| ***Reply Commenters*** | ***Abbreviation*** |
|---|---|
| United States Telecom Association | USTA |
| Teletruth and National Internet Alliance | TeleTruth |
| United States Access Telecom d/b/a USA Telephone | USA Telephone |
| Utah Committee of Consumer Services | Utah Committee of Consumer Services |
| Verizon Telephone Companies | Verizon |
| WorldNet Telecommunications | WorldNet |

## APPENDIX B – FINAL RULES

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

# *PART 51 – INTERCONNECTION*

1. Section 51.5 is amended by removing the definitions for "Non-qualifying service" and "Qualifying service" and by adding five new definitions in alphabetical order to read as follows:

**§ 51.5 Terms and Definitions.**

Business line. A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

* * * * *

Mobile wireless service. A mobile wireless service is any mobile wireless telecommunications service, including any commercial mobile radio service.

* * * * *

Fiber-based collocator. A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that (1) terminates at a collocation arrangement within the wire center; (2) leaves the incumbent LEC wire center premises; and (3) is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. § 153(1) and any relevant interpretation in this Title.

* * * * *

Triennial Review Remand Order. The Triennial Review Remand Order is the Commission's Order on Remand in CC Docket Nos. 01-338 and 04-313 (released February 4, 2005).

* * * * *

Wire center. A wire center is the location of an incumbent LEC local switching facility containing one or more central offices, as defined in the Appendix to part 36 of this chapter. The wire center boundaries define the area in which all customers served by a given wire center are located.

* * * * *

2. Section 51.309 is amended by revising paragraphs (b), (d), and (g)(2) to read as follows:

**§ 51.309 Use of unbundled network elements.**

* * * * *

(b) A requesting telecommunications carrier may not access an unbundled network element for the exclusive provision of mobile wireless services or interexchange services.

* * * * *

(d) A requesting telecommunications carrier that accesses and uses an unbundled network element consistent with paragraph (b) of this section may provide any telecommunications services over the same unbundled network element.

* * * * *

(g) * * *

(2) Shares part of the incumbent LEC's network with access services or inputs for mobile wireless services and/or interexchange services.

* * * * *

3. Section 51.317 is amended by designating the paragraph heading "Proprietary network elements" as paragraph (a), redesignating paragraphs (a) and (b) as paragraphs (a)(1) and (a)(2), respectively, redesignating paragraphs (b)(1), (b)(2) and (b)(3) as paragraphs (a)(2)(i), (a)(2)(ii), and (a)(2)(iii), respectively, and adding new paragraph (b) to read as follows:

**§ 51.317 Standards for requiring the unbundling of network elements.**

* * * * *

(b) Non-proprietary network elements. The Commission shall determine whether a non-proprietary network element should be made available for purposes of section 251(c)(3) of the Act by analyzing, at a minimum, whether lack of access to a non-proprietary network element "impairs" a requesting carrier's ability to provide the service it seeks to offer. A requesting carrier's ability to provide service is "impaired" if, taking into consideration the availability of alternative elements outside the incumbent LEC's network, including elements self-provisioned by the requesting carrier or acquired as an alternative from a third-party supplier, lack of access to that element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market by a reasonably efficient competitor uneconomic.

* * * * *

4. Section 51.319 is amended by: removing paragraphs (a)(7) and (e)(4); redesignating paragraphs (a)(8) and (a)(9) as (a)(7) and (a)(8), respectively; redesignating paragraph (e)(5) as (e)(4); and revising paragraphs (a), (d), and (e) to read as follows:

## § 51.319 Specific unbundling requirements.

(a) * * *

(4) DS1 loops. (i) Subject to the cap described in paragraph (a)(4)(ii), an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS1 loop on an unbundled basis to any building not served by a wire center with at least 60,000 business lines and at least four fiber-based collocators. Once a wire center exceeds both of these thresholds, no future DS1 loop unbundling will be required in that wire center. A DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services.

(ii) Cap on unbundled DS1 loop circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 loops to any single building in which DS1 loops are available as unbundled loops.

