section 1.48 and all other applicable sections of the Commission's rules.[76] We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission.

41. Filings and comments may be downloaded from the Commission's ECFS web site, and filings and comments are available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, D.C. 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160, or online at www.bcpiweb.com.

### C. Commission Resources For Commenting Parties

42. In order to keep interested parties apprised of new developments in this proceeding and to facilitate meaningful comment from all interested parties, the Wireline Competition Bureau will maintain a website devoted to this proceeding, including links to relevant resources, available at: http://www.fcc.gov/wcb/cpd/triennial_review/. This website is not intended to serve – and should not be relied upon – as a complete list of relevant resources, but rather to promote meaningful analysis during the accelerated comment period contemplated in this Notice.

43. Additionally, for parties not familiar with the Commission's Internet resources, we highlight two databases that may aid interested parties in their participation in this proceeding. First, the Commission's Electronic Comment Filing System (ECFS) serves as the repository for official records in the Commission's docketed proceedings and rulemakings, such as this, from the year 1992 onward.[77] Any interested party can research, retrieve, view, and print any document in the system, including comments and other pleadings filed by parties to prior and ongoing proceedings.[78] Second, all Commission decisions and other publications issued since March 1996 can be found via the Commission's EDOCS database.[79]

### D. Accessible Formats

44. To request materials in accessible formats for people with disabilities (braille, large

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[76] *See* 47 C.F.R. § 1.48.

[77] The Commission's ECFS system can be accessed at: http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi (main site); or at: http://svartifoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi (alternative site).

[78] Please refer to the Commission's ECFS webpage at: http://www.fcc.gov/cgb/ecfs/ for more details. For instructions on filing comments or other pleadings, please refer to the discussion above.

[79] The Commission's EDOCS database is available at: http://hraunfoss.fcc.gov/edocs_public/SilverStream/Pages/edocs.html. EDOCS has two search modules: quick[79] and advanced. The quick search allows users to search by a document's DA or FCC number, its release date, and/or its title or description. The advanced search allows users to search by a much larger number of criteria including citations, titles, descriptions, docket numbers, and dates. The EDOCS advanced query works with any data element or combination of data elements.

print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0531 (voice), 202-418-7365 (tty).

### E. Initial Regulatory Flexibility Analysis

45. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to this Notice of Proposed Rule Making as set forth above, and have a separate and distinct heading designating them as responses to the IRFA.

### F. Paperwork Reduction Act Analysis

46. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

## VI. ORDERING CLAUSES

47. Accordingly, IT IS ORDERED that pursuant to Sections 1, 3, 4, 201-205, 251, 256, 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 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, the *Order and Notice of Proposed Rulemaking* in CC Docket No. 01-338 and WC Docket No. 04-313 IS ADOPTED, and the interim requirements set forth herein SHALL BECOME EFFECTIVE immediately upon publication in the Federal Register pursuant to 5 U.S.C. § 553(b)(3)(B).

48. IT IS FURTHER ORDERED that pursuant to Sections 1, 3, 4, 201-205, 251, 256, 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 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, the emergency motion for stabilization order filed in CC Docket Nos. 01-338, 96-98, 98-147 by CompTel/ASCENT on June 24, 2004 IS GRANTED to the extent indicated herein and otherwise IS DENIED.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

# APPENDIX

## INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the RFA,[1] the Commission has prepared this IRFA of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this NPRM. Written public comments are sought on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM, provided above in Part V. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for SBA Advocacy.[2] In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.[3]

### A. Need for, and Objectives of, the Proposed Rule

2. We initiate this proceeding to begin a comprehensive examination of the circumstances under which incumbent LECs must make UNEs available to requesting carriers pursuant to sections 251(c)(3) and 251(d)(2) of the Act. The Commission last reviewed its unbundling rules comprehensively in 2003 in the *Triennial Review Order*. Portions of the *Triennial Review Order* were vacated and/or remanded by the D.C. Circuit in its *USTA II* decision.[4] The NPRM seeks comment on how the Commission should respond to the D.C. Circuit's opinion, both in terms of creating a legally sustainable impairment standard and applying that standard to individual network elements.[5]

### B. Legal Basis

3. The legal basis for any action that may be taken pursuant to the NPRM 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).

