broadband Internet access service, regardless of the underlying technology.[442] This framework necessarily will be built on our ancillary jurisdiction under Title I; as we explain in the Order,[443] this jurisdiction is ample to accomplish the consumer protection goals we identify below, and we will not hesitate to exercise it.[444]

147. For each of the specific areas of Commission regulation described below, we ask commenters to address whether the imposition of regulations pursuant to our ancillary jurisdiction, and the corresponding ability of consumers to take advantage of Commission avenues for resolution of consumer protection issues, is desirable and necessary as a matter of public policy, or whether we should rely on market forces to address some or all of the areas listed. Are these types of regulations more or less relevant in the context of broadband Internet access service than they are for traditional telephony services? We ask commenters to describe any technical, economic, or other impediments that may affect the ability of broadband Internet access service providers to comply with such regulations. Are there areas of consumer protection not listed above for which the Commission should impose regulations? If so, commenters should describe the nature of the concern and address the questions posed in this paragraph.

A. CPNI

148. Consumers' privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on telecommunications services. For example, a consumer may have questions about whether a broadband Internet access service provider will treat his or her account and usage information as confidential, or whether the provider reserves the right to use account information for marketing and other purposes. Section 222 of the Act establishes the regulatory framework governing telecommunications carriers' use and disclosure of CPNI and other customer information obtained by those carriers in their "provision of a *telecommunications service*."[445] That section requires, in general, that telecommunications carriers use or disclose CPNI only in the provision of the telecommunications service from which the CPNI is derived, or in the provision of services necessary to, or used in, the provision of such telecommunications services.[446]

149. We seek comment on whether we should extend privacy requirements similar to the Act's CPNI requirements to providers of broadband Internet access services. For example, should we adopt rules under our Title I authority that forbid broadband Internet access providers from disclosing, without their

[442] We note that questions regarding necessary regulatory obligations of cable modem providers have previously been raised in the *Cable Modem Declaratory Ruling and NPRM*, 17 FCC Rcd at 4848-54, paras. 96-112. To the extent that our inquiry here is duplicative of those questions, we ask commenters to refresh the record by filing comments in this instant proceeding in WC Docket No. 05-271.

[443] *See supra* paras. 108-111.

[444] Indeed, this Commission has already shown its willingness to rely on ancillary jurisdiction in the face of a demonstrated need. *See VoIP E911 Order* at paras. 26-32.

[445] 47 U.S.C. § 222(c)(1) (emphasis added). The Commission has adopted rules implementing section 222, including rules defining the scope of the phrase "telecommunications service" in section 222(c)(1)(A) as well as rules specifying which services are included in the phrase "services necessary to, or used in the provision of telecommunications service" in section 222(c)(1)(B). *See* 47 C.F.R. §§ 64.2001-64.2008; *see also Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860 (2002) (*CPNI Remand Order*).

[446] 47 U.S.C. § 222(c)(1).

customers' approval, information about their customers that they learn through the provision of their broadband Internet access service? We seek comment on what sort of customer proprietary information broadband Internet access providers possess, *e.g.*, information about consumers' service plans, installed equipment, or patterns of Internet access use. We note that long before Congress enacted section 222 of the Act, the Commission had recognized the need for privacy requirements associated with the provision of enhanced services and had adopted CPNI-related requirements in conjunction with other *Computer Inquiry* obligations.[447]

B. Slamming

150. Section 258 of the Act prohibits telecommunications carriers from submitting or executing an unauthorized change in a subscriber's selection of a provider of telephone exchange service or telephone toll service, a practice commonly known as "slamming."[448] In a series of orders, the Commission adopted various rules to implement section 258, and concluded that state authorities should have primary responsibility for administering the rules.[449] By providing for state administration of slamming rules, the

[447] *See Computer III Phase II Order*, 2 FCC Rcd at 3094-95, paras. 152-56 (1987). Specifically, in the *Computer III* proceeding, the Commission adopted a framework governing CPNI not only to protect independent enhanced service providers from anticompetitive use of customers' local and long distance services information gained by the dominant telephone service providers to advance their enhanced services provisioning, but also to protect legitimate customer expectations of confidentiality. Under the pre-1996 Act CPNI framework, which was eliminated in its entirety when the Commission implemented section 222, customer information derived from the provision of enhanced services was not subject to CPNI protections. *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8184-93, paras. 176-89 (1998) (*CPNI Order*), *on recon.*, 14 FCC Rcd 14409 (1999) (*CPNI Reconsideration Order*), *vacated sub nom. U.S. West v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