(iii) Transition period for DS1 loop circuits. For a 12-month period beginning on the effective date of the Triennial Review Remand Order, any DS1 loop UNEs that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (a)(4)(i) or (a)(4)(ii) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the loop element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that loop element. Where incumbent LECs are not required to provide unbundled DS1 loops pursuant to paragraphs (a)(4)(i) or (a)(4)(ii) of this section, requesting carriers may not obtain new DS1 loops as unbundled network elements.

(5) DS3 loops. (i) Subject to the cap described in paragraph (a)(5)(ii), an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS3 loop on an unbundled basis to any building not served by a wire center with at least 38,000 business lines and at least four fiber-based collocators. Once a wire center exceeds both of these thresholds, no future DS3 loop unbundling will be required in that wire center. A DS3 loop is a digital local loop having a total digital signal speed of 44.736 megabytes per second.

(ii) Cap on unbundled DS3 loop circuits. A requesting telecommunications carrier may obtain a maximum of a single unbundled DS3 loop to any single building in which DS3 loops are available as unbundled loops.

(iii) Transition period for DS3 loop circuits. For a 12-month period beginning on the effective date of the Triennial Review Remand Order, any DS3 loop UNEs that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (a)(5)(i) or (a)(5)(ii) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the loop element on June

15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that loop element. Where incumbent LECs are not required to provide unbundled DS3 loops pursuant to paragraphs (a)(5)(i) or (a)(5)(ii) of this section, requesting carriers may not obtain new DS3 loops as unbundled network elements.

(6) Dark fiber loops. (i) An incumbent LEC is not required to provide requesting telecommunications carriers with access to a dark fiber loop on an unbundled basis. Dark fiber is fiber within an existing fiber optic cable that has not yet been activated through optronics to render it capable of carrying communications services.

(ii) Transition period for dark fiber loop circuits. For an 18-month period beginning on the effective date of the Triennial Review Remand Order, any dark fiber loop UNEs that a competitive LEC leases from the incumbent LEC as of that date shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the loop element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that loop element. Requesting carriers may not obtain new dark fiber loops as unbundled network elements.

* * * * *

(d) Local circuit switching.

(1) * * *

(2) DS0 capacity (*i.e.*, mass market) determinations.

(i) An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops.

(ii) Each requesting telecommunications carrier shall migrate its embedded base of end-user customers off of the unbundled local circuit switching element to an alternative arrangement within 12 months of the effective date of the Triennial Review Remand Order.

(iii) Notwithstanding paragraph (d)(2)(i) of this section, for a 12-month period from the effective date of the Triennial Review Remand Order, an incumbent LEC shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve its embedded base of end-user customers. The price for unbundled local circuit switching in combination with unbundled DS0 capacity loops and shared transport obtained pursuant to this paragraph shall be the higher of: (A) the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or (B) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that combination of network elements, plus one dollar. Requesting carriers may not obtain new local switching as an unbundled network element.

(3) * * *

(4) Other elements to be unbundled. Elements relating to the local circuit switching element shall be made available on an unbundled basis to a requesting carrier to the extent that the requesting carrier is entitled to unbundled local circuit switching as set forth in paragraph (d)(2) of this section.

(i) An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to signaling, call-related databases, and shared transport facilities on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part, to the extent that local circuit switching is required to be made available pursuant to paragraph (d)(2)(iii). These elements are defined as follows:

(A) Signaling networks. Signaling networks include, but are not limited to, signaling links and signaling transfer points.

(B) Call-related databases. Call-related databases are defined as databases, other than operations support systems, that are used in signaling networks for billing and collection, or the transmission, routing, or other provision of a telecommunications service. Where a requesting telecommunications carrier purchases unbundled local circuit switching from an incumbent LEC, an incumbent LEC shall allow a requesting telecommunications carrier to use the incumbent LEC's service control point element in the same manner, and via the same signaling links, as the incumbent LEC itself.

(1) Call-related databases include, but are not limited to, the calling name database, 911 database, E911 database, line information database, toll free calling database, advanced intelligent network databases, and downstream number portability databases by means of physical access at the signaling transfer point linked to the unbundled databases.

