

[2147] *Id.*

[2148] *See, e.g.*, WorldCom Comments on Mpower May 25, 2001 Petition at 5-6.

incumbent LEC and other carriers. If incumbent LECs do file and obtain state approval for a SGAT, however, the current pick-and-choose rule would apply solely to the SGAT, and all other approved interconnection agreements would be subject to an "all-or-nothing" rule requiring carriers to adopt the interconnection agreement in its entirety.[2149] The SGAT condition would guarantee competitors access to a minimum set of terms and conditions for interconnection and access to UNEs or resale (or services provided pursuant to section 251). Once the incumbent LEC met the SGAT condition, the incumbent LEC would be free to negotiate more customized agreements with the knowledge that third parties would be limited to opting into the entirety of such agreements, rather than taking individual terms without making any trade-offs.[2150]

726. We note that such an approach, unlike Mpower's FLEX contract proposal, would leave in place all of the safeguards in sections 251 and 252. The Commission would not exercise any forbearance authority. Rather, the Commission would reinterpret section 252(i) to limit carriers' opt-in rights to the entire agreement, subject to the SGAT condition. Importantly, states would be able to draw on their considerable expertise in deciding whether to approve an SGAT. Moreover, any "customized" agreement entered into, subsequent to the satisfaction of the SGAT requirement, would continue to be subject to the duty of good faith negotiation in section 251(c)(1), as well as the state approval requirement in section 252(e). Incumbent LECs also would remain subject to the nondiscrimination provisions and other safeguards in sections 201 and 202 of the Act.

727. We seek comment on the reasonableness of interpreting section 252(i) to allow carriers to opt into entire agreements, but not individual provisions, subject to satisfaction of the above described SGAT condition. We recognize that section 252(f) refers only to BOCs, rather than to incumbent LECs generally. We seek comment on whether conditioning a departure from the pick-and-choose rule on approval of an SGAT – but not otherwise making non-BOC incumbent LECs subject to section 252(f) – would be consistent with the statute.[2151] We also seek comment on whether this conditional approach would adequately address the shortcomings

[2149] As discussed below in paragraph 727, we acknowledge that only BOCs are subject to § 252(f) and seek comment on whether we can provide alternate means for non-BOC incumbent LECs to meet our proposed SGAT condition.

[2150] If the Commission were to adopt such a rule change, state commissions could not prevent its implementation by rejecting a proposed interconnection agreement on the ground that it is available to competitors only on a package-deal basis. Rather, the state commission could reject a customized agreement as discriminatory only if the commission found that the parties intended to discriminate against other carriers. The fact that a third party might be unable to opt into the agreement as a practical matter would not constitute unreasonable discrimination in light of the availability of interconnection, UNEs, and services under the state-approved SGAT.

[2151] Although § 252(f) applies specifically only to BOCs, in order to provide the same opportunity to non-BOC incumbent LECs to enter into customized agreements, we would allow non-BOC incumbent LECs to file a single interconnection agreement for state approval and designate it as an SGAT-equivalent that is subject to the current pick-and-choose rule. Because non-BOC incumbent LECs already file multiple interconnection agreements for state approval under the current pick-and-choose rule, this requirement would not impose any new requirements on non-BOC incumbent LECs, but rather provide them with the same opportunity we propose to provide BOCs to adopt more customized interconnection agreements with third parties.

in the existing pick-and-choose rule. Moreover, would such an approach adequately protect competitors from discrimination and other anti-competitive effects? Would the SGAT condition, together with the preservation of the good-faith obligation and nondiscrimination safeguards, be sufficient to prevent the more limited approach to opt-in rights from "eviscerat[ing] the obligation Congress imposed in section 252(i)"?[2152] We seek comment on whether the proposal described above would be workable for all classes of carriers, including smaller competitive LECs that lack the resources of larger competitors. We ask commenters to describe any relevant experience requesting or provisioning network elements and services out of SGATs.

