

Other Wireless Telecommunications” companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.<sup>154</sup> According to the Census Bureau data for 1997, only twelve firms out of a total of 1,238 such firms that operated for the entire year in 1997, had 1,000 or more employees.<sup>155</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 standard.

47. *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 defining “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>156</sup> This small business 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.<sup>157</sup> A “very small business” is defined as 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.<sup>158</sup> The SBA has approved these small size standards.<sup>159</sup> Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.<sup>160</sup> 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.<sup>161</sup> Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.<sup>162</sup> A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.<sup>163</sup>

48. *Specialized Mobile Radio.* The Commission awards “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.<sup>164</sup> The

<sup>154</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

<sup>155</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 513322 (October 2000).

<sup>156</sup> *Amendment of Part 90 of the Commission’s Rules to Provide For the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, Third Report and Order, 12 FCC Rcd 10943, 11068-70, paras. 291-95 (1997).

<sup>157</sup> *Id.* at 11068, para. 291.

<sup>158</sup> *Id.*

<sup>159</sup> See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

<sup>160</sup> See generally *220 MHz Service Auction Closes*, Public Notice, 14 FCC Rcd 605 (WTB 1998).

<sup>161</sup> See *FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made*, Public Notice, 14 FCC Rcd 1085 (WTB 1999).

<sup>162</sup> See *Phase II 220 MHz Service Spectrum Auction Closes*, Public Notice, 14 FCC Rcd 11218 (WTB 1999).

<sup>163</sup> See *Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

<sup>164</sup> 47 C.F.R. § 90.814(b)(1).

Commission awards "very small entity" bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years.<sup>165</sup> The SBA has approved these small business size standards for the 900 MHz Service.<sup>166</sup> The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.<sup>167</sup> A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.<sup>168</sup>

49. *Common Carrier Paging.* The SBA has developed a small business size standard for wireless firms within the broad economic census categories of "Cellular and Other Wireless Telecommunications."<sup>169</sup> Under this SBA category, 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 1,320 firms in this category, total, that operated for the entire year.<sup>170</sup> Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.<sup>171</sup> Thus, under this category and associated small business size standard, the great majority of firms can be considered small.

50. In the *Paging Second Report and Order*, the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>172</sup> A small business is an entity that, together with its affiliates and controlling

---

<sup>165</sup> *Id.*

<sup>166</sup> See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999. We note that, although a request was also sent to the SBA requesting approval for the small business size standard for 800 MHz, approval is still pending.

<sup>167</sup> See "Correction to Public Notice DA 96-586 'FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,'" Public Notice, 18 FCC Rcd 18367 (WTB 1996).

<sup>168</sup> See "Multi-Radio Service Auction Closes," Public Notice, 17 FCC Rcd 1446 (WTB 2002).

<sup>169</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

<sup>170</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

<sup>171</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000). 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 1000 employees or more."

<sup>172</sup> *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Second Report and Order*, 12 FCC Rcd 2732, 2811-2812, paras. 178-181 (*Paging Second Report and Order*); see also *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 10030, 10085-10088, paras. 98-107 (1999).

principals, has average gross revenues not exceeding \$15 million for the preceding three years.<sup>173</sup> The SBA has approved this definition.<sup>174</sup> An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold.<sup>175</sup> Fifty-seven companies claiming small business status won 440 licenses.<sup>176</sup> An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.<sup>177</sup> One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.<sup>178</sup> Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service*, 608 private and common carriers reported that they were engaged in the provision of either paging or “other mobile” services.<sup>179</sup> Of these, we estimate that 589 are small, under the SBA-approved small business size standard.<sup>180</sup> We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

51. *700 MHz Guard Band Licenses.* In the *700 MHz Guard Band Order*, we adopted size standards for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>181</sup> A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>182</sup> 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 \$15 million for the preceding three years.<sup>183</sup> SBA approval of these definitions is not required.<sup>184</sup> An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.<sup>185</sup> Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of

<sup>173</sup> *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

<sup>174</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

<sup>175</sup> See *929 and 931 MHz Paging Auction Closes*, Public Notice, 15 FCC Rcd 4858 (WTB 2000).