(2) Service management systems are defined as computer databases or systems not part of the public switched network that interconnect to the service control point and send to the service control point information and call processing instructions needed for a network switch to process and complete a telephone call, and provide a telecommunications carrier with the capability of entering and storing data regarding the processing and completing of a telephone call. Where a requesting telecommunications carrier purchases unbundled local circuit switching from an incumbent LEC, the incumbent LEC shall allow a requesting telecommunications carrier to use the incumbent LEC's service management systems by providing a requesting telecommunications carrier with the information necessary to enter correctly, or format for entry, the information relevant for input into the incumbent LEC's service management system, including access to design, create, test, and deploy advanced intelligent network-based services at the service management system, through a service creation environment, that the incumbent LEC provides to itself.

(3) An incumbent LEC shall not be required to unbundle the services created in the advanced intelligent network platform and architecture that qualify for proprietary treatment.

(C) Shared transport. Shared transport is defined as the transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network.

(e) Dedicated transport. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to dedicated transport on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part, as set forth in paragraphs (e) through (e)(4) of this section. A "route" is a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches. A route between two points (*e.g.*, wire center or switch "A" and wire center or switch "Z") may pass through one or more intermediate wire centers or switches (*e.g.*, wire center or switch "X"). Transmission paths between identical end points (*e.g.*, wire center or switch "A" and wire center or switch "Z") are the same "route," irrespective of whether they pass through the same intermediate wire centers or switches, if any.

(1) Definition. For purposes of this section, dedicated transport includes incumbent LEC transmission facilities between wire centers or switches owned by incumbent LECs, or between wire centers or switches owned by incumbent LECs and switches owned by requesting telecommunications carriers, including, but not limited to, DS1-, DS3-, and OCn-capacity level services, as well as dark fiber, dedicated to a particular customer or carrier.

(2) Availability.

(i) Entrance facilities. An incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers.

(ii) Dedicated DS1 transport. Dedicated DS1 transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dedicated DS1 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 1.544 megabytes per second and are dedicated to a particular customer or carrier.

(A) General availability of DS1 transport. Incumbent LECs shall unbundle DS1 transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are Tier 1 wire centers. As such, an incumbent LEC must unbundle DS1 transport if a wire center at either end of a requested route is not a Tier 1 wire center, or if neither is a Tier 1 wire center.

(B) Cap on unbundled DS1 transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

(C) Transition period for DS1 transport circuits. For a 12-month period beginning on the effective date of the Triennial Review Remand Order, any DS1 dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(ii)(A) or (e)(2)(ii)(B) of this section, shall be

available for lease from the incumbent LEC at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled DS1 transport pursuant to paragraphs (e)(2)(ii)(A) or (e)(2)(ii)(B) of this section, requesting carriers may not obtain new DS1 transport as unbundled network elements.

(iii) Dedicated DS3 transport. Dedicated DS3 transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dedicated DS3 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 44.736 megabytes per second and are dedicated to a particular customer or carrier.

(A) General availability of DS3 transport. Incumbent LECs shall unbundle DS3 transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are either Tier 1 or Tier 2 wire centers. As such, an incumbent LEC must unbundle DS3 transport if a wire center on either end of a requested route is a Tier 3 wire center.

(B) Cap on unbundled DS3 transport circuits. A requesting telecommunications carrier may obtain a maximum of 12 unbundled DS3 dedicated transport circuits on each route where DS3 dedicated transport is available on an unbundled basis.

(C) Transition period for DS3 transport circuits. For a 12-month period beginning on the effective date of the Triennial Review Remand Order, any DS3 dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(iii)(A) or (e)(2)(iii)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled DS3 transport pursuant to paragraphs (e)(2)(iii)(A) or (e)(2)(iii)(B) of this section, requesting carriers may not obtain new DS3 transport as unbundled network elements.

(iv) Dark fiber transport. Dedicated dark fiber transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dark fiber transport consists of unactivated optical interoffice transmission facilities.

(A) General availability of dark fiber transport. Incumbent LECs shall unbundle dark fiber transport between any pair of incumbent LEC wire centers except where, though application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are either Tier 1 or Tier 2 wire

centers. As such, an incumbent LEC must unbundle dark fiber transport if a wire center on either end of a requested route is a Tier 3 wire center.