728. We tentatively conclude that limiting carriers' opt-in rights to entire agreements (subject to satisfaction of the SGAT condition) would be consistent with the text of section 252(i), which requires only that an incumbent LEC "make available any interconnection, service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier *upon the same terms and conditions* as those provided in the agreement."[2153] We note that the ambiguous nature of this italicized phrase prompted the Supreme Court to conclude that the appropriate interpretation of section 252(i) is "eminently within the Commission's expertise."[2154] Our view on the reasonableness of the interpretation proposed above is strongly influenced by our tentative judgment that conditioning relief from the pick-and-choose rule on an SGAT requirement would strike an appropriate balance among the competing policy interests at stake. We seek comment on these tentative conclusions.

729. Finally, we seek comment on other means of restoring the congressional goal of meaningful marketplace negotiations. Are there modifications to the approach described above that would better serve the statutory goals? Would a different approach be preferable? We ask commenters to describe in detail any proposal and explain how the proposal (a) would restore market-based incentives to negotiate, and (b) protect competitors from discrimination.

X. PROCEDURAL ISSUES

A. Final Regulatory Flexibility Analysis

730. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[2155] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Federal Register summary of the *Triennial Review NPRM*.[2156] The Commission sought written public comments on the proposals in the *Triennial Review NPRM*, including comments on the IRFA. Comments

[2152] *Local Competition Order*, 11 FCC Rcd at 16138, para. 1312.

[2153] 47 U.S.C. § 252(i) (emphasis added).

[2154] *Iowa Utils. Bd.*, 525 U.S. at 396.

[2155] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2156] 67 Fed. Reg. 1947 (Jan. 15, 2002).

addressed the proposals contained in the *Triennial Review NPRM,* as well as the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) addresses comments on the IRFA and conforms to the RFA.[2157]

1. Need for, and Objectives of, the Rules

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

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

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

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[2157] *See* 5 U.S.C. § 604.

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

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

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

during this proceeding, those comments are discussed throughout the Order and are summarized in Part X.A.5, below.

733. As an initial matter, we reject the contention that the Commission failed to consider the needs of small business customers of competitive LECs in fashioning the analysis set forth in this Order. We have grappled, throughout this proceeding and throughout this Order, with the consequences our determinations will have on all market participants, including small business providers and the small business end users about which TeleTruth, NFIB, SBA Advocacy, and Senator Talent express concern.[2161] We have also considered various alternatives to the rules we adopt, and have stated the reasons for rejecting these alternative rules, as commenters have urged.[2162] A summary of our analysis regarding small business concerns, and of alternative rules that we considered in light of those concerns, is presented in subsection 5 of the FRFA, *infra.*

734. Many of the complaints raised regarding the Commission's IRFA hinge on the argument that in performing the analysis mandated by the RFA, an agency must analyze the effects its proposed rules will have on "customers" of the entities it regulates.[2163] But as the courts have made clear time and again, this is not the case. Indeed, the D.C. Circuit "has consistently held that the RFA imposes no obligation to conduct a small entity impact analysis of effects on entities which [the agency conducting the analysis] does not regulate."[2164] Thus, we

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

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

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

[2164] *Michigan v. EPA*, 213 F.3d 663, 689 (D.C. Cir. 2000) (internal quotation marks omitted); *see also Motor & Equip. Mfrs. Ass'n. v. Nichols*, 142 F.3d 449, 467 (D.C. Cir. 1998); *United Distribution Cos. v. FERC*, 88 F.3d (continued....)

emphasize that the RFA imposes no independent obligation to examine the effects an agency's action will have on the customers of the companies it regulates unless those customers are, themselves, subject to regulation by the agency. In any event, as noted above, we have considered the needs of small business customers of competitive (and incumbent) LECs throughout this Order. Our analysis of small business concerns is summarized in Part X.A.5, below.

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

736. TeleTruth further contends that the Commission's IRFA was flawed by its use of "boilerplate" language that differed little from the language used in the IRFAs prepared for other proceedings.[2171] However, the only language it cites does not even appear in the IRFA prepared for this proceeding. Moreover, TeleTruth has suggested no reason why the use of similar language in several proceedings is at all problematic. Indeed, the particular language about

(Continued from previous page)

1105, 1170 (D.C. Cir. 1996); *American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1044, *reh'g granted in part, denied in part* 195 F.3d 4 (D.C. Cir. 1999), *rev'd in part on other grounds*, 531 U.S. 457 (2001).

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

[2166] *See* 5 U.S.C. § 609.

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

[2168] 5 U.S.C. § 609(a)(1).

[2169] *Id.* § 609(a)(2).

[2170] *Id.* § 609(a)(5).

[2171] *See* TeleTruth Reply at 19-20.

which it complains merely describes the "number of telephone companies affected" by a given proceeding – a class that is likely to differ little, if at all, among industry-wide rulemakings such as this.

737. TeleTruth next complains that the IRFA used outdated census data from 1992 in estimating the number of small businesses that might be affected by the Commission's decisions here.[2172] While certain 1997 census data became available in late 2000 and were not incorporated into the previous NPRM, this updating would not, we believe, have affected a small entity's decisions concerning IRFA. This more recent data are reflected in subsection 3 of the FRFA, *infra*.

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

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

740. In a letter challenging the *UNE Remand Order*, Senator Talent argued that that Order violated section 3(a)(2)(C) of the Small Business Act.[2177] Specifically, Senator Talent noted that the *UNE Remand Order* differentiated between businesses that used fewer than four access lines and those that used four or more lines, in contravention of the Small Business Act's directive that "unless specifically authorized by statute, no Federal department or agency may prescribe a size standard for categorizing a business concern as a small business concern," unless

[2172] *See id.* at 22.

[2173] *See id.* at 37-39, 41.

[2174] 47 U.S.C. § 208.

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

[2176] *See* 5 U.S.C. § 604.

[2177] *See* 15 U.S.C. § 632(a)(2)(C).

certain procedural requirements are satisfied.[2178] In the present Order, our action does not establish any special small business size standard.

741. TeleTruth and Senator Talent suggest that section 257 of the Act dictates a particular substantive result in this matter. Specifically, TeleTruth claims that this "Triennial Review is mandated in Section [257(c)]," and requires an outcome favorable to entrepreneurs and small businesses.[2179] Senator Talent argued that in limiting the class of elements subject to section 251(c), the *UNE Remand Order* "erected a new barrier to entry" by small business carriers, and consequently violated section 257 of the Communications Act. Section 257, however, did *not* mandate this proceeding and in no way cabins this Commission's exercise of its authority to adopt rules implementing the Act. Section 257 required the Commission to conduct a proceeding designed to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services" within 15 months of the enactment of the 1996 Act,[2180] and periodically to review its regulations and report to Congress on any such barriers.[2181] The Commission concluded the requisite proceeding in 1997[2182] and issued its first subsequent section 257 Report to Congress in 2000.[2183] Thus, this proceeding is *not* mandated (or in any way governed) by section 257. Rather, as described above, this Order fulfills the Commission's commitment – set forth in the *UNE Remand Order* – to reevaluate unbundling requirements, and responds to various judicial rulings regarding those requirements.[2184]

742. TeleTruth, the NFIB, and SBA Advocacy caution that this Order may stand in violation of Executive Order 13272.[2185] Setting aside the question of whether a multi-member independent agency such as the FCC must comply with that Executive Order, we note that affected agencies must: (1) comply with the RFA, (2) give SBA Advocacy advanced notice of any proposed rules that might substantially impact small businesses, and (3) give "appropriate consideration to" and provide a written response to "any comments provided by" SBA Advocacy. Here, the Commission did send SBA Advocacy a copy of the published Triennial Review NPRM

[2178] *Id.*

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

[2180] *See* 47 U.S.C. § 257(a).

[2181] *See id.* § 257(c).

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

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

[2184] *See supra* Parts I, III.

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

(which pre-dated the Executive Order).[2186] Moreover, in this FRFA, we fully satisfy our obligations under the RFA. Finally, we address SBA Advocacy's other comments below. Therefore, this proceeding stands in compliance with Executive Order 13272.

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

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

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

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

[2188] *Id.* at 1-2.

[2189] *See id.* at 3-4.

[2190] *Id.* at 3.

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

[2192] *Id.*

[2193] *Id.* at 22797-98, para. 34.

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

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

signaling,[2198] and call-related databases.[2199] We are thus not persuaded that the Notice somehow failed to signal the Commission's intent to examine rules that might result in modification of the list of elements (including possible removal of elements) subject to section 251(c)(3)'s unbundling requirements.

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

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

746. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by rules adopted in this Order. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission published in its *Trends in Telephone Service May 2002* report.[2204] The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,[2205]

(Continued from previous page)

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

[2197] *See id.* at 22813, para. 70.

[2198] *See id.* at 22812, para. 68.

[2199] *See id.* at 22812-13, para. 69.

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

[2201] *Id.* § 601(6).

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

[2203] 15 U.S.C. § 632.

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

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

Paging,[2206] and Cellular and Other Wireless Telecommunications.[2207] Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

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

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

749. *Incumbent LECs*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers.

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

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

[2208] 5 U.S.C. § 601(3).

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

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

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

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

Under that size standard, such a business is small if it has 1,500 or fewer employees.[2213] According to Commission data, 1,329 carriers reported that they were engaged in the provision of local exchange services.[2214] Of these 1,329 carriers, an estimated 1,024 have 1,500 or fewer employees and 305 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted herein.

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

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

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

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

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

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

[2217] *Id.*

[2218] *Id.*

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

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

[2221] *Id.*

Commission estimates that the majority of interexchange service providers are small entities that may be affected by the rules and policies adopted herein.

752. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to OSPs. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[2222] According to Commission data, 22 companies reported that they were engaged in the provision of operator services.[2223] Of these 22 companies, an estimated 20 have 1,500 or fewer employees and two have more than 1,500 employees.[2224] Consequently, the Commission estimates that the great majority of OSPs are small entities that may be affected by the rules and policies adopted herein.

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

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

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

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

[2224] *Id.*

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

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

[2227] *Id.*

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

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

[2230] *Id.*

Commission estimates that most "Other Toll Carriers" are small entities that may be affected by the rules and policies adopted herein.

755. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of Paging[2231] and Cellular and Other Wireless Telecommunications.[2232] Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1320 firms in this category, total, that operated for the entire year.[2233] Of this total, 1303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.[2234] Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications firms, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.[2235] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[2236] Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

756. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years.[2237] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years."[2238] These standards defining "small entity" in the context of broadband PCS auctions have been approved

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

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

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

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

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

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

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

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

by the SBA.[2239] No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[2240] On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In addition, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

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

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

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

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

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

Commission's Rules. The Commission assumes, for purposes of this analysis that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

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

759. *220 MHz Radio Service – Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[2246] This small business size standard indicates that a "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[2247] A "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small business size standards.[2248] Auctions of Phase II

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

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

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

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

[2247] *Id.* at 11068-69, para. 291.

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

licenses commenced on September 15, 1998, and closed on October 22, 1998.[2249] In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.[2250]

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

761. *Common Carrier Paging.* In the Paging Third Report and Order, we developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[2252] A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000,

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

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

[2251] 47 C.F.R. § 90.814(b)(1).

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

and closed on March 2, 2000.[2253] Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. At present, there are approximately 24,000 Private-Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the *Trends in Telephone Service May 2002 Report*, 471 carriers reported that they were engaged in the provision of either paging and messaging services or other mobile services.[2254] Of those, the Commission estimates that 450 are small, under the SBA business size standard specifying that firms are small if they have 1,500 or fewer employees.[2255]

762. *700 MHz Guard Band Licensees.* In the 700 MHz Guard Band Order, we adopted a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[2256] A "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.[2257] Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[2258]

763. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[2259] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS).[2260] The Commission uses the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.[2261] There

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

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

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

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

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

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

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

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

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

are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

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

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

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

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

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

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

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

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

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

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

768. *Wireless Communications Services (WCS).* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the WCS auction. A "small business" is an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" is an entity with average gross revenues of $15 million for each of the three preceding years. The

(Continued from previous page)

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

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

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

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

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

[2272] *Id.*

SBA has approved these small business size standards.[2273] The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as "very small business" entities, and one that qualified as a "small business" entity. We conclude that the number of geographic area WCS licensees affected by this analysis includes these eight entities.