[448] 47 U.S.C. § 258(a) (mandating that "[n]o telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe"). Prior to the adoption of section 258 of the Act, the Commission had recognized that slamming was a significant problem, and had taken various steps to address the issue; the adoption of section 258 expanded the Commission's authority in this area. *See, e.g.*, *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Report and Order, 10 FCC Rcd 9560 (1995), *stayed in part*, 11 FCC Rcd 856 (1995); *Policies and Rules Concerning Changing Long Distance Carriers*, CC Docket No. 91-64, Report and Order, 7 FCC Rcd 1038 (1992), *recon. denied*, 8 FCC Rcd 3215 (1993); *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, 101 FCC 2d 935, *recon.*, 102 FCC 2d 503 (1985); *see also, e.g.*, *Cherry Communications*, File No. ENF-93-045, Order, 9 FCC Rcd 2086 (1994) (adopting consent decree enforcing the Commission's anti-slamming rules).

[449] *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508 (1998) (*Second Report and Order*), *stayed in part*, *MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. May 18, 1999) (*Stay Order*), *motion to dissolve stay granted*, *MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. June 27, 2000) (*Order Lifting Stay*); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, First Order on Reconsideration, 15 FCC Rcd 8158 (2000) (*First Reconsideration Order*); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd 15996 (2000) (*Third Report and Order*); Errata, DA 00-2163 (rel. Sept. 25, 2000); Erratum, DA 00-292 (rel. Oct. 4, 2000); *Implementation of the* (continued . . .)

Commission recognized that state authorities are particularly well-equipped to handle such complaints because states are close to consumers and are familiar with trends in their regions.[450] The Commission also recognized, however, that all states may not have the resources available to handle slamming complaints.[451] Accordingly, the Commission's rules allow consumers in states that do not "opt-in" to administer the slamming rules to file slamming complaints with the Commission.[452]

151. We seek comment on whether we should exercise our Title I authority to impose similar requirements on providers of broadband Internet access service. Commenters should explain in what circumstances subscribers to broadband Internet access could get "slammed."[453] Is the provisioning process for broadband Internet access service such that an unauthorized change in provider is more likely in situations where the provider relies on third-party broadband transmission facilities?

C. Truth-in-Billing

152. The Commission has adopted truth-in-billing rules to ensure that consumers receive accurate, meaningful information on their telecommunications bills that will allow consumers to better understand their bills, compare service offerings, and thereby promote a more efficient, competitive marketplace.[454] In general, the Commission's rules require that a telecommunication carrier's bill must: (1) be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered; (2) identify the service provider associated with each charge; (3) clearly and conspicuously identify any change in service provider; (4) identify those charges for which failure to pay will not result in disconnection of basic local service; and (5) provide a toll-free number for consumers to inquire or dispute any charges.[455] The Commission's rules on truth-in-billing are designed to reduce slamming,[456]

(continued from previous page)
Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94-129, Order, 16 FCC Rcd 4999 (2001); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Third Order on Reconsideration and Second Further Notice of Proposed Rule Making, 18 FCC Rcd 5099 (2003) (*Third Reconsideration Order* and/or *Second FNPRM*). The rules adopted by the Commission to implement section 258 are codified in part 64. *See* 47 C.F.R. §§ 64.1100 *et seq.*

[450] *First Reconsideration Order*, 15 FCC Rcd at 8169-80, paras. 22-43.

[451] *Id.* at 8165-66, paras. 25-28.

[452] *Id.*

[453] Typically, in order to subscribe to broadband Internet access service, a consumer must install, or have installed, equipment (*i.e.*, a modem that the ISP provides to the consumer and that is specific to that ISP) that, along with a proprietary password, enables the consumer to utilize that particular ISP's Internet access service. We therefore seek comment on whether, given the manner in which broadband Internet access service is provisioned, slamming could actually occur from a technical perspective.