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

4. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein.[6] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization,"

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

[2] *See* 5 U.S.C. § 603(a).

[3] *Id.*

[4] *USTA II*, 359 F.3d 554.

[5] *See* Order and Notice of Proposed Rulemaking, *supra* paras. 8-13.

[6] 5 U.S.C. § 604(a)(3).

and "small governmental jurisdiction."[7] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[8] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[9]

5. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by our action. 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.[10] The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,[11] Paging,[12] and Cellular and Other Wireless Telecommunications.[13] 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.

6. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[14] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[15] We have therefore included small incumbent local exchange

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[7] 5 U.S.C. § 601(6).

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

[9] 15 U.S.C. § 632.

[10] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service* at Table 5.3, Page 5-5 (May 2004) (*Trends in Telephone Service*). This source uses data that are current as of October 22, 2003.

[11] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (changed to 517110 in Oct. 2002).

[12] 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in Oct. 2002).

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

[14] 15 U.S.C. § 632.

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

carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

7. *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.[16] According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year.[17] 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.[18] Thus, under this size standard, the great majority of firms can be considered small.

8. *Incumbent Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[19] According to Commission data,[20] 1,310 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,310 carriers, an estimated 1,025 have 1,500 or fewer employees and 285 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 our proposed action.

9. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[21] According to Commission data,[22] 563 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 563 carriers, an estimated 472 have 1,500 or fewer employees and 91 have more than 1,500 employees. In addition, 14 carriers have reported that they are "Shared-Tenant Service Providers," and all 14 are estimated to have 1.500 or fewer employees. In addition, 37 carriers have reported that they are "Other Local Service Providers." Of the 37, an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local

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[16] 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

[17] 1997 Economic Census, Establishment and Firm Size, Table 5, NAICS code 513310 (issued Oct. 2000).

[18] 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."

[19] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517110 (changed from 513310 in October 2002).

[20] *Trends in Telephone Service* at Table 5.3.

[21] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in October 2002).

[22] *Trends in Telephone Service* at Table 5.3.

Service Providers" are small entities that may be affected by our proposed action.

10. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[23] According to Commission data,[24] 281 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 254 have 1,500 or fewer employees and 27 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

11. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[25] According to Commission data,[26] 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 22 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed action.

12. *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.[27] According to Commission data, 32 companies reported that they were engaged in the provision of prepaid calling cards.[28] Of these 32 companies, an estimated 31 have 1,500 or fewer employees and one has more than 1,500 employees.[29] 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.

13. *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.[30] According to Commission's data, 65 companies reported that their primary

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[23] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in October 2002).

[24] *Trends in Telephone Service* at Table 5.3.

[25] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in October 2002).

[26] *Trends in Telephone Service* at Table 5.3.

[27] 13 C.F.R. § 121.201, NAICS code 513330 (changed to 517310 in Oct. 2002).

[28] *Trends in Telephone Service* at Table 5.3.

[29] *Id.*

[30] 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

telecommunications service activity was the provision of other toll services.[31] Of these 65 companies, an estimated 62 have 1,500 or fewer employees and three have more than 1,500 employees.[32] Consequently, the Commission estimates that most "Other Toll Carriers" are small entities that may be affected by the rules and policies adopted herein.

14. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging"[33] and "Cellular and Other Wireless Telecommunications."[34] 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 1,320 firms in this category, total, that operated for the entire year.[35] 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.[36] 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, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.[37] 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.[38] Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

15. *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 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.[39] For Block F, an additional classification for "very small business"

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[31] *Trends in Telephone Service* at Table 5.3.

[32] *Id.*

[33] 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

[34] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[35] 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).

[36] 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."

[37] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

[38] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (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."

[39] *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).

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."[40] These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[41] 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.[42] 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.

16. *Narrowband Personal Communications Services.* The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less.[43] Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.[44] To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.[45] 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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[40] *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).