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

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

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

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

[2275] *Id.*

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

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

[2278] 47 C.F.R. § 21.961(b)(1).

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

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

additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard also appears applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[2281] Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

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

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

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

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

[2283] *Id.*

[2284] *Id.*

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

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

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

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

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

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

[2288] *Id.*

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

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

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

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

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

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

775. *Internet Service Providers.* While internet service providers (ISPs) are only indirectly affected by our present actions, and ISPs are therefore not formally included within this present FRFA, we have addressed them informally to create a fuller record and to recognize their participation in this proceeding. The SBA has developed a small business size standard for Online Information Services, which consists of all such companies having $21 million or less in annual receipts.[2296] According to Census Bureau data for 1997, there were 2,751 firms in this category, total, that operated for the entire year.[2297] Of this total, 2,659 firms had annual receipts of $9,999,999 or less, and an additional 67 had receipts of $10 million to $24,999,999.[2298] Thus, under this size standard, the great majority of firms can be considered small.

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

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

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

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

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

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

[2298] *Id.*

[2299] 47 U.S.C. § 251(c), (d).

[2300] *USTA*, 290 F.3d at 422.

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

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

[2301] *Id.* at 426.

[2302] *See supra* Part VI.D.6.

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

[2304] *See supra* Part VI.A.2.

[2305] *See supra* Part VI.A.3.

[2306] *See supra* Part VI.A.4.

[2307] *See id.*

[2308] *See supra* Part VI.A.5.

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

[2310] *See supra* Part VI.B.2.

[2311] *See supra* Part VI.B.3.

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

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

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

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

780. The various compliance requirements contained in this Order will require the use of engineering, technical, operational, accounting, billing, and legal skills. The carriers that are affected by these requirements already possess these skills. This Order contains new or modified information collections, which are subject to Office of Management and Budget review pursuant to the Paperwork Reduction Act of 1995.[2316]

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

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

[2313] *See supra* Part VI.B.3.

[2314] *See supra* Part VI.B.4.

[2315] *See supra* Part VI.B.6.

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

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

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

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

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

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[2317] 5 U.S.C. § 603(c).

[2318] *See supra* Part V.B.

[2319] *See id.*

[2320] *See id.*

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

[2322] *See supra* Part V.B.

[2323] *Id.*

national scale where the record permits us to, but delegate some determining role to the states where it appears that impairment might exist in some regions of the country but not others.[2324] In this regard, we note that Congress provided a mechanism – in section 251(f) of the Act – to exempt small and rural incumbent LECs from several of the Act's obligations.[2325] For example, unbundling rules shall not apply to a rural telephone company until it receives a bona fide request for interconnection and until the state commission determines that the request is technically feasible, not unduly economically burdensome, and consistent with section 254.[2326] Or, a LEC with fewer than two percent of the nation's subscriber lines may obtain relief from unbundling if the state commission decides, among other things, that relief is necessary to avoid imposing a economically burdensome requirement or other significant adverse economic impact.[2327]

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

786. We also have established service eligibility requirements for UNEs which are designed to ensure that carriers use UNEs primarily to provide local services in competition with incumbent LECs, "while avoiding burdensome administrative rules that serve as a drag on competitive entry."[2330] While we recognize that regulatory requirements may disproportionately impact smaller entities, we have adopted the least burdensome of several available alternatives in requiring competitors to satisfy certain service eligibility criteria.[2331] For example, rather than

[2324] *Id.*

[2325] *See* 47 U.S.C. § 251(f).

[2326] *See id.* § 251(f)(1).

[2327] *See id.* § 251(f)(2).

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

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

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

[2331] *Id.*

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

6. Report to Congress

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

B. Initial Regulatory Flexibility Analysis

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

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

[2333] *Id.*

[2334] *Id.*

[2335] *Id.*

[2336] *Id.*

[2337] *See* 5 U.S.C. § 801(a)(1).

[2338] *See* 5 U.S.C. § 604(b).

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