<sup>176</sup> See *id.*

<sup>177</sup> See *Lower and Upper Paging Band Auction Closes*, Public Notice, 16 FCC Rcd 21821 (WTB 2002).

<sup>178</sup> See *id.*

<sup>179</sup> See *Trends in Telephone Service May 2002 Report* at Table 5.3.

<sup>180</sup> 13 C.F.R. § 121.201, NAICS code 517211.

<sup>181</sup> See *Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 5299 (2000).

<sup>182</sup> See *id.* at 5343, para. 108.

<sup>183</sup> See *id.*

<sup>184</sup> See *id.* at 5343, para. 108 n.246 (for the 746-764 MHz and 776-794 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

<sup>185</sup> See *700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 15 FCC Rcd 18026 (2000).

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>186</sup> *Rural Radiotelephone Service*. The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.<sup>187</sup> A significant subset of the Rural Radiotelephone Service is the BETRS.<sup>188</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>189</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.

52. *Air-Ground Radiotelephone Service*. The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.<sup>190</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>191</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.

53. *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.<sup>192</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

---

<sup>186</sup> See *700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 16 FCC Rcd 4590 (WTB 2001).

<sup>187</sup> The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

<sup>188</sup> BETRS is defined in sections 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757, 22.759.

<sup>189</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

<sup>190</sup> The service is defined in § 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

<sup>191</sup> 13 CFR § 121.201, NAICS codes 513322 (changed to 517212 in October 2002).

<sup>192</sup> 13 CFR § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

\$3 million dollars.<sup>193</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.

54. *Fixed Microwave Services.* Fixed microwave services include common carrier,<sup>194</sup> private operational-fixed,<sup>195</sup> and broadcast auxiliary radio services.<sup>196</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>197</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 proposed herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

55. *Offshore Radiotelephone Service.* This service operates on several ultra high frequencies (UHF) television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.<sup>198</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>199</sup> Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.<sup>200</sup>

---

<sup>193</sup> *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

<sup>194</sup> See 47 C.F.R. §§ 101 *et seq.* (formerly, Part 21 of the Commission's Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

<sup>195</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>196</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>197</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

<sup>198</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>199</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

<sup>200</sup> *Id.*

56. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined “small business” for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the three preceding years.<sup>201</sup> The SBA has approved these definitions.<sup>202</sup> The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670-1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

57. *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>203</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>204</sup> The SBA has approved these small business size standards.<sup>205</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 proposed herein.

58. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service.* Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as “wireless cable,” transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).<sup>206</sup> In connection with the 1996 MDS auction, the Commission defined “small business” as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.<sup>207</sup> The SBA has approved of this standard.<sup>208</sup> The MDS auction resulted

---

<sup>201</sup> *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS)*, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

<sup>202</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

<sup>203</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, 12 FCC Rcd 18600 (1997); 63 Fed.Reg. 6079 (Feb. 6, 1998).

<sup>204</sup> *Id.*

<sup>205</sup> See Letter to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998) (VoIP); Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Hector Barreto, Administrator, Small Business Administration, dated January 18, 2002 (WTB).

<sup>206</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*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995) (MDS Auction R&O).

<sup>207</sup> 47 C.F.R. § 21.961(b)(1).

in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).<sup>209</sup> Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities.<sup>210</sup>

59. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution,<sup>211</sup> which includes all such companies generating \$12.5 million or less in annual receipts.<sup>212</sup> 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.<sup>213</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.<sup>214</sup> Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies.

60. Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities.<sup>215</sup> There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

61. *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.<sup>216</sup> The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for

---

<sup>208</sup> See Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Gary Jackson, Assistant Administrator for Size Standards, Small Business Administration, dated March 20, 2003 (noting approval of \$40 million size standard for MDS auction).

<sup>209</sup> Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. See *MDS Auction R&O*, 10 FCC Rcd at 9608, para. 34.