[454] *See* 47 C.F.R. §§ 64.2400-2401.

[455] 47 C.F.R. § 64.2401.

[456] *See supra* Part VIII.B.

cramming,[457] and other telecommunications fraud by setting standards for accuracy on bills for telecommunications service.[458]

153. We seek comment on whether we should exercise our Title I authority to impose requirements on broadband Internet access service providers that are similar to our truth-in-billing requirements or are otherwise geared toward reducing slamming, cramming, or other types of telecommunications-related fraud. For example, during 2005, the Commission's Consumer and Governmental Affairs Bureau has received complaints about the billing practices of broadband Internet access services providers, including complaints related to double billing, billing for unexplained charges, and billing for cancelled services.[459] Overall, parties should explain what problems customers of broadband Internet access service are likely to have with their bills and whether we should address these problems through truth-in-billing-type requirements.

D. Network Outage Reporting

154. The Commission requires certain communications providers to notify the Commission of outages of thirty or more minutes that affect a substantial number of customers or involve major airports, major military installations, key government facilities, nuclear power plants, or 911 facilities.[460] We seek comment on whether we should exercise our Title I authority to impose any similar requirements on broadband Internet access service providers. Do the purposes of our network outage reporting requirements apply to outages of broadband Internet access service? Should we adopt requirements that differ depending on the nature of the facility or the type of customer served?

E. Section 214 Discontinuance

155. Section 214 of the Act limits a telecommunications carrier's ability to discontinue unilaterally its service to customers.[461] The Commission's implementing rules generally require that domestic carriers wishing to "discontinue, reduce, or impair" services must first request authority to do so from the Commission[462] and must notify affected customers and others of their plans.[463]

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[457] "Cramming" is the practice of placing unauthorized, misleading, or deceptive charges on a telecommunications bill. Cramming is most likely to occur when a carrier does not clearly or accurately describe all of the relevant charges on the consumer's bill.

[458] *See* 47 C.F.R. § 64.2400(a).

[459] Operations Support for Complaint Analysis and Resolution (OSCAR) System, Consumer & Governmental Affairs Bureau (Aug. 4, 2005).

[460] 47 C.F.R. § 63.100(a)-(e); *see also New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 16830, 16867, para. 65 (2004).

[461] 47 U.S.C. § 214(a). Part 63 of the Commission's rules implements this section of the Act, establishing comprehensive rules with which telecommunications carriers must comply in seeking to discontinue telecommunications services. These rules vary depending on whether the carrier in question is a dominant or non-dominant provider of the telecommunications services it is seeking to discontinue. *See* 47 C.F.R. §§ 63.60 *et seq.*

[462] 47 U.S.C. § 63.71.

[463] 47 U.S.C. § 63.71(a).

156. We seek comment on whether we should exercise our Title I authority to impose discontinuance-type requirements on providers of broadband Internet access service. As customers grow more dependent on broadband Internet access services, does the need for notice to customers grow stronger?[464] Or do the multiplicity and availability of broadband Internet access providers mitigate the need for such notice?

F. Section 254(g) Rate Averaging Requirements

157. Finally, we seek to ensure that our actions today do not jeopardize the policies of section 254(g). That section required the Commission to adopt rules "to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas . . . be no higher than the rates charged by each such provider to its subscribers in urban areas."[465] The provision further required that the rules "require that a provider of interstate interexchange telecommunications services . . . provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State."[466] The Commission has forborne from the requirements of section 254(g) with regard to private line services, of which DSL is one.[467] Because the policies underlying section 254(g) remain important, however, we ask whether we should exercise our Title I authority to impose any similar requirements on providers of broadband Internet access services, particularly as consumers substitute broadband services and applications for narrowband services that were covered by section 254(g).