[41] *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).

[42] 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).

[43] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

[44] *See* "Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total $617,006,674," Public Notice, PNWL 94-004 (released Aug. 2, 1994); "Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total $490,901,787," Public Notice, PNWL 94-27 (released Nov. 9, 1994).

[45] *Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS*, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000).

of not more than $40 million.[46] 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.[47] The SBA has approved these small business size standards.[48] A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.[49] Three of these claimed status as a small or very small entity and won 311 licenses.

17. *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 definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to "Cellular and Other Wireless Telecommunications" companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.[50] 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.[51] 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.

18. *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.[52] This small business standard indicates that a "small business" is an entity that, together with its affiliates and controlling principals, has average gross

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[46] *Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS*, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000).

[47] *Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS*, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000).

[48] *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.

[49] *See* "Narrowband PCS Auction Closes," Public Notice, 16 FCC Rcd 18663 (WTB 2001).

[50] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[51] 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).

[52] *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. 291-295 (1997).

revenues not exceeding $15 million for the preceding three years.[53] 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.[54] The SBA has approved these small size standards.[55] Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[56] 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.[57] 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.[58] 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.[59]

19. *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.[60] The 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.[61] The SBA has approved these small business size standards for the 900 MHz Service.[62] 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

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[53] *Id.* at 11068, para. 291.

[54] *Id.*

[55] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

[56] *See generally* "220 MHz Service Auction Closes," Public Notice, 14 FCC Rcd 605 (WTB 1998).

[57] *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).

[58] *See* "Phase II 220 MHz Service Spectrum Auction Closes," Public Notice, 14 FCC Rcd 11218 (WTB 1999).

[59] *See* "Multi-Radio Service Auction Closes," Public Notice, 17 FCC Rcd 1446 (WTB 2002).

[60] 47 C.F.R. § 90.814(b)(1).

[61] 47 C.F.R. § 90.814(b)(1).

[62] *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.

size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.[63] 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.[64]

20. *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."[65] 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.[66] 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.[67] Thus, under this category and associated small business size standard, the great majority of firms can be considered small.

21. 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.[68] 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.[69] The SBA has approved this definition.[70] 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.[71] Fifty-seven companies claiming small business status won 440 licenses.[72] An auction of

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[63] *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).

[64] *See* "Multi-Radio Service Auction Closes," *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

[65] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[66] 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).

[67] 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."

[68] *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).

[69] *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

[70] *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.

[71] *See* "929 and 931 MHz Paging Auction Closes," Public Notice, 15 FCC Rcd 4858 (WTB 2000).

[72] *See* "929 and 931 MHz Paging Auction Closes," Public Notice, 15 FCC Rcd 4858 (WTB 2000).

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.[73] 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.[74] Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service,* 379 private and common carriers reported that they were engaged in the provision of either paging or "other mobile" services.[75] Of these, we estimate that 373 are small, under the SBA-approved small business size standard.[76] We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

22. *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.[77] 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.[78] 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.[79] SBA approval of these definitions is not required.[80] An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.[81] 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

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[73] *See* "Lower and Upper Paging Band Auction Closes," Public Notice, 16 FCC Rcd 21821 (WTB 2002).

[74] *See* "Lower and Upper Paging Bands Auction Closes," Public Notice, 18 FCC Rcd 11154 (WTB 2003).

[75] *Trends in Telephone Service* at Table 5.3.

[76] 13 C.F.R. § 121.201, NAICS code 517211.

[77] *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).

[78] *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, 5343, para. 108 (2000).

[79] *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, 5343, para. 108 (2000).

[80] *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, 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).

[81] *See* "700 MHz Guard Bands Auction Closes: Winning Bidders Announced," Public Notice, 15 FCC Rcd 18026 (2000).

of two licenses.[82] *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[83] A significant subset of the Rural Radiotelephone Service is the BETRS.[84] 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.[85] 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.

23. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.[86] 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.[87] 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.

24. *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.[88] 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

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[82] *See* "700 MHz Guard Bands Auction Closes: Winning Bidders Announced," Public Notice, 16 FCC Rcd 4590 (WTB 2001).

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

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

[85] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

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

[87] 13 CFR § 121.201, NAICS codes 513322 (changed to 517212 in October 2002).

[88] 13 CFR § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

$3 million dollars.[89] 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.

25. *Fixed Microwave Services.* Fixed microwave services include common carrier,[90] private operational-fixed,[91] and broadcast auxiliary radio services.[92] 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.[93] 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.

26. *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.[94] 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.[95]

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[89] *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).

[90] *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).

[91] 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.

[92] 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.

[93] 13 CFR § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

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

[95] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[96]

27. *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.[97] The SBA has approved these definitions.[98] 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.

28. *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.[99] 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.[100] The SBA has approved these small business size standards.[101] The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and polices proposed herein.

29. *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).[102] In connection with the 1996 MDS auction, the Commission defined "small business" as an

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[96] *Id.*

[97] *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).

[98] *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.

[99] *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).

[100] *Id.*

[101] *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).

[102] *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* (continued....)

entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years.[103] The SBA has approved of this standard.[104] The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).[105] 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.[106]

30. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution,[107] which includes all such companies generating $12.5 million or less in annual receipts.[108] 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.[109] 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.[110] 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.

31. 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.[111]

(Continued from previous page)

*Communications Act – Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995) (*MDS Auction R&O*).

[103] 47 C.F.R. § 21.961(b)(1).

[104] *See* Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Bureau, 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).

[105] 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.

[106] 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.

[107] 13 C.F.R. § 121.201, NAICS code 517510.

[108] *Id.*

[109] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4 (issued October 2000).

[110] *Id.*

[111] 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.

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.

32. *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.[112] 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 LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[113] 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.[114] The SBA has approved these small business size standards in the context of LMDS auctions.[115] 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.

33. *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).[116] 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.[117] 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

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[112] *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).

[113] *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).

[114] *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).

[115] *See* Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

[116] *See* "Interactive Video and Data Service (IVDS) Applications Accepted for Filing," Public Notice, 9 FCC Rcd 6227 (1994).

[117] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

years.[118] 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.[119] The SBA has approved of these definitions.[120] 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 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.

34. *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.[121] According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.[122] 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.[123] 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[124] 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.

35. *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.[125] "Very small business" in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has

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[118] *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).

[119] *Id.*

[120] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

[121] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[122] 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).

[123] *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."

[124] 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.

[125] *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).

average gross revenues not exceeding $3 million for the preceding three years.[126] The SBA has approved these definitions.[127] The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

36. *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."[128] Under the SBA size standard, such a business is small if it has average annual receipts of $21 million or less.[129] According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year.[130] 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.[131] Thus, under this size standard, the great majority of firms can be considered small entities.

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

37. In this NPRM, we seek comment on proposed rules that would establish unbundling requirements for incumbent LECs, pursuant to sections 251(c) and 251(d)(2) of the Act. The Commission last reviewed its unbundling rules comprehensively in 2003 in the *Triennial Review Order*.[132] Portions of the *Triennial Review Order* were vacated and/or remanded by the D.C. Circuit in its *USTA II* decision.[133] The NPRM seeks comment on how the Commission should respond to the D.C. Circuit's opinion, in terms of both how to create a legally sustainable impairment standard, as well as applying that standard to individual network elements.

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

38. The RFA requires an agency to describe any significant alternatives that it has considered in

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[126] *24 GHz Report and Order*, 15 FCC Rcd at 16967, para. 77; *see also* 47 C.F.R. § 101.538(a)(1).

[127] *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.

[128] 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).

[129] 13 C.F.R. § 121.201, NAICS code 518111.

[130] 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).

[131] 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).

[132] *Triennial Review Order*, 18 FCC Rcd 16978.

[133] *USTA II*, 359 F.3d 554.

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."[134]

39. In this Notice, we seek comment on how to develop legally sustainable rules for access to unbundled network elements. We seek comment, for instance, on how best to define markets, including product markets and customer classes. We also wish to solicit comment on the economic effect that various UNE approaches might have on small entity telecommunications providers.

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

40. None.

[134] 5 U.S.C. § 603(c)(1) – (c)(4).

## STATEMENT OF CHAIRMAN MICHAEL K. POWELL

*Re: Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338.*

Today's decision does two critical things: It starts a rulemaking to quickly replace rules within 6 months, swept away by a court incensed by the Commission's persistent refusal to apply the law faithfully. Second, it puts in place an interim freeze for 6 months, ensuring consumers and competitors are protected while we complete our work. Contrary to the inaccurate assertions being thrown around, there are no automatic price increase after 6 months for facilities providers. Today's Order only seeks comment on a transition that will not be necessary if the Commission gets its work done.

Over a year and a half ago, I dissented from the Majority's ill-considered decision to preserve at all costs a repudiated mode of competition—UNE-P. I took that position on policy grounds, but my greatest concern was the prolonged uncertainty it would unleash. I believed, given that this modality had twice before been struck down by the courts, it was a reckless decision that was sure to meet a similar fate, which, in turn, would plunge a fragile market into even further chaos. I wrote: "I fear as much or more for competitors as I do for incumbents, for the prolonged uncertainty . . . may prove stifling."[135] Despite the warning, we forged ahead and now we embark for the fourth time on an effort to write rules that promote local competition. Getting it right this time, without clever shortcuts, is vital.

I want to make one essential point at the outset, given the melodrama of my dissenting colleagues: There are not automatic price increases after 6 months for facilities providers. Such assertions are flat wrong. I elaborate on this more fully below.

I am not a fan of UNE-P as the vehicle for parking our aspirations for vigorous voice competition. It is a synthetic form of competition that would never have proved sustainable, or have provided long-lasting consumer benefits. I believe government policy should encourage intermodal and intramodal facilities-based competition. Bringing some of your own infrastructure to the table allows a competitor to offer a differentiated service to consumers. It allows a competitor to control more of its costs, and thus offer consumers potentially lower prices. A facilities competitor is less dependent on its major competitor for its service—an unenviable position for any competitor. And, a facilities competitor helps create vital redundant networks that can serve our nation if other facilities are damaged by those hostile to our way of life. Facilities competition is real competition and it is emerging everywhere.

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[135] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17519 (2003) (*Triennial Review Order*), *corrected by* Errata, 18 FCC Rcd 19020 (2003).

There is no need to fear that consumers will be left with nothing to choose from as UNE-P begins to whither. Consumers are using wireless telephones more than they are using wired telephones today—many now use their mobile as their primary phone. Cable companies are offering competitive telephone service to residential consumers. VoIP is surging into the marketplace as broadband grows, offering an exciting and new competitive alternative that offers cut-rate prices and futuristic features. Indeed, the venerable AT&T is pushing its own VoIP consumer service and re-entering the consumer wireless market. Aggressive AT&T advertisements for VoIP, touting the re-invention of the telephone, are blanketing the airwaves during the Summer Olympic Games. And, recent reports show Ma Bell has teamed up with cable providers to offer this service in direct competition to the Bells.[136] I applaud these developments.

I also have consistently supported intramodal competitors that are facilities-based. Carries like Covad, NuVox, McLeod and XO have been important contributors to competition. In the *Triennial Review Order*, I supported fully requiring incumbents to unbundle DS1 loops and transport, as did every one of my colleagues. I remain steadfastly committed to providing the key network elements to these facilities competitors in this proceeding, without which they would be impaired. Indeed, I am quite confident that we will be able to provide these elements, once we have a full and complete record, consistent with the guidance of the court. We will move to do so as quickly as possible.

It is exceedingly important for the Commission to rewrite the new rules of competition as fast as it can. As I predicted in the *Triennial Review Order*, the course the Commission took a year and a half ago has led to more uncertainty that risks stifling investment. Clarity is needed to repair the damage. The court has vacated the competition rules and we need to work to fill the void. As an interim step, today we freeze any changes in the current competition rules for six months, to protect consumers from any sudden disruption in service. This will give us the time we need to repair the rules. I have committed to push the Commission to complete this proceeding in six months, before the freeze expires. As a sign of that commitment, I have already scheduled the decision for a vote at our December 2004 open meeting. I insist the parties and urge my colleagues to move heaven and earth to ensure we meet this objective. Consumers demand it and competitors and incumbents alike need it.

In addition to an interim freeze, we also seek comment on a transition proposal that will only take effect if the Commission does not act on final rules, or fails to justify an unbundled element. It is important to emphasize that no transition will be required, or go into effect if we meet our objective to finish the rules and re-justify necessary inputs. In other words, no price increases if we get the job done, which I am fully confident we will. For example, I have expressed a commitment and some confidence that DS1 loops and transport will remain unbundled elements for facilities-based providers. Should the Commission adopt final rules

[136] *AT&T dials up VoIP service with cable deals*, USA Today, Aug. 19, 2004; *AT&T, Cable Providers Join Forces*, Wall Street Journal, Aug. 19, 2004.

along these lines, facilities competitors will not be subject to price increases, or special access pricing. Indeed, I expect that will be the case.

Some parties wanted even more to be done to make elements available right this minute. I fully empathize with the desire to re-unbundle key elements immediately. A business loathes even a brief period of uncertainty. However, I believe there is no lawful way to order an incumbent to provide an element indefinitely that the court vacated with gusto. To do so now, without notice or comment from the public is a hazardous and unlawful course to take. To do so is to flaunt the court's decision and would lead, I am sure, to the court vacating our interim rule and perhaps making it even more difficult to sustain good competition rules. This is an unacceptable risk, for short-term gain. This is the game we played before that cost so dearly and I doubt seriously the court would be amused to play it again. It might be worth repeating the court's own words when it wiped these rules from the books: "This deadline is appropriate in light of the Commission's failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings. *So ordered.*"[137] Will we ever learn?

Before concluding, I must reject utterly the inaccurate and revisionist statements of my dissenting colleagues. The unbundling rules have been tossed out because of their ill-considered UNE-P decision. We are working now to pick up the pieces. We are not free to simply plop the rules back into place as they seem to think. Second, they bemoan the harm to facilities competitors by our action today, while simultaneously refusing overtures by us to modify today's decision to provide greater confidence to this community going forward. They seem prepared to inflict harm on companies, in order to maintain the political purity to criticize today's well-considered step to reconstruct a regime blown down by the court's rejection of their approach.

Nonetheless, I believe a majority of the Commission is committed to providing a sound decision that will allow competition to flourish. I am confident that we can put in place the fundamentals of sustainable competition and get this right for American consumers.

[137] *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 595 (D.C. Cir. 2004), *pets. for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004).

## STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

*Re: Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338.*

This Order and Notice of Proposed Rulemaking represent an important step along the road to sustainable, facilities-based competition. In the wake of the D.C. Circuit's decision invalidating many of the Commission's unbundling rules, we must expeditiously build a record and develop a revised framework. For too long the Commission has given short shrift to the direction provided by the courts in pursuit of a policy of maximum unbundling. Now, we have an opportunity to craft judicially sustainable rules that promote competition in a manner that more fully embraces free-market principles and is less dependent on regulatory micromanagement. While our rules must change, I remain committed to ensuring that bottleneck transmission facilities continue to be unbundled, consistent with our statutory mandate; the challenge ahead is to develop an appropriate framework that distinguishes true bottlenecks from facilities that can be self-supplied or obtained on a reasonable wholesale basis.

As we address the court's directives on remand, this Order will ensure the stability of the telecommunications marketplace and will minimize disruption to consumers. By freezing existing interconnection and access arrangements for six months, we provide full protection for competitors that purchase access to elements in markets where the Commission is likely to find impairment and reinstitute unbundling obligations that are consistent with the court decision. And to the extent that some competitors will have to diminish their reliance on unbundled network elements, the six-month freeze, along with the subsequent period during which wholesale rate increases will be constrained for existing customers, will provide for an orderly transition to alternative arrangements.