<sup>210</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for "other telecommunications" (annual receipts of \$12.5 million or less). See 13 C.F.R. § 121.201, NAICS code 517910.

<sup>211</sup> 13 C.F.R. § 121.201, NAICS code 517510.

<sup>212</sup> *Id.*

<sup>213</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4 (issued October 2000).

<sup>214</sup> *Id.*

<sup>215</sup> In addition, the term "small entity" under 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>216</sup> See *Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>217</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>218</sup> The SBA has approved these small business size standards in the context of LMDS auctions.<sup>219</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 32 small and very small business winning that won 119 licenses.

62. *218-219 MHz Service.* The first auction of 218-219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs).<sup>220</sup> Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as 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>221</sup> In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we defined 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 exceeding \$15 million for the preceding three years.<sup>222</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 exceeding \$3 million for the preceding three years.<sup>223</sup> The SBA has approved of these definitions.<sup>224</sup> At this time, we cannot estimate 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. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription

---

<sup>217</sup> See *Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

<sup>218</sup> See *Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

<sup>219</sup> See Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

<sup>220</sup> See *Interactive Video and Data Service (IVDS) Applications Accepted for Filing*, Public Notice, 9 FCC Rcd 6227 (1994).

<sup>221</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

<sup>222</sup> *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999).

<sup>223</sup> *Id.*

<sup>224</sup> See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

television services and message communications industries, we assume for purposes of this analysis that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

63. *Incumbent 24 GHz 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>225</sup> According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.<sup>226</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>227</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<sup>228</sup> and TRW, Inc. 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.

64. *Future 24 GHz Licensees.* With respect to new applicants in the 24 GHz band, we have defined “small business” as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding \$15 million.<sup>229</sup> “Very small business” in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.<sup>230</sup> The SBA has approved these definitions.<sup>231</sup> The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

65. *Internet Service Providers.* The SBA has developed a small business size standard for Internet Service Providers. This category comprises establishments “primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others.”<sup>232</sup> Under the SBA size standard, such a business is small if it has average annual receipts of \$21 million or

---

<sup>225</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

<sup>226</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Employment Size of Firms Subject to Federal Income Tax: 1997,” Table 5, NAICS code 513322 (issued October 2000).

<sup>227</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>228</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>229</sup> *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules To License Fixed Services at 24 GHz*, Report and Order, 15 FCC Rcd 16934, 16967, para. 77 (2000) (*24 GHz Report and Order*); see also 47 C.F.R. § 101.538(a)(2).

<sup>230</sup> *24 GHz Report and Order*, 15 FCC Rcd at 16967, para. 77; see also 47 C.F.R. § 101.538(a)(1).

<sup>231</sup> See Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Gary M. Jackson, Assistant Administrator, Small Business Administration, dated July 28, 2000.

<sup>232</sup> Office of Management and Budget, North American Industry Classification System, page 515 (1997). NAICS code 514191, “On-Line Information Services” (changed to current name and to code 518111 in October 2002).

less.<sup>233</sup> According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year.<sup>234</sup> Of these, 2,659 firms had annual receipts of under \$10 million, and an additional 67 firms had receipts of between \$10 million and \$24,999,999.<sup>235</sup> Thus, under this size standard, the great majority of firms can be considered small entities.

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

66. In this Order, we eliminate the current pick-and-choose rule. The changes will restrict competitive LECs' choices to opt into specific terms and conditions of existing interconnection agreements, requiring competitors to opt into entire agreements or negotiate their own agreements with incumbents. We do not expect the new rule to impose additional burdens beyond those under the existing rule.

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

67. The RFA requires an agency to describe any significant alternatives that it has considered in developing its 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 and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."<sup>236</sup>

68. In this Order, we amend the pick-and-choose rule in a manner that encourages more customized contracts between competitive and incumbent LECs, as envisioned by the Act. The Order seeks 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. 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. The Commission finds that the current rules, however, 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 creates 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 establish a separate pick-and-choose regime to govern small business incumbents or competitors. We believe the alternative adopted in this Order will serve the Commission's goal of encouraging negotiation while protecting the

<sup>233</sup> 13 C.F.R. § 121.201, NAICS code 518111.