G. Federal and State Involvement

158. We recognize that the states play an important role in ensuring that public safety and consumer protection goals are met. The Commission has recently announced the creation of a federal-state task force on VoIP E911 enforcement,[468] and we believe that this *Notice* may give rise to additional areas in which cooperation between this Commission and the states can achieve the best results. We note in this regard that NARUC has recently advocated for a "functional" approach to questions of federal and state jurisdiction, particularly with respect to consumer protection issues.[469] For example, with respect to CPNI, NARUC recommends that the Commission be primarily responsible for establishing rules, while state or local authorities assume responsibility for enforcing those rules.[470] To the extent that the

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[464] For example, in 2001, a large provider of broadband Internet access services, @Home, sought bankruptcy court protection and announced plans to sell its high-speed network. Within a relatively brief period of time, the company requested and received permission from the United States Bankruptcy Court to shut down its network, causing its subscribers to switch to other providers. News reports described the many problems the subscribers encountered during the transition, including service outages, inadequate customer support, and loss of high-speed access. *See* Bill Bergstrom, *Comcast Fields Internet Complaints*, Tallahassee Democrat, Jan. 9, 2002; Bill Bergstrom, *Internet Switch Problems Annoy Comcast Customers*, Fort Wayne Journal-Gazette, Jan. 7, 2002.

[465] 47 U.S.C. § 254(g).

[466] *Id.*

[467] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 11 FCC Rcd 9564, 9577, para. 27 (1996) (forbearing from application of section 254(g) "to the extent necessary to permit carriers to depart from geographic rate averaging to offer . . . private line services").

[468] *See, e.g., FCC Announces Joint Federal/State VoIP Enhanced 911 Enforcement Task Force*, Press Release, 2005 Westlaw 1750445 (July 25, 2005).

[469] *See generally NARUC Legislative Task Force Report on Federalism and Telecom* (July 2005).

[470] *See id.* at 8.

Commission finds it necessary to impose consumer protection and related regulations on broadband Internet access service providers, we seek comment on how best to harmonize federal regulations with the states' efforts and expertise in these areas. Do commenters support NARUC's functional approach? In what other ways can the federal and state governments cooperate in order to ensure the best results for consumers?

H. Consumer Options for Enforcement

159. We note that consumers have various methods of pursuing complaints with the Commission against entities subject to our jurisdiction. In particular, the Commission's informal complaint process permits consumers to submit complaints to the Commission by any reasonable means, including by telephone, facsimile, postal mail, email and an Internet complaint form. Consumer Center representatives, known as Consumer Advocacy and Mediation Specialists or CAMSs, are available to assist consumers in filing complaints if needed. CAMSs staff review complaints for subject matter content and determine appropriate handling of the complaints.

IX. PROCEDURAL MATTERS

A. Final Paperwork Reduction Act Analysis

160. This Report and Order does not contain any information collection 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).

B. Regulatory Flexibility

161. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared a Final Regulatory Flexibility Certification of the possible significant economic impact on small entities of the policies and rules addressed in this Report and Order. This certification is set forth in Appendix B.

162. As required by the Regulatory Flexibility Act, 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 Notice of Proposed Rulemaking. The IRFA is set forth in Appendix B. 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 Rulemaking and must have a separate and distinct heading designating them as responses to the IRFA.

C. Other Procedural Matters

1. Ex Parte Presentations

163. The rulemaking this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[471] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence

[471] 47 C.F.R. §§ 1.200 *et seq.*

description of the views and arguments presented is generally required.[472] Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

2. Comment Filing Procedures

164. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R §§ 1.415, 1.419, interested parties may file comments and reply comments regarding the Notice of Proposed Rulemaking on or before the dates indicated on the first page of this document. **All filings related to this Notice of Proposed Rulemaking should refer to WC Docket No. 05-271 and need not reference the other docket numbers appearing in the caption to this document.** Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.
  - ECFS filers must transmit one electronic copy of the comments for WC Docket No. 05-271. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.
  - The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, Md. 20743.
  - U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, S.W., Washington D.C. 20554.

165. Parties should send a copy of their filings to Janice Myles, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5-C140, 445 12th Street, S.W.,

[472] *See* 47 C.F.R. § 1.1206(b)(2).

Washington, D.C. 20554, or by e-mail to janice.myles@fcc.gov. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

166. Documents in WC Docket No. 05-271 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street S.W., Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

3. Accessible Formats

167. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov; phone: 202-418-0530 or TTY: 202-418-0432.

X. ORDERING CLAUSES

168. Accordingly, IT IS ORDERED that, pursuant to Sections 1-4, 10, 201-205, 214, 222, 225, 251, 252, 254-256, 258, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 160, 201-205, 214, 222, 225, 251, 252, 254-256, 258, 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, the Report and Order and Notice of Proposed Rulemaking ARE ADOPTED.

169. IT IS FURTHER ORDERED, pursuant to Sections 1-4, 10, 201-205, 214, 222, 225, 251, 252, 254-256, 258, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 160, 201-205, 214, 222, 225, 251, 252, 254-256, 258, 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that wireline broadband Internet access transmission providers ARE GRANTED blanket certification to discontinue the provision of common carrier broadband Internet access transmission services to existing customers as set forth and subject to the conditions stated in this Order.

170. IT IS FURTHER ORDERED, pursuant to Sections 1-4, 10, 201-205, 214, 222, 225, 251, 252, 254-256, 258, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 160, 201-205, 214, 222, 225, 251, 252, 254-256, 258, 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that the Conditional Petition for Forbearance Under 47 U.S.C. § 160(c) filed by the Verizon Telephone Companies in WC Docket No. 04-242 on June 28, 2004, IS DENIED AS MOOT.

171. IT IS FURTHER ORDERED, pursuant to Sections 1-4, 10, 201-205, 214, 222, 225, 251, 252, 254-256, 258, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 160, 201-205, 214, 222, 225, 251, 252, 254-256, 258, 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that the Petition for Declaratory Ruling or, Alternatively, for Interim Waiver filed in WC Docket No. 04-242 by the Verizon Telephone Companies on June 28, 2004, IS DISMISSED AS MOOT.

172. IT IS FURTHER ORDERED, pursuant to sections 1.103(a) and 1.427(b) of the Commission's rules, 47 C.F.R. §§ 1.103(a), 1.427(b), that this Report and Order SHALL BE EFFECTIVE 30 days after publication of the Report and Order in the FEDERAL REGISTER.

173. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order, including the Final

Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

174. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.[473]

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[473] *See* 5 U.S.C. § 603(a).

APPENDIX A
LIST OF COMMENTERS

Commenters
WC Docket No. 02-33

Comments	Abbreviation
Alcatel USA, Inc.	Alcatel
Allegiance Telecom, Inc.	Allegiance
Alvarion, Inc.	Alvarion
American Foundation for the Blind	AFB
American ISP Association	AISPA
American Public Power Association	APPA
AOL Time Warner Inc.	AOL
Arizona Consumer Council, Center for Digital Democracy, Citizen Action of Illinois, Citizens Utility Board of Oregon, Consumer Action, the Consumer Federation of America, Consumers Union, Democratic Process Center, Florida Consumer Action Network, Illinois Pirg, Massachusetts Consumer Coalition, Media Access Project, New Jersey Citizen Action, Texas Consumer Association, Texas Office of Public Utility Counsel, USAction	Arizona Consumer Council *et al.*
Association of Communications Enterprises	ASCENT
AT&T Corporation	AT&T
Beacon Telecommunications Advisors, LLC	Beacon
BellSouth Corporation	BellSouth
Big Planet, Inc.	Big Planet
Business Telecom, Inc., CTC Communications Corp., Florida Digital Network, Inc., Globalcom, Inc., and RCN Telecom Services, Inc.	Business Telecom *et al.*
California Internet Service Providers Association	CISPA
Catena Networks, Inc.	Catena
Cbeyond Communications, LLC, EL Paso Networks, LLC, Focal Communications Corporation, New Edge Network, Inc., and Pac-West Telecomm, Inc.	Cbeyond *et al.*
Charter Communications, Inc.	Charter
Cinergy Communications Company	Cinergy
Covad Communications Company	Covad
Cox Communications, Inc.	Cox
David R. Hughes	David R. Hughes
DirectTV Broadband, Inc.	DirectTV
DSLnet Communications, LLC	DSLnet
EarthLink, Inc.	EarthLink
Federal Bureau of Investigation (FBI) and Department of Justice	DOJ/FBI
Florida Public Service Commission	Florida Commission
Fred Williamson and Associates, Inc.	FW&A
General Communication Inc.	GCI
GVNW Consulting, Inc.	GVNW
Hugh Carter Donahue	Donahue

Hughes Network Systems, Inc., Hughes Communications, Inc., and Hughes Communications Galaxy, Inc.	Hughes
Illinois Commerce Commission	Illinois Commission
Independent Telephone and Telecommunications Alliance	ITTA
Information Technology Association of America	ITAA
Kenneth Arrow *et al.*	Arrow *et al.*
JMC Telecom and NuVox Communications	JMC/NuVox
McLeodUSA Telecommunications Services, Inc.	McLeodUSA
Mescalero Apache Telecom, Inc.	MATI
Michigan Public Service Commission	Michigan Commission
Minnesota Department of Commerce	Minnesota Commerce Dept.
Monet Mobile Networks, Inc.	Monet
Mpower Communications Corp.	Mpower
Mutual Data Services, Inc.,	Mutual Data
National Association of Regulatory Utility Commissioners	NARUC
National Cable & Telecommunications Association	NCTA
National Exchange Carrier Association, Inc.	NECA
National Rural Telecom Association	NRTA
Nebraska Independent Companies	Nebraska Independents
New Hampshire ISP Association	New Hampshire ISPs
NewSouth Communications	NewSouth
New York State Department of Public Service	New York Commission
Office of the Attorney General of Texas, Consumer Protection Division	Texas Attorney General
Ohio Internet Service Providers Association, Texas Internet Services Providers Association, and Washington Association of Internet Service Providers	Ohio ISP Assoc. *et al.*
Oregon Public Utility Commission	Oregon Commission
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
Oregon Public Utility Commission	Oregon Commission
Part-15 Organization, Inc.	Part-15.Org
People of the State of California and the California Public Utilities Commission	California Commission
Pennsylvania Office of Consumer Advocate, Maine Public Advocate, Maryland Office of People's Counsel, Ohio Consumers' Counsel, Utility Reform Network, California Office of Ratepayer Advocates, Connecticut Office of Consumer Counsel, and New Hampshire Office of Consumer Advocate	Pennsylvania Consumer Advocate *et al.*
Public Service Commission of Wisconsin	Wisconsin Commission
Public Utilities Commission of Ohio	Ohio Commission
Public Utilities Commission of Texas	Texas Commission
Qwest Communications International Inc.	Qwest
Rehabilitation Engineering Research Center on Telecommunications Access	RERC-TA
Ruby Ranch Internet Cooperative Association	Ruby
SBC Communications Inc.	SBC
Secretary of Defense	Secretary of Defense

SES AMERICOM, Inc.	SES AMERICOM
Socket Holdings Corporation	Socket
Sprint Corporation	Sprint
State Members of the Federal-State Joint Board on Separations	Federal-State Joint Board
Statement of 43 Economists	Economists
SureWest Communications	SureWest
TDS Telecommunications Corporation, Madison River Communications, and North Pittsburgh Systems Inc.	TDS *et al.*
Telecommunications for The Deaf, Inc.	Telecom for the Deaf
TeleTruth	TeleTruth
Texas Office of Public Utility Counsel, Consumer Federation of America, Consumers Union, Media Access Project, and the Center for Digital Democracy	Texas Counsel *et al.*
Time Warner Telecom	Time Warner
Pennsylvania Office of Consumer Advocate, Maine Public Advocate, Maryland Office of People's Counsel, Ohio Consumers' Counsel, Utility Reform Network, California Office of Ratepayer Advocates, Connecticut Office of Consumer Counsel, and New Hampshire Office of Consumer Advocate	Pennsylvania Consumer Advocate *et al.*
United Church of Christ, Office of Communication,; Association of Independent Video and Filmmakers; National Association of Media Arts and Culture	United Church of Christ *et al.*
United States Internet Industry Association	USIIA
United States Telecom Association	USTA
US LEC Corp.	US LEC
Verizon telephone companies	Verizon
Verizon Wireless	Verizon Wireless
Vermont Public Service Board	Vermont Commission
WaveRider Communications Inc.	WaveRider
Western Alliance	Western Alliance
Whizwireless, LLC	Whizwireless
Wireless Communications Association International, Inc.	WCA
WorldCom, Inc., The Competitive Telecommