

including this IRFA, to the Chief Counsel for SBA Advocacy.<sup>2340</sup> In addition, the FNPRM and IRFA (or summaries thereof) will be published in the Federal Register.<sup>2341</sup>

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

789. We initiate the FNPRM portion of this proceeding to ensure that market-based incentives exist for incumbent and competitive LECs to negotiate innovative commercial interconnection arrangements. The current pick-and-choose rules implementing section 252(i) may discourage give-and-take negotiation because incumbent LECs may be reluctant to make significant concessions (in exchange for negotiated benefit) if those concessions become automatically available – without any tradeoff – to every potential market entrant. We therefore seek comment on whether alternate approaches to implementing section 252(i), such as requiring third parties to opt into entire agreements, would promote more innovative and flexible arrangements between parties. Any changes to the current pick-and-choose rule, however, may raise concerns as to whether there is the potential for parties to interconnection agreements to include “poison pill” language that would deter third parties from opting into those agreements under section 252(i). This FNPRM proposes an approach that would eliminate the current pick-and-choose regime for incumbent LECs wherever the incumbent LEC has filed and received state approval of a statement of generally available terms and conditions (SGAT), and this FNPRM seeks to build a record from which to judge the wisdom of this approach.

### 2. Legal Basis

790. The legal basis for any action that may be taken pursuant to the FNPRM is contained in Sections 1, 3, 4, 201-205, 251, 256, 271, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, 303(r).

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

791. 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.<sup>2342</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>2343</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>2344</sup> A

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<sup>2340</sup> See 5 U.S.C. § 603(a).

<sup>2341</sup> *Id.*

<sup>2342</sup> 5 U.S.C. §§ 603(b)(3), 604(a)(3).

<sup>2343</sup> *Id.* § 601(6).

<sup>2344</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an (continued....)”

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 SBA.<sup>2345</sup>

792. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by rules proposed in this FNPRM. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report.<sup>2346</sup> The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,<sup>2347</sup> Paging,<sup>2348</sup> and Cellular and Other Wireless Telecommunications.<sup>2349</sup> 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.

793. 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.”<sup>2350</sup> 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.<sup>2351</sup> We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

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

<sup>2345</sup> 15 U.S.C. § 632.

<sup>2346</sup> *Trends in Telephone Service May 2002 Report* at Table 5.3.

<sup>2347</sup> 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (changed to 517110 in Oct. 2002).

<sup>2348</sup> 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in Oct. 2002).

<sup>2349</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

<sup>2350</sup> 5 U.S.C. § 601(3).

<sup>2351</sup> 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).

794. *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.<sup>2352</sup> According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year.<sup>2353</sup> 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.<sup>2354</sup> Thus, under this size standard, the great majority of firms can be considered small.

795. *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. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>2355</sup> According to Commission data, 1,329 carriers reported that they were engaged in the provision of local exchange services.<sup>2356</sup> 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.

796. *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.<sup>2357</sup> According to Commission data, 532 companies reported that they were engaged in the provision of either competitive access provider services or competitive LEC services.<sup>2358</sup> Of these 532 companies, an estimated 411 have 1,500 or fewer employees and 121 have more than 1,500 employees.<sup>2359</sup> 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.<sup>2360</sup> Consequently, the Commission estimates that most providers of competitive local

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<sup>2352</sup> 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

<sup>2353</sup> 1997 Economic Census, Establishment and Firm Size, Table 5, NAICS code 513310 (issued Oct. 2000).

<sup>2354</sup> *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."

<sup>2355</sup> 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

<sup>2356</sup> *Trends in Telephone Service May 2002 Report* at Table 5.3.

<sup>2357</sup> 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

<sup>2358</sup> *Trends in Telephone Service May 2002 Report* at Table 5.3.

<sup>2359</sup> *Id.*

<sup>2360</sup> *Id.*

exchange service, competitive access providers, and “Other Local Exchange Carriers” are small entities that may be affected by the rules and policies adopted herein.

797. *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.<sup>2361</sup> According to Commission data, 229 companies reported that their primary telecommunications service activity was the provision of interexchange services.<sup>2362</sup> Of these 229 companies, an estimated 181 have 1,500 or fewer employees and 48 have more than 1,500 employees.<sup>2363</sup> Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the rules and policies adopted herein.

798. *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.<sup>2364</sup> According to Commission data, 22 companies reported that they were engaged in the provision of operator services.<sup>2365</sup> Of these 22 companies, an estimated 20 have 1,500 or fewer employees and two have more than 1,500 employees.<sup>2366</sup> Consequently, the Commission estimates that the great majority of OSPs are small entities that may be affected by the rules and policies adopted herein.

799. *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.<sup>2367</sup> According to Commission data, 32 companies reported that they were engaged in the provision of prepaid calling cards.<sup>2368</sup> Of these 32 companies, an estimated 31 have 1,500 or fewer employees and one has more than 1,500 employees.<sup>2369</sup> 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.

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<sup>2361</sup> 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

<sup>2362</sup> *Trends in Telephone Service May 2002 Report* at Table 5.3.

<sup>2363</sup> *Id.*

<sup>2364</sup> 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

<sup>2365</sup> *Trends in Telephone Service May 2002 Report* at Table 5.3.

<sup>2366</sup> *Id.*

<sup>2367</sup> 13 C.F.R. § 121.201, NAICS code 513330 (changed to 517310 in Oct. 2002).

<sup>2368</sup> *Trends in Telephone Service May 2002 Report* at Table 5.3.

<sup>2369</sup> *Id.*

800. *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.<sup>2370</sup> According to Commission’s data, 42 companies reported that their primary telecommunications service activity was the provision of payphone services.<sup>2371</sup> Of these 42 companies, an estimated 37 have 1,500 or fewer employees and five have more than 1,500 employees.<sup>2372</sup> Consequently, the Commission estimates that most “Other Toll Carriers” are small entities that may be affected by the rules and policies adopted herein.

801. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of Paging<sup>2373</sup> and Cellular and Other Wireless Telecommunications.<sup>2374</sup> 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.<sup>2375</sup> 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.<sup>2376</sup> 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.<sup>2377</sup> 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.<sup>2378</sup> Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

802. *Broadband PCS.* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The

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<sup>2370</sup> 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

<sup>2371</sup> *Trends in Telephone Service May 2002 Report* at Table 5.3.

<sup>2372</sup> *Id.*

<sup>2373</sup> 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in Oct. 2002).

<sup>2374</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

<sup>2375</sup> 1997 Economic Census, Employment Size of Firms, Table 5, NAICS code 513321 (issued Oct. 2000).

<sup>2376</sup> *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.”

<sup>2377</sup> 1997 Economic Census, Employment Size of Firms, Table 5, NAICS code 513322 (issued Oct. 2000).

<sup>2378</sup> *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.”

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.<sup>2379</sup> For Block F, an additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.”<sup>2380</sup> These standards defining “small entity” in the context of broadband PCS auctions have been approved by the SBA.<sup>2381</sup> 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.<sup>2382</sup> 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 305, 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.

803. *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*.<sup>2383</sup> A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years

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<sup>2379</sup> See *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824 (1996); see also 47 C.F.R. § 24.720(b).

<sup>2380</sup> See *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824 (1996).

<sup>2381</sup> See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5332 (1994).

<sup>2382</sup> *Broadband PCS, D, E and F Block Auction Closes*, (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).

<sup>2383</sup> *In the Matter of 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).

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.<sup>2384</sup> In the future, the Commission will auction 459 licenses to serve 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 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.

804. *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.<sup>2385</sup> According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.<sup>2386</sup> 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.<sup>2387</sup> 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.

805. *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.<sup>2388</sup> This small business size standard indicates that a “small business” is an entity that, together with its affiliates and

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<sup>2384</sup> See SBA Dec. 2, 1998 *Ex Parte* Letter.

<sup>2385</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

<sup>2386</sup> 1997 Economic Census, Employment Size of Firms, Table 5, NAICS code 513322 (issued Oct. 2000).

<sup>2387</sup> *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.”

<sup>2388</sup> *220 MHz Third Report and Order*, 12 FCC Rcd at 11068-70, paras. 291-295.

controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.<sup>2389</sup> 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.<sup>2390</sup> Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.<sup>2391</sup> In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional EAG Licenses, and 875 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.<sup>2392</sup>

806. *800 MHz and 900 MHz SMR Licenses.* The Commission awards “small entity” and “very small entity” bidding credits in auctions for 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.<sup>2393</sup> 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.

807. *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

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<sup>2389</sup> *Id.* at para. 291.

<sup>2390</sup> See SBA Jan. 6, 1998 *Ex Parte* Letter.