<sup>234</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 4, Receipts Size of Firms Subject to Federal Income Tax: 1997, NAICS code 514191 (issued October 2000).

<sup>235</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 4, Receipts Size of Firms Subject to Federal Income Tax: 1997, NAICS code 514191 (issued October 2000).

<sup>236</sup> 5 U.S.C. § 603(c)(1) – (c)(4).

rights and interests of competitors, including small businesses. We believe that this approach is the least burdensome way to achieve market-driven contract negotiations. Alternatives proposed to address small business concerns were not adopted because they do not accomplish the Commission's objectives in this proceeding.<sup>237</sup>

69. **Report to Congress:** 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.<sup>238</sup> In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.

#### B. Final Paperwork Reduction Act Analysis

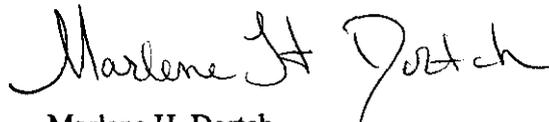
70. This Report and Order does not contain information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.

#### V. ORDERING CLAUSES

71. Accordingly, IT IS ORDERED that pursuant to sections 1, 3, 4, 252(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 252(i), 303(r), the *Report and Order* 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 Report and Order shall become effective 30 days after publication in the Federal Register.

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

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch  
Secretary

---

<sup>237</sup> See paras. 27-29, *supra*.

<sup>238</sup> See 5 U.S.C. § 801(a)(1)(A).

**APPENDIX A  
LIST OF COMMENTERS**

**Comments in Pick-and-Choose Proceeding, CC Docket No. 01-338**

<b>Comments</b>	<b>Abbreviation</b>
American Farm Bureau, Inc. Anew Telecommunications Corporation d/b/a Call America Creative Interconnect, Inc. Enhanced Communications Network, Inc. Utilities Commission of New Smyrna Beach A+ American Discount Telecom, LLC	AFB <i>et al.</i>
Association for Local Telecommunications Services	ALTS
BellSouth Corporation	BellSouth
California Public Utilities Commission	California Commission
CenturyTel, Inc.	CenturyTel
CLEC Coalition Excel Telecommunications, Inc. KMC Telecom Holdings, Inc. NuVox Inc. SNiP LiNK LLC Talk America VarTec Telecom, Inc. XO Communications, Inc. Xspedius LLC	CLEC Coalition
Covad Communications Company	Covad
Cox Communications, Inc.	Cox
Florida Public Service Commission	Florida Commission
Iowa Utilities Board	Iowa Commission
LecStar Telecom, Inc.	LecStar
Mpower Communications Corp.	Mpower
National Association of State Utility Consumer Advocates	NASUCA
New York State Department of Public Service	New York Commission
PAETEC Communications, Inc.	PAETEC
Promoting Active Competition Everywhere Coalition The Competitive Telecommunications Association	PACE/CompTel
Qwest Communications International Inc.	Qwest
Rural Independent Competitive Alliance	RICA
SBC Communications Inc.	SBC
Sprint Corporation	Sprint
The Public Utilities Commission of Ohio	Ohio Commission
United States Telecom Association	USTA
US LEC Corp. TDS Metrocom, LLC	US LEC <i>et al.</i>

Focal Communications Corporation Pac-West Telecomm, Inc. Globalcom, Inc. Lightship Telecom, LLC OneEighty Communications, Inc.	
Verizon Telephone Companies	Verizon
Verizon Wireless	Verizon Wireless
WorldCom, Inc./MCI	MCI
Z-Tel Communications, Inc.	Z-Tel

## Replies in Pick-and-Choose Proceeding, CC Docket No. 01-338

<b>Replies</b>	<b>Abbreviation</b>
American Farm Bureau, Inc. Anew Telecommunications Corporation d/b/a Call America Creative Interconnect, Inc. Utilities Commission of New Smyrna Beach A+ American Discount Telecom, LLC	AFB <i>et al.</i>
Arizona Corporation Commission	Arizona Commission
AT&T Wireless Services, Inc.	AT&T Wireless
BellSouth Telecommunications, Inc.	BellSouth
Birch Telecom, Inc.	Birch
Cablevision Lightpath, Inc.	Lightpath
CenturyTel, Inc.	CenturyTel
CLEC Coalition KMC Telecom Holdings, Inc. NuVox Inc SNiP LiNK LLC Talk America XO Communications, Inc. Xspedius LLC	CLEC Coalition
Cox Communications, Inc.	Cox
National Association of State Utility Consumer Advocates	NASUCA
Nextel Communications, Inc.	Nextel
SBC Communications Inc.	SBC
Sprint Corporation	Sprint
T-Mobile USA, Inc.	T-Mobile
US LEC Corp. TDS Metrocom, LLC Focal Communications Corporation Pac-West Telecomm, Inc. Globalcom, Inc. Lightship Telecom, LLC OneEighty Communications, Inc. Cavalier Telephone	US LEC <i>et al.</i>
Verizon Telephone Companies	Verizon
WorldCom, Inc./MCI	MCI

## Comments in the Mpower Flex Contract Proceeding, CC Docket No. 01-117

<b>Comments</b>	<b>Abbreviation</b>
Association of Communications Enterprises	ASCENT
AT&T Corp.	AT&T
BellSouth Corporation	BellSouth
Covad Communications Company	Covad
Focal Communications Corporation	Focal
Qwest Corporation	Qwest
Sprint Corporation	Sprint
Verizon Telephone Companies	Verizon
WorldCom, Inc.	WorldCom
Z-Tel Communications, Inc.	Z-Tel

## Replies in the Mpower Flex Contract Proceeding, CC Docket No. 01-117

<b>Replies</b>	<b>Abbreviation</b>
Association of Communications Enterprises	ASCENT
Association for Local Telecommunications Services	ALTS
AT&T Corp.	AT&T
Focal Communications Corporation	Focal
Mpower Communications Corp.	Mpower
United States Telecom Association	USTA
Verizon Telephone Companies	Verizon
WorldCom, Inc.	WorldCom

**APPENDIX B  
FINAL RULES**

PART 51 of Title 47 of the Code of Federal Regulations is amended as follows:

**PART 51 – INTERCONNECTION**

1. Section 51.809 is amended by revising the section heading, paragraphs (a), (b), and (c) to read as follows:

**§ 51.809 Availability of agreements to other telecommunications carriers under section 252(i) of the Act.**

(a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local, access, or interexchange) as the original party to the agreement.

(b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

(1) The costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or

(2) The provision of a particular agreement to the requesting carrier is not technically feasible.

(c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act.

**STATEMENT OF  
CHAIRMAN MICHAEL K. POWELL**

*Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers  
(CC Docket No. 01-338) Second Report and Order*

One of the Commission's most important goals is to advance competition that is meaningful and sustainable, and that will eventually achieve Congress' goal of reducing regulation and promoting facilities-based competition. As carriers continue their migration away from unbundled network elements and toward increased reliance upon network elements they own and control, they will require more specialized interconnection agreements with incumbent LECs. Today's decision removes a rule that has thwarted those individualized agreements.

Specifically, we adopt an "all-or-nothing" rule, in place of the current pick-and-choose interpretation of section 252(i). Through this action, the Commission advances the cause of facilities-based competition by permitting carriers to negotiate individually tailored interconnection agreements designed to fit their business needs more precisely. Consistent with the purpose of section 252(i), it also continues to safeguard against discrimination. Specifically, nothing in our decision diminishes the ability of a requesting carrier to avail itself of the arbitration process clearly set forth in section 252 of the Act.

Preserving parties' ability to contract freely, and indeed encouraging transactions, is not simply an oft-cited legal policy – the 1996 Act makes it our statutory mandate. Our decision today ensures that facilities-based competitors are given a fighting chance to participate in local markets.