I recognize and appreciate competitors' anxiety that DS-1 transmission facilities — which can be critical inputs in bringing competition to the small business market — could be subject to significant price increases following the end of the six-month freeze. This risk is an inevitable byproduct of the D.C. Circuit's vacatur of significant portions of the Triennial Review Order. But it is fully within the Commission's power to prevent any price increases from occurring. Indeed, it bears emphasis that a clear majority of the Commission has advocated the continued unbundling of DS-1 facilities in most circumstances and has also called for issuing new unbundling rules well before the interim period ends. If we fulfill our responsibilities, as I am confident will be the case, then there will be no price increases for any DS-1 loops or transport facilities that are designated as UNEs; rather, TELRIC rates would continue to apply as they do today. I will do everything in my power, and I trust the same is true of my colleagues, to develop an appropriate analytical framework that yields procompetitive and judicially sustainable unbundling rules — hopefully by the end of the year, but in all events within the next six months.

As the Commission undertakes this task, the upcoming months provide a further opportunity for commercial negotiations. Competitors that make use of network elements that seem most vulnerable under the D.C. Circuit decision — most notably, circuit switching — may

continue to obtain access to the relevant capabilities at just and reasonable rates. I applaud the efforts of those carriers that have already reached commercial deals regarding the price and other terms of such access, and I encourage others to do so. Yet I am disappointed that the Commission did not clarify in this Order the legal status of commercial agreements that pertain to services or facilities for which no section 251 mandate exists. Because both incumbent LECs and competitors have cited lingering uncertainty on this issue as a stumbling block to further agreements, we should have removed that obstacle now. I only hope that the Commission does so in the near future.

Finally, I am committed to working with my colleagues to reach consensus on unbundling rules that provide meaningful competitive opportunities while heeding the admonishments of the courts. While we have differed on some issues in the past, the Commission was unanimous in its support for unbundling high-capacity transmission facilities in many circumstances. I see no reason why we cannot reach agreement on these issues once again. As we move toward the adoption of permanent rules, we must be willing to reach compromises to produce a sustainable order that will finally bring certainty and stability to the competitive landscape.

## DISSENTING STATEMENT OF COMMISSIONER MICHAEL J. COPPS,

*Re: Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338.*

I respectfully but strongly dissent to these interim rules. There is no need to mince words. The current Commission is on track to butcher the pro-competitive vision of the 1996 Act. And it is sticking consumers with higher telephone rates and fewer choices. The people who pay America's phone bills deserve better.

The majority characterizes this effort as a comprehensive plan to stabilize the market. The truth is just the opposite. In exchange for a standstill today, they commit to price increases tomorrow. After six months of stay, existing enterprise market loop and dedicated transport customers can expect rate increases of 15 percent. The news is even worse for new customers. For enterprise loops and transport, rates will race up to special access. This could mean price increases of more than 300 percent—a potentially lethal blow to any carrier that built its business plan on the core tenets of the 1996 Act. For carriers operating on slim margins in price sensitive markets, absorbing these increases may just not be possible.

Stability in the short term is good. But it is meaningless if it is accompanied by rate increases that make it impossible for facilities-based carriers to continue to operate. In a capital intensive industry, this kind of regulatory whiplash prevents companies from planning. It ruptures good business models. It scares investors. And it denies the market the clarity it needs and deserves from the FCC.

This situation is particularly harmful to carriers serving small business customers. Small businesses power this country's economy. They generate between two-thirds and three-quarters of all new jobs. They produce over half of our private sector output. The Small Business Administration tells us that in metropolitan areas, 29 percent of small business customers are served by competitive carriers, many of them using enterprise loops and transport facilities. Right now, thousands of small business consumers enjoy affordable access to innovative broadband services that were previously available only to the largest business customers. Clearly, America's small businesses are deriving huge benefits from these services, and their productivity has been increasing as a result. Why would we eliminate this opportunity? For whose benefit?

In effect, the majority justifies these price increases as pressure on the Commission to put final rules in place. But in putting pressure on the Commission, the majority points a loaded gun at industry's head. I agree wholeheartedly that we need final, judicially-sustainable rules in place as soon as possible. And I believe my colleagues will work hard to ensure this happens. But there is no reason to hold one segment of an industry hostage to a motivational framework for regulators.

The problems with the majority's framework run deep. The price increases they commit

to are based on shaky legal ground. There is no analysis relating them back to the Commission's statutory duties. There is no discussion of impairment. This may come as a surprise to both Congress and the courts, because impairment is the touchstone of our unbundling policy under Section 251. It triggers a very specific pricing obligation. All elements unbundled pursuant to Section 251 must be made available to competitors at cost plus a reasonable profit. The statute provides no authority for grafting onto the current rules arbitrary price increases of 15 to 300 percent. Today's decision casts aside these legal realities, saving them, perhaps, for another day. The bad news for competitors is that they must deal with the resulting wreckage now. After so many trips to the court and back, ignoring the statute like this only invites more problems.

It didn't have to be this way. Sadly, there is no justification for the majority's insistence on price increases during the interim period. The Commission was unanimous in upholding unbundled access to DS-1 transmission facilities in the original Triennial Review Order, and nowhere does the court state that our rules requiring the unbundling of high capacity loop facilities are vacated. To suggest that special access rates apply in six months and a day is not just devastating—it is, as a legal matter, wholly unnecessary.

Similarly, we must address the future of line-sharing and how it can contribute to renewed competition in the drastically-changed and more anti-competitive environment that we now confront. We especially need to clarify that the standstill in today's decision also applies to carriers using the high frequency portion of the loop.

I hope we can hammer out greater certainty on these issues very soon. Reconsideration is a good idea. But I cannot and will not be party to any policy that permits competition-killing price increases before we achieve permanent rules. I hope permanent rules will come quickly, but given all the volatilities we face in this summer of 2004, it is not unimaginable that it might take more than six months until we achieve them. By then this Commission's version of "Survivor" might be over, and those left standing could number less than a handful. That's not what the 1996 Act, competition, consumer well-being or good regulation is all about.

## DISSENTING STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN

*Re: Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338.*

For all involved, this Order continues the "one step forward, two steps back" saga of the local competition provisions of the Telecommunications Act of 1996. After eight years of divisive litigation and a summer of promises, the Commission adopts an approach that prolongs the regulatory uncertainty for incumbents, competitors, and consumers alike. Indeed, the only things that are certain here are that consumer prices will go up and that the telecommunications industry will fight the same old battles come the new year.

Through this Order, the Commission adopts an ambiguous approach that is perhaps designed to give a little to everyone but that ultimately grants stability to none. The Order leaves unclear which elements are available to competitors and at what prices they will be available. It is difficult to imagine how either competitors or incumbents will plan for the future, develop business plans, or seek investor support with this foggy vision into the long-term framework. If savvy industry players will be left wondering about the rules of the game, consumers surely will have little guidance about how to choose among the ever-dwindling list of providers.

In response to this ambiguity, this Order promises Commission action before the end of this year. Promises of swift action are laudable, but, rather than deferring the difficult decisions, we should be working right now to develop permanent rules that provide certainty for all involved. At the very minimum, it is unfair to incumbents, competitors, and consumers to "hide the ball" with the ambiguous approach adopted here.

If regulatory certainty is elusive in this Order, what is clear is that prices for consumers are likely to rise. Rather than respond to the D.C. Circuit's decision on a tailored and responsive basis, this Order calls for higher rates for consumers and competitors without any linkage to the requirements of the statute. For new customers in particular these rates could rise dramatically without any consideration of "impairment," the statutory touchstone when deciding which elements should be available at cost-based prices.

Though I cannot join this Order, I have appreciated recent dialogues with my colleagues. I was disappointed that we could not take limited action to provide meaningful protection for carriers serving small business customers, but remain open to reconsideration of these issues. A more daunting but equally pressing challenge now is to move forward as expeditiously as possible with the final rulemaking process. Our chief goal now should be to develop permanent rules for all UNEs as soon as possible, so that the American public and the telecom industry will understand what the choices and price tag will be. The Act and the American consumer deserve no less.