(B) Transition period for dark fiber transport circuits. For an 18-month period *beginning on the effective date of the* Triennial Review Remand Order, any dark fiber dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(iv)(A) or (e)(2)(iv)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled dark fiber transport pursuant to paragraphs (e)(2)(iv)(A) or (e)(2)(iv)(B) of this section, requesting carriers may not obtain new dark fiber transport as unbundled network elements.

(3) Wire center tier structure. For purposes of this section, incumbent LEC wire centers shall be classified into three tiers, defined as follows:

(i) Tier 1 wire centers are those incumbent LEC wire centers that contain at least four fiber-based collocators, at least 38,000 business lines, or both. Tier 1 wire centers also are those incumbent LEC tandem switching locations that have no line-side switching facilities, but nevertheless serve as a point of traffic aggregation accessible by competitive LECs. Once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center.

(ii) Tier 2 wire centers are those incumbent LEC wire centers that are not Tier 1 wire centers, but contain at least 3 fiber-based collocators, at least 24,000 business lines, or both. Once a wire center is determined to be a Tier 2 wire center, that wire center is not subject to later reclassification as a Tier 3 wire center.

(iii) Tier 3 wire centers are those incumbent LEC wire centers that do not meet the criteria for Tier 1 or Tier 2 wire centers.

* * * * *

## APPENDIX C – FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Interim Order and NPRM* in this proceeding.[2] The Commission sought written comment on the proposals in the *Interim Order and NPRM*, including comment on the IRFA. The present Final Regulatory Flexibility Analysis (FRFA) addresses comments received on the IRFA and conforms to the RFA.[3]

### A. Need for, and Objectives of, the Order on Remand

2. This Order responds to the United States Court of Appeals for the District of Columbia's *USTA II* decision, which vacated and remanded significant portions of the *Triennial Review Order's* unbundling rules.[4] Based on the record compiled in response to the *Triennial Review NPRM*,[5] the Commission adopted, in the *Triennial Review Order*, new unbundling rules implementing section 251 of the 1996 Act.[6] The *Triennial Review Order* reinterpreted the statute's "impair" standard and reevaluated incumbent LECs' unbundling obligations with regard to particular elements. Various parties appealed the *Triennial Review Order*, and on March 2, 2004, the D.C. Circuit decided *USTA II*, vacating and remanding several of the *Triennial Review Order*'s unbundling rules. In this Order, we address the remanded issues and take additional steps to encourage the innovation and investment that results from facilities-based competition.

3. Specifically, this Order clarifies the *Triennial Review Order*'s impairment standard in one respect and modifies the unbundling framework in three respects. *First*, we clarify that we evaluate impairment with regard to the capabilities of a *reasonably efficient* competitor. *Second*, we set aside the *Triennial Review Order*'s "qualifying service" interpretation of section 251(d)(2), but prohibit the use of UNEs for the provision of telecommunications services in the mobile wireless and long-distance markets,

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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 Small Business Regulatory Enforcement Fairness Act of 1966 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783, 16804 (2004) (*Interim Order and NPRM*).

[3] *See* 5 U.S.C. § 604.

[4] *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, 17145, para. 278 (2003) (*Triennial Review Order*), *corrected by* Errata, 18 FCC Rcd 19020 (2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*). In the *Interim Order and NPRM*, the Commission sought comment on how to respond to the *USTA II* decision. Our decision today is based on comments filed in response to the *Interim Order and NPRM* and focuses on those issues that were remanded to us.

[5] *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, Notice of Proposed Rulemaking, 16 FCC Rcd 22781 (2001) (*Triennial Review NPRM*).