**STATEMENT OF  
COMMISSIONER KATHLEEN Q. ABERNATHY**

*Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,  
Second Report and Order in CC Docket No. 01-338 (adopted July 8, 2004).*

I strongly support the Commission's decision to bolster incentives for marketplace negotiations by eliminating the "pick and choose" rule. In enacting the Telecommunications Act of 1996, Congress envisioned a sharing regime built primarily upon negotiated access arrangements, rather than governmental mandates. To be sure, the Commission was required to establish default unbundling rules, and state commissions were expected to set UNE prices and resolve interconnection disputes. But Congress anticipated that competitors and incumbents would establish most terms and conditions at the bargaining table, rather than in regulatory tribunals and courtrooms.

Unfortunately, this vision has not been realized. Instead, we have endured eight years of pitched regulatory battles and resource-draining litigation, and industry participants of all stripes agree that incumbent LECs and new entrants almost never engage in true give-and-take negotiations. There are undoubtedly many complex reasons why the Act's implementation took this course, many of which have nothing to do with the "pick and choose" rule. But I believe that the record in this proceeding confirms something I have long suspected: the "pick and choose" rule impedes marketplace negotiations and is not necessary to prevent discrimination. When the Supreme Court upheld the "pick and choose" rule as a valid interpretation of the Act, it recognized that the rule might "significantly impede negotiations (by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions)," and suggested that the Commission would be able to change course if that came to pass.<sup>1</sup> That absence of genuine trade-offs is precisely what has occurred, as incumbent LECs have proven reluctant to make significant concessions in negotiations as long as third parties can later come along and avail themselves of the benefit without making the same trade-off as the contracting party.

By requiring that competitors opt into interconnection agreements on an "all or nothing" basis, we ensure that third parties take the bitter with the sweet. In doing so, I am optimistic that we will promote more meaningful negotiations. Given the almost-complete dearth of marketplace deals, this change can only improve negotiations, notwithstanding claims that it will diminish competitors' leverage. In fact, I expect that the continuing application of the statutory duty of good faith, together with competitors' ability to opt into any negotiated or arbitrated agreement (on an all-or-nothing basis), will be sufficient to prevent discrimination.

The reform we adopt today is part of a much broader transformation. The "pick and choose" rule, along with a remarkably expansive unbundling regime, has fostered an expectation that the government will micromanage every aspect of the relationship between an incumbent LEC and its wireline competitors. The courts have now made unmistakably clear that the Commission must impose meaningful limits when adopting new unbundling rules. While I have no doubt that the Commission will continue to mandate the unbundling of bottleneck transmission facilities, it is equally apparent that the concept of maximum unbundling of all elements in all geographic markets cannot be sustained. As we move toward adopting new rules under which competitors will be increasingly required to rely on their

---

<sup>1</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 396 (1999).

own facilities and to differentiate their services, the availability of customized interconnection agreements will be all the more vital. I expect that our elimination of the "pick and choose" rule will help pave the way toward a regime that is more dependent on negotiated access arrangements and less dominated by regulatory fiat.

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

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338)*

Eight years ago, the Commission adopted its pick-and-choose rule. It provided structural assurance that interconnection, service and network elements would be available to all carriers at nondiscriminatory rates, terms and conditions. The rule was based on the strongest statutory reading of Section 252(i). It was designed to minimize contracting costs and was grounded in principles of equal treatment.

We have no looming judicial charge that compels us to depart from our pick-and-choose policy. Quite the contrary: the pick-and-choose rule was upheld by the Supreme Court five years ago. The highest court characterized the rule as “not only reasonable,” but also “the most readily apparent” interpretation of the statute. This is strong stuff for a Commission whose policy pronouncements do not always pass muster with the courts of the land.

I am not convinced that dismantling the pick-and-choose rule and replacing it with an all-or-nothing approach will usher in a new era of negotiation and unique commercial deals. While statements about enhancing give-and-take negotiation have intuitive appeal, their logic here is thin. Trade-off, compromise and concession are good. They are features of any negotiation, including negotiation in a pick-and-choose environment. But in the wireline market, the only wholesaler is also the dominant force in retail competition. I know of no other industry where this is true. It makes contracting difficult. The hurly-burly and give-and-take that go on in so many commercial dialogues are not guaranteed in this one. Take-it-or-leave-it bargaining means competitors will walk away without any wholesale alternatives. To understand this difficulty, look no further than the lack of widespread commercial agreement reached during the months since the *USTA II* decision.

Pulling apart the fabric that supports competition will not speed its arrival. Discarding the pick-and-choose policy will increase the costs of contracting for smaller carriers. It will make it harder for them to compete. The real losers are consumers—residential and small business customers—who will face a dwindling set of choices and more limited competition as a result. For these reasons, I respectfully dissent.

**STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN  
DISSENTING IN PART AND APPROVING IN PART**

*Re: Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, FCC 04-164.*

Section 252 of the Communications Act establishes a framework for the negotiation and arbitration of interconnection agreements between incumbent carriers and new entrants. Section 252(i) provides a valuable tool for preventing discrimination between competitive carriers and incumbents, by requiring incumbents to make available "any interconnection, service, or network element" to other requesting carriers. Since 1996, the Commission's rules have implemented this provision by affording new entrants the ability to choose among individual provisions contained in publicly-filed interconnection agreements. That approach, called the "pick and choose" rule, was affirmed by the Supreme Court as the "most readily apparent" reading of the statute.

In the realm of our local competition rules, I am reticent to cast aside rules that have been affirmed by the Supreme Court. Maintaining some level of regulatory stability in this sector warrants such an approach. I nonetheless join today's Order to the extent that it provides incumbents and competitors with greater flexibility to develop comprehensive negotiated agreements. As a practical matter, the availability of the pick and choose rule appears to have influenced virtually all negotiations between incumbents and competitors, even if the parties to a specific negotiation did not invoke the pick and choose option. By affording parties the ability to balance a series of trade-offs, we should provide additional incentive for negotiated agreements.

The question remains whether this change will provide sufficient incentive for incumbents and competitors to reach mutually-acceptable agreements. The experience of the past 8 years, and particularly the past few months, has demonstrated how difficult it is for competitors and incumbents to reach negotiated agreements for access to unbundled network elements and other critical inputs. Competitors raise legitimate concerns about whether current market conditions create adequate incentives for both parties. The pick and choose rule has served to balance, to some degree, disparities in market power, and it is difficult to predict the effect of its wholesale elimination.

While I support providing parties with some avenue for reaching agreements outside of the pick and choose framework, I cannot fully support this item. Particularly in light of the Supreme Court's conclusion that our current rule "tracks the pertinent language of the statute almost exactly," I would have supported a more measured approach. For example, the Commission could have adopted its "all or nothing" approach for negotiated agreements, but allowed the limited use of the pick and choose rule for new entrants seeking to include previously-arbitrated provisions in new interconnection agreements. These arbitrated provisions have been reviewed by State commissions for consistency with the Act and our rules, and they do not reflect the give-and-take of purely negotiated agreements. Such an approach, though not compelled by our rules, would be a measured way to grant additional flexibility, now that we have concluded that multiple interpretations of the statute are permissible. Allowing the use of the pick and choose rule for previously-arbitrated issues would also address concerns raised by competitors, some state commissions, and consumer advocacy groups that adopting the "all or nothing" approach would lead to more arbitrations, potentially increasing cost and delay for smaller carriers.

This Commission should be cautious about an approach that may permit parties to delay unreasonably making available even those provisions of interconnection agreements that have been

arbitrated by state commissions. We should at minimum commit to monitoring the implementation of this new approach. Parties forcefully dispute whether the relief we provide here will lead to mutually-acceptable, non-discriminatory agreements or towards greater litigation costs because parties are forced to arbitrate more agreements. The difference in these outcomes is far from academic, but rather will be reflected in the existence and number of options available to consumers of telecommunications services. Our vigilance, and the commitment of our State commission colleagues who will review these agreements, is essential if we are to ensure that consumers continue to enjoy the benefits of choice.