<sup>2391</sup> 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, DA No. 98-2143, 14 FCC Rcd 605 (rel. Oct. 23, 1998).

<sup>2392</sup> *Phase II 220 MHz Service Spectrum Auction Closes*, Report No. AUC-24-E, DA 99-1287, 14 FCC Rcd 11218 (rel. July 1, 1999).

<sup>2393</sup> 47 C.F.R. § 90.814(b)(1).

payments.<sup>2394</sup> 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 MEA licenses commenced on February 24, 2000, and closed on March 2, 2000.<sup>2395</sup> 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.<sup>2396</sup> 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.<sup>2397</sup>

808. *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.<sup>2398</sup> 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 MEA licenses commenced on September 6, 2000, and closed on September 21, 2000.<sup>2399</sup> 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.<sup>2400</sup>

809. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.<sup>2401</sup> A significant subset of the

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<sup>2394</sup> *220 MHz Third Report and Order*, 12 FCC Rcd at 11068-70, paras. 291-95.

<sup>2395</sup> *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, para. 98 (1999).

<sup>2396</sup> *Trends in Telephone Service May 2002 Report* at Table 5.3.

<sup>2397</sup> *Id.* The SBA size standard is that of Paging, 13 C.F.R. § 121.201, NAICS code 517211.

<sup>2398</sup> *See Service Rules for the 746-764 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).

<sup>2399</sup> *See generally, 220 MHz Service Auction Closes*, Report No. WT 98-36 (rel Oct. 23, 1998).

<sup>2400</sup> *700 MHz Guard Band Auction Closes*, Report No. AUC-38-F, DA 01-478, 16 FCC Rcd 4590 (rel. Feb. 22, 2001).

<sup>2401</sup> The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

Rural Radiotelephone Service is the BETRS.<sup>2402</sup> 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.<sup>2403</sup> There 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.

810. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.<sup>2404</sup> 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.<sup>2405</sup> There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard.

811. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a 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.<sup>2406</sup> 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.<sup>2407</sup> There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards.

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<sup>2402</sup> BETRS is defined in sections 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

<sup>2403</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

<sup>2404</sup> The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

<sup>2405</sup> 13 C.F.R. § 121.201, NAICS codes 513322 (changed to 517212 in Oct. 2002).

<sup>2406</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

<sup>2407</sup> *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

812. *Fixed Microwave Services.* Fixed microwave services include common carrier,<sup>2408</sup> private operational-fixed,<sup>2409</sup> and broadcast auxiliary radio services.<sup>2410</sup> At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not 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.<sup>2411</sup> 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.

813. *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.<sup>2412</sup> 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.<sup>2413</sup> Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.<sup>2414</sup>

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<sup>2408</sup> See 47 C.F.R. §§ 101 *et seq.* (formerly, Part 21 of the Commission’s Rules) for common carrier fixed microwave services (except MDS).

<sup>2409</sup> Persons eligible under Parts 80 and 90 of the Commission’s Rules can use Private Operational-Fixed Microwave services. See 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee’s commercial, industrial, or safety operations.

<sup>2410</sup> Auxiliary Microwave Service is governed by Part 74 of Title 47 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.

<sup>2411</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

<sup>2412</sup> This service is governed by Subpart I of Part 22 of the Commission’s Rules. See 47 C.F.R. §§ 22.1001-22.1037.

<sup>2413</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

<sup>2414</sup> *Id.*

814. *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 SBA has approved these small business size standards.<sup>2415</sup> 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.

815. *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.<sup>2416</sup> 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.<sup>2417</sup> The SBA has approved these small business size standards.<sup>2418</sup> 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 policies adopted herein.

816. *MDS, MMDS, and ITFS.* MMDS systems, often referred to as “wireless cable,” transmit video programming to subscribers using the microwave frequencies of the MDS and ITFS.<sup>2419</sup> 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.<sup>2420</sup> The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 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.<sup>2421</sup> According to Census Bureau data for 1997, there were a total of 1,311 firms

<sup>2415</sup> See SBA Dec. 2, 1998 *Ex Parte* Letter.

<sup>2416</sup> 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).

<sup>2417</sup> *Id.*

<sup>2418</sup> See SBA Feb. 4, 1998 *Ex Parte* Letter.

<sup>2419</sup> *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service 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).

<sup>2420</sup> 47 C.F.R. § 21.961(b)(1).

<sup>2421</sup> 13 C.F.R. § 121.201, NAICS code 513220 (changed to 517510 in Oct. 2002).

in this category, total, that had operated for the entire year.<sup>2422</sup> Of this total, 1,180 firms had annual receipts of under \$10 million and an 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.<sup>2423</sup> Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

817. *LMDS*. LMDS is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.<sup>2424</sup> 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.<sup>2425</sup> 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.<sup>2426</sup> The SBA has approved these small business size standards in the context of LMDS auctions.<sup>2427</sup> *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.*

818. *218-219 MHz Service*. The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 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.<sup>2428</sup> In the 218-219 MHz Report and Order and

<sup>2422</sup> 1997 Economic Census, Establishment and Firm Size, Table 4, NAICS code 513220 (issued Oct. 2000).

<sup>2423</sup> 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.

<sup>2424</sup> See *Local Multipoint Distribution Service*, CC Docket No. 92-297, Second Report and Order, 12 FCC Red 12545 (1997).

<sup>2425</sup> *Id.*

<sup>2426</sup> *Id.*

<sup>2427</sup> See SBA Jan. 6, 1998 *Ex Parte* Letter.

<sup>2428</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Red 2330 (1994).

Memorandum Opinion and Order, we established a small business size 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.<sup>2429</sup> 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.<sup>2430</sup> 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.

819. *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.<sup>2431</sup> According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.<sup>2432</sup> 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.<sup>2433</sup> 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.<sup>2434</sup> 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.

820. *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.<sup>2435</sup> “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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<sup>2429</sup> *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).

<sup>2430</sup> *Id.*

<sup>2431</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

<sup>2432</sup> 1997 Economic Census, Employment Size of Firms, Table 5, NAICS code 513322 (issued Oct. 2000).

<sup>2433</sup> *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.”

<sup>2434</sup> 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.

<sup>2435</sup> *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 (2000); see also 47 C.F.R. § 101.538(a)(2).

the preceding three years.<sup>2436</sup> The SBA has approved these small business size standards.<sup>2437</sup> These size standards will apply to the future auction, if held.

821. *ISPs.* While ISPs are only indirectly affected by our present actions, and ISPs are therefore not formally included within this present IRFA, we address them informally to create a fuller record. 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.<sup>2438</sup> According to Census Bureau data for 1997, there were 2,751 firms in this category, total, that operated for the entire year.<sup>2439</sup> 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.<sup>2440</sup> Thus, under this size standard, the great majority of firms can be considered small.

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

822. In this FNPRM, we seek comment on proposed rules that would eliminate the current pick-and-choose rules under some circumstances.<sup>2441</sup> The proposed changes may restrict competitive LECs' choices to opt into specific terms and conditions of existing interconnection agreements, perhaps requiring competitors to opt into entire agreements or negotiate their own agreements with incumbents. The proposed rules may encourage incumbent LECs to seek approval from state public utility commissions for statements of generally available terms and conditions.

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

823. 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

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<sup>2436</sup> *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 (2000); *see also* 47 C.F.R. § 101.538(a)(1).

<sup>2437</sup> *See* SBA July 28, 2000 *Ex Parte* Letter.

<sup>2438</sup> 13 C.F.R. § 121.201, NAICS code 514191 (changed to 518111 in Oct. 2002).

<sup>2439</sup> 1997 Economic Census, Receipts Size of Firms, Table 4, NAICS code 514191 (issued Oct. 2000).

<sup>2440</sup> *Id.*

<sup>2441</sup> *See supra* Part IX.

entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>2442</sup>

824. In this FNPRM, we seek comment on amending the pick-and-choose rules in a manner that encourages more customized contracts between competitive and incumbent LECs, as envisioned by the Act. The FNPRM proposes to remove disincentives to the ability of incumbent LECs and competitive LECs to negotiate more customized agreements, including agreements that may include significant concessions in exchange for negotiated benefits. In doing so, the FNPRM also seeks to minimize the potential for discrimination against third parties that may seek to opt into the entire agreement by proposing that incumbent LECs first file and receive state approval for a statement of generally available terms and conditions (SGAT) before the incumbent LEC may file other interconnection agreements not subject to the pick-and-choose rules.

825. Changing the current rules, in favor of an approach where competitive LECs – including small entities – must opt into entire agreements, rather than individual terms and conditions, may impose additional burdens on these parties than they currently bear. We will consider, therefore, maintaining the current pick-and-choose rules. The current rules, however, may expose incumbent LECs to the risk that subsequent entrants may reap a one-sided benefit from negotiated concessions made between the incumbent LEC and the actual contracting competitive LEC, and this may form a disincentive to negotiation to both negotiating parties. This may, in turn, impose additional burdens on competitors and incumbents as the parties attempt to reach agreements and resolve disputes, often through arbitration and litigation, in a regulatory environment that creates disincentives for either party to compromise. For this reason, we do not propose to establish a separate pick-and-choose regime to govern small business incumbents or competitors. We believe the alternative advanced in the FNPRM – by proposing to modify the application of the pick-and-choose rule for any incumbent LEC that files and receives state approval of a statement of generally available terms and conditions (SGAT) – would serve the Commission’s goal of encouraging negotiation while protecting the rights and interests of competitors, including small businesses. We invite comment on this approach, and we plan to review the record assembled in response to the FNPRM with a view to considering the least burdensome way to achieve market-driven contract negotiations.

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

826. None.

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<sup>2442</sup> 5 U.S.C. § 603(c).

## C. Other Procedural Matters

### 1. Ex Parte Presentations

827. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.<sup>2443</sup> Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.<sup>2444</sup> Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

### 2. Comment Filing Procedures

828. Pursuant to sections 1.415 and 1.419 of the Commission's rules,<sup>2445</sup> interested parties may file comments not later than 30 days after publication of this Notice in the Federal Register and may file reply comments not later than 30 days after the date for filing comments. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.<sup>2446</sup> Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and five copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal

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<sup>2443</sup> 47 C.F.R. § 1.1200 *et seq.*

<sup>2444</sup> See 47 C.F.R. § 1.1206(b)(2).

<sup>2445</sup> 47 C.F.R. §§ 1.415, 1.419.

<sup>2446</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

### 3. Scope of Written *Ex Parte* Presentations Included in This Proceeding

829. The Commission adopted the substance of this Order at an open meeting on February 20, 2003. Originally, this meeting was scheduled for February 13, 2003 by a notice issued February 6, 2003, which initiated the Sunshine period prohibition on *ex parte* presentations to the Commission and staff. The Commission lifted this Sunshine restriction late on February 10, 2003, but reimposed it on February 13, 2003 by releasing a public notice announcing inclusion of this proceeding on the Sunshine agenda for a Commission meeting on February 20, 2003. In light of these facts and the widespread interest in this proceeding, we find it in the public interest to include in the record *ex parte* presentations that were made on February 10, but prior to the lifting of the Sunshine restriction. We also include in the record *ex parte* presentations made during the imposition of the Sunshine restriction in direct response to an express request by a Commissioner or Commission staff.

## XI. ORDERING CLAUSES

830. Accordingly, IT IS ORDERED that pursuant to Sections 1, 3, 4, 201-205, 251, 256, 271, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, the *Report and Order on Remand and Further Notice of Proposed Rulemaking* in CC Docket No. 01-338 IS ADOPTED, and that Part 51 of the Commission's Rules, 47 C.F.R. Part 51, is amended as set forth in Appendix B. The requirements of this Order shall become effective 30 days after publication in the Federal Register, pending Office of Management and Budget (OMB) approval.<sup>2447</sup> The Commission will publish a document in the Federal Register announcing the effective date of these rules.

831. IT IS FURTHER ORDERED that the collection of information contained herein is contingent upon approval by the OMB.

832. IT IS FURTHER ORDERED, pursuant to sections 1, 3, 4, 201-205, 251, 256, 271, and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, and 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt. that the petitions for reconsideration of the *UNE Remand Order* filed in CC Docket No. 96-98 by Low Tech Designs, Inc. on February 15, 2000 and by the Telecommunications Resellers Association on February 18, 2000; the petition for partial reconsideration of the *UNE Remand Order* filed in CC Docket No. 96-98 by Birch Telecom, Inc. on February 17, 2000; the petition for reconsideration and clarification of the *UNE Remand Order* filed in CC Docket No. 96-98 by Sprint Corporation on February 17, 2000; the petition for

<sup>2447</sup> In light of the importance of these rules, the Commission is seeking emergency approval from OMB.

clarification on reconsideration of the *UNE Remand Order* filed in CC Docket No. 96-98, 95-185 by MGC Communications, Inc., d/b/a Mpower Communications, Corp. on February 17, 2000; the joint petition filed in CC Docket No. 96-98 by BellSouth Corporation and BellSouth Telecommunications, Inc., SBC Communications, Inc., and Verizon Telephone Companies on April 5, 2001; the petitions for waiver of the supplemental order clarification filed in CC Docket No. 96-98 by WorldCom, Inc. on September 12, 2000 and ITC^DeltaCom Communications, Inc. on August 16, 2001; the petition filed in CC Docket Nos. 01-338, 96-98, 98-147 by Promoting Active Competition Everywhere (PACE) Coalition on February 6, 2002; and the petition for declaratory ruling filed in CC Docket No. 01-338 by WorldCom, Inc. on August 8, 2002 ARE DISMISSED AS MOOT.

833. IT IS FURTHER ORDERED, pursuant to sections 1, 3, 4, 201-205, 251, 256, 271, and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, and 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt. that the joint petition for declaratory ruling filed in CC Docket No. 96-98 by AT&T Wireless Services, Inc. and VoiceStream Wireless, Corp. on November 19, 2001 IS GRANTED to the extent indicated herein and otherwise IS MOOT.

834. IT IS FURTHER ORDERED, pursuant to sections 1, 3, 4, 201-205, 251, 256, 271, and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, and 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt. that the petition for reconsideration/clarification of the *UNE Remand Order* filed in CC Docket No. 96-98 by BellSouth Corporation and BellSouth Telecommunications, Inc. on February 17, 2000 IS GRANTED to the extent indicated herein and otherwise ARE DENIED.

835. IT IS FURTHER ORDERED, pursuant to sections 1, 3, 4, 201-205, 251, 256, 271, and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, and 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt. that the petitions for reconsideration of the *UNE Remand Order* filed in CC Docket Nos. 96-98, 95-185 by Rhythms Netconnections Inc. and Covad Communications Co. on January 21, 2000, @Link Networks, Inc., DSL.net, Inc. and MGC Communications, Inc., d/b/a Mpower Communications Corp. on February 17, 2000, McLeodUSA Telecommunications Services, Inc. and the petition for reconsideration of the *UNE Remand Order* filed in CC Docket No. 96-98 by RCN Telecom Services, Inc. on February 17, 2000 ARE DENIED.

836. IT IS FURTHER ORDERED, pursuant to sections 1, 3, 4, 201-205, 251, 256, 271, and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, and 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt. that the petition of the *UNE Remand Order* filed in CC Docket No. 96-98 by Competitive Telecommunications Association on November 26, 2001; and the petitions for reconsideration of the *UNE Remand Order* filed in CC Docket No. 96-98 by Intermedia Communications, Inc. and by MCI WorldCom, Inc. on February 17, 2000 ARE DENIED to the extent indicated herein and otherwise ARE DISMISSED AS MOOT.

837. IT IS FURTHER ORDERED, pursuant to sections 1, 3, 4, 201-205, 251, 256, 271, and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205,

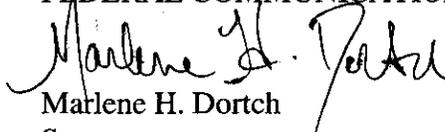
251, 252, 256, 271, and 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt. that the petition for clarification of the *UNE Remand Order* filed in CC Docket No. 96-98 by MCI WorldCom, Inc. on February 17, 2000; the petition for reconsideration of the *UNE Remand Order* filed in CC Docket No. 96-98 by the Competitive Telecommunications Association on February 17, 2000; the petition for reconsideration and clarification of the *UNE Remand Order* filed in CC Docket No. 96-98 by Bell Atlantic on February 17, 2000; and the petition for reconsideration and clarification of the *UNE Remand Order* filed in CC Docket No. 96-98 by AT&T Corp. on February 17, 2000 ARE GRANTED to the extent indicated herein and otherwise ARE DENIED or DISMISSED AS MOOT.

838. IT IS FURTHER ORDERED that the Public Notice, *Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service*, CC Docket No. 96-98, DA 01-169 (rel. Jan. 24, 2001); *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, and Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 16 FCC Rcd 2101 (2001); *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, CC Docket Nos. 96-98 and 95-185, 12 FCC Rcd 12460 (1997); and *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 15 FCC Rcd 3696 (1999) ARE TERMINATED.

839. IT IS FURTHER ORDERED, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order and Order on Remand*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

840. IT IS FURTHER ORDERED, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

  
Matlene H. Dortch  
Secretary