[6] *Triennial Review Order*, 18 FCC Rcd at 17155-75, 17199-223, 17263-79, paras. 298-327, 359-93, 459-79.

which we previously have found to be competitive. *Third*, in applying our impairment test, we draw reasonable inferences regarding the prospects for competition in one geographic market based on the state of competition in other, similar markets. *Fourth*, we consider the appropriate role of tariffed incumbent LEC services in our unbundling framework, and determine that in the context of the local exchange markets, a general rule prohibiting access to UNEs whenever a requesting carrier is able to compete using an incumbent LEC's tariffed offering would be inappropriate. We then apply this revised unbundling framework to the dedicated transport network element, the high-capacity loop network element, and the mass market local circuit switching network element. In each case, we adopt a result that will promote the deployment of competitive facilities wherever possible, spreading the benefits of facilities-based competition to market entrants and end-user customers alike, including small businesses falling into each category.

### B. Summary and Discussion of Significant Issues Raised by Public Comments in Response to IRFA

4. In this section, we respond to comments filed in response to the IRFA.[7] To the extent we received comments raising general small business concerns during this proceeding, those comments are discussed throughout the Order and are summarized in part E, below.

5. First, we reject TeleTruth's contention that the Commission fails to assess the impact of its unbundling rules on small Internet Service Providers (ISPs), and that this failure violates the RFA.[8] Although we understand that our rules will have an economic impact in many sectors of the economy, including the ISP market, the RFA only requires the Commission to consider the impact on entities *directly* subject to our rules. The RFA is not applicable to ISPs because, as we previously noted, ISPs are only *indirectly* affected by our unbundling actions.[9] In the interest of ensuring notice to all interested parties and out of an abundance of caution, we have previously included ISPs among the entities potentially indirectly affected by our unbundling rules, although we have been explicit in emphasizing that ISPs are only indirectly affected by these rules. On this subject, we note that the D.C. Circuit "has consistently held that the RFA imposes no obligation to conduct a small entity impact analysis of effects on entities which [the agency conducting the analysis] does not regulate."[10] Thus, we emphasize that the RFA imposes no independent obligation to examine the effects an agency's action will have on the customers, clients, or end users of the companies it regulates – including ISPs – unless such entities are, themselves, subject to regulation by the agency. In any event, we have considered the needs of small business customers of competitive (and incumbent) LECs throughout this Order and previous orders, in

[7] *See* Digital Telecommunications Comments; Dialog Comments; SBA Comments; TeleTruth TRO Reply; TeleTruth DQA Reply; Letter from Genevieve Morelli and Jennifer M. Kashatus, Counsel for PACE *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (filed Dec. 6, 2004) (PACE *et al.* Dec. 6, 2004 *Ex Parte* Letter).

[8] TeleTruth TRO Reply at 11, 15-17.

[9] *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17437, para. 775; *see infra* para. 42.

[10] *Michigan v. EPA*, 213 F.3d 663, 689 (D.C. Cir. 2000) (internal quotation marks omitted); *see also Motor & Equip. Mfrs. Ass'n. v. Nichols*, 142 F.3d 449, 467 (D.C. Cir. 1998); *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996); *American Trucking Assn's, Inc. v. EPA*, 175 F.3d 1027, 1044, *reh'g granted in part, denied in part* 195 F.3d 4 (D.C. Cir. 1999), *rev'd in part on other grounds*, 531 U.S. 457 (2001).

each case choosing the outcome that will foster facilities-based competition and the benefits such competition will bring to small businesses and other consumers of telecommunications.

6. We also reject TeleTruth's argument that the Commission violates the RFA by relying on outdated 1997 Census Bureau data to identify the number of ISPs potentially affected by our final rules in the IRFA. The 1997 Census Bureau data were and still are the most current data available. According to TeleTruth, data compiled by both the SBA and Boardwatch/ISP-Planet, an ISP-focused periodical,[11] indicate that the number of ISPs is close to 7,000, rather than the 2,751 ISPs identified by the IRFA.[12] Although TeleTruth cites to higher numbers, the Census Bureau has not released the more recent (2002) results for telecommunications providers or for ISPs.[13] Thus, the IRFA in this proceeding and this FRFA appropriately rely on the most up-to-date 1997 Census Bureau data and therefore comply with the RFA.

7. We disagree with TeleTruth's claim that by relying on 1997 Census Bureau data in the IRFA, the Commission violates the Data Quality Act (DQA).[14] We conclude that the IRFA's description of the ISP marketplace based on 1997 Census Bureau data was consistent with the Commission's DQA guidelines. As an initial matter, the DQA requires federal agencies to issue information quality guidelines ensuring the quality, utility, objectivity and integrity of information that they disseminate, and to provide mechanisms by which affected persons can take action to correct any errors reflected in such information.[15] In 2002, the Commission adopted guidelines implementing the DQA stating that it is dedicated to ensuring that all data that it disseminates reflect a level of quality commensurate with the

[11] *See http://www.isp-planet.com.*

[12] TeleTruth TRO Reply at 11-13; TeleTruth DQA Reply at 7. The RFA requires all agencies to use size standards set by the SBA to determine whether businesses are small businesses. SBA sets the standards using the North American Industry Classification System (NAICS) and once an agency has identified the industry by code, it uses the NAICS code in combination with the U.S. Census data to identify the number of small businesses. As noted in the IRFA, under the SBA size standard for ISPs, a business is small if it has average annual receipts of $21 million or less. According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year. 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). We note that the SBA figure cited by TeleTruth departs from the revenue-based size standard typically employed by SBA and relied on by this Commission. Specifically, the SBA filing on which TeleTruth relies indicates that "there are a total of 7,099 ISP firms, of which 6,975 [have] less than 500 employees." *See* TeleTruth TRO Reply at 11; TeleTruth DQA Reply at 7; Letter from Thomas M. Sullivan, Chief Counsel for Advocacy, on behalf of Small Business Administration, Office of Advocacy, to Chairman Powell, FCC, CC Docket No. 02-33 (filed Aug. 27, 2002). Thus, in this case, the SBA has relied on a size standard based on the number of employees working for an enterprise, rather than relying on its own revenue-based standard for firms. We do not believe that case-by-base departure from the SBA revenue-based approach to categorizing ISPs would be appropriate. In this context, we have used the very specific and sole NAICS code for the purpose at hand.

[13] The Census Bureau will release final revised firm, employees, and revenue data concerning telecommunication providers and ISPs sometime during the last quarter of 2005. Please refer to the Census Bureau's webpage at *http://www.census.gov/econ/census02/guide/g02sched.htm* for more details.

[14] *See* TeleTruth DQA Reply at 1-10; TeleTruth TRO Reply at 15.

[15] *See* Treasury and General Government Appropriation Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515 Appendix C, 114 Stat. 2763A-153 (2000).

nature of the information.[16] Specifically, these guidelines require the Commission to review and substantiate the quality of information before it is disseminated to the public and describe the administrative mechanisms allowing affected persons to seek and obtain correction of information that does not comply with the guidelines.[17] By relying on the most recent Census Bureau data, the Commission complied with DQA guidelines as the Census Bureau is the leading source of high-quality data of the sort set forth in the IRFA – and a source on which we have consistently relied.[18] In this regard, we note that the Census Bureau data and SBA generic small business size standards track each other precisely, as intended by both the Census Bureau and SBA.[19]

8. We also reject TeleTruth's argument that the Commission violates the RFA by failing to conduct proper outreach to small businesses for purposes of compiling a comprehensive record in this proceeding.[20] The Commission has satisfied its RFA obligation to assure that small companies were able to participate in this proceeding. Specifically, the RFA requires the Commission to "assure that small entities have been given an opportunity to participate in the rulemaking," and proposes as example five "reasonable techniques" that an agency might employ to do so.[21] In this proceeding, the Commission has complied with the RFA by employing several of these techniques: it (1) has published a "notice of proposed rulemaking in publications likely to be obtained by small entities";[22] (2) has "inclu[ded] . . . a statement that the proposed rule may have a significant economic effect on a substantial number of small entities" in the *Interim Order and NPRM*;[23] (3) has solicited comments over its computer network;[24] and

[16] *See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Pursuant to Section 515 of Public Law No. 105-554,* Information Quality Guidelines, 17 FCC Rcd. 19890, 19891, para. 5 (2002) (DQA Guidelines).

[17] DQA Guidelines, 17 FCC Rcd. at 19894 (App. A).

[18] TelTruth DQA Reply at 1-10. *See* TeleTruth TRO Reply at 15. TeleTruth also argues that the *Triennial Review Order* and other Commission orders have violated the DQA in various respects. *See* TeleTruth TRO Reply at 18-25. We need not reach the merits of these complaints in this remand proceeding. To the extent a party believes that a Commission order has violated federal law, that party should seek recourse in the context of a petition for reconsideration of the order at issue or before an appropriate court, not in the context of a subsequent rulemaking proceeding. *See, e.g.*, TeleTruth TRO Reply at 7.

[19] For instance, the universe of ISPs is defined and tracked by the Census Bureau, and the SBA assesses the same pool as the Census Bureau in determining the appropriate size standard.

[20] TeleTruth argues that publication in the Federal Register is not outreach. TeleTruth TRO Reply at 14.

[21] 5 U.S.C. § 609.

[22] *Id.* § 609(a)(2). TeleTruth has provided no reason to believe that small carriers would be unfamiliar with the Federal Register, in which all federal regulations pertinent to those companies' operations are published. We note that a summary of the *Interim Order and NPRM* was published in the Federal Register at 69 FR 55128 (Sept. 13, 2004).

[23] 5 U.S.C. § 609(a)(1).

[24] *Id.* § 609(a)(2).

(4) has acted "to reduce the cost or complexity of participation in the rulemaking by small entities" by, among other things, facilitating electronic submission of comments.[25]

9. We also disagree with commenters that claim that the Commission did not specifically consider the impact of eliminating UNEs on small businesses or describe alternatives to minimize any impact in the IRFA.[26] Although the Small Business Administration Office of Advocacy (SBA) recommends that we issue a revised IRFA to account for the impact our rules might have on small competitive LECs,[27] we believe it is not necessary since the *Interim Order and NPRM* explained in detail the ruling of the D.C. Circuit in *USTA II*, which gave rise to this proceeding; posed specific questions to commenters regarding the proper implementation of that decision; and solicited comment from all parties. While the NPRM did not specify particular results the Commission would consider – and the IRFA therefore did not catalogue the effects that such particular results might have on small businesses – the Commission provided notice to parties regarding the range of policy outcomes that might result from this Order. As indicated above, a summary of the *Interim Order and NPRM* was published in the Federal Register, and we believe that such publication constitutes appropriate notice to small businesses subject to this Commission's regulation. Indeed, far from discouraging small entities from participating, the *Interim Order and NPRM* and the associated IRFA elicited extensive comment on issues affecting small businesses.[28] These comments have enabled us to consider the concerns of competitive LECs throughout this Order. Moreover, in Part C, below, we attempt to estimate the number of competitive LECs that will be affected by the rules we adopt herein. We therefore reject arguments that small entities were prejudiced by any lack of specificity regarding specific results potentially resulting from this proceeding.

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

10. 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.[29] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[30] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[31] A "small business concern" is one

[25] *Id.* § 609(a)(5).

[26] SBA Comments at 3-5; Digital Telecommunications Comments at 10-12; Dialog Comments at 6-7.

[27] SBA Comments at 2.

[28] *See* Digital Telecommunications Comments; Dialog Comments; SBA Comments; TeleTruth TRO Reply; TeleTruth DQA Reply.

[29] *Id.* § 604(a)(3).

[30] *Id.* § 601(6).

[31] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" set forth in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

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).[32]

11. 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.[33] The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,[34] Paging,[35] and Cellular and Other Wireless Telecommunications.[36] 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.

12. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[37] SBA Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[38] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

13. *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.[39] According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year.[40] Of this total, 2,201 firms had employment of 999 or fewer employees,

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[32] 15 U.S.C. § 632.

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

[34] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (changed to 517110 in Oct. 2002).

[35] 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in Oct. 2002).

[36] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

[37] 15 U.S.C. § 632.

[38] 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).

[39] 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

[40] 1997 Economic Census, Establishment and Firm Size, Table 5, NAICS code 513310 (issued Oct. 2000).

and an additional 24 firms had employment of 1,000 employees or more.[41] Thus, under this size standard, the great majority of firms can be considered small.

14. *Incumbent Local Exchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services (LECs). 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.42 According to Commission data,[43] 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.

15. *Competitive Local Exchange Carriers, 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.[44] According to Commission data,[45] 563 carriers have reported that they are engaged in the provision of either CAP services or competitive LEC 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 Service Providers" are small entities that may be affected by our proposed action.

16. *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.[46] According to Commission data,[47] 281 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 254

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[41] *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."

[42] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517110 (changed from 513310 in October 2002).

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

[44] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in October 2002).

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

[46] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in October 2002).

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

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.

17. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for OSPs. 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.[48] According to Commission data,[49] 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.

18. *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.[50] According to Commission data, 32 companies reported that they were engaged in the provision of prepaid calling cards.[51] Of these 32 companies, an estimated 31 have 1,500 or fewer employees and one has more than 1,500 employees.[52] 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.

19. *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.[53] According to Commission's data, 65 companies reported that their primary telecommunications service activity was the provision of other toll services.[54] Of these 65 companies, an estimated 62 have 1,500 or fewer employees and three have more than 1,500 employees.[55] Consequently, the Commission estimates that most "Other Toll Carriers" are small entities that may be affected by the rules and policies adopted herein.

20. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging"[56] and "Cellular and Other Wireless

[48] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in October 2002).

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

[50] 13 C.F.R. § 121.201, NAICS code 513330 (changed to 517310 in Oct. 2002).

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

[52] *Id.*

[53] 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

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

[55] *Id.*

[56] 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

Telecommunications."[57] 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.[58] 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.[59] 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.[60] 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.[61] Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

21. *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.[62] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years."[63] These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[64] 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

[57] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[58] 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).

[59] 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."

[60] 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).

[61] 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."

[62] *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).

[63] *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).

[64] *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).

small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[65] 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. In addition, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

22. *Narrowband Personal Communications Services (PCS).* 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.[66] Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.[67] 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*.[68] A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million.[69] 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.[70] The SBA has approved these small business size standards.[71] A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading

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[65] 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).

[66] *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).

[67] *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).

[68] *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).

[69] *Id.*

[70] *Id.*

[71] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration (filed December 2, 1998).

Areas and nationwide) licenses.[72] Three of these claimed status as a small or very small entity and won 311 licenses.

23. *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.[73] 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.[74] 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.

24. *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.[75] 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.[76] 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.[77] The SBA has approved these small size standards.[78] Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[79] 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.[80] Thirty-nine small businesses won 373 licenses

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

[73] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[74] 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).

[75] *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).

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

[77] *Id.*

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

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

[80] *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).

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.[81] 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.[82]

25. *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.[83] 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.[84] The SBA has approved these small business size standards for the 900 MHz Service.[85] 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.[86] 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.[87]

26. *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."[88] 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.[89] Of this total, 1,303 firms had employment

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

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

[83] 47 C.F.R. § 90.814(b)(1).

[84] *Id.*

[85] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration (filed 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.

[86] *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).

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

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

[89] 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).

of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.[90] Thus, under this category and associated small business size standard, the great majority of firms can be considered small.

27. 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.[91] 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.[92] The SBA has approved this definition.[93] 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.[94] Fifty-seven companies claiming small business status won 440 licenses.[95] 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.[96] 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.[97] 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.[98] Of these, we estimate that 373 are small, under the SBA-approved small business size standard.[99] We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

28. *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

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[90] *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 1000 employees or more."

[91] *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).

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

[93] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration (filed December 2, 1998).

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

[95] *See id.*

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

[97] *See id.*

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

[99] 13 C.F.R. § 121.201, NAICS code 517211.

special provisions such as bidding credits and installment payments.[100] 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.[101] 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.[102] SBA approval of these definitions is not required.[103] An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.[104] Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[105] *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[106] A significant subset of the Rural Radiotelephone Service is the BETRS.[107] 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.[108] 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.

29. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.[109] 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.[110] There are approximately 100 licensees in the Air-Ground Radiotelephone

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[100] *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).

[101] *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).

[102] *See id.*

[103] *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).

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

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

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

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

[108] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

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

[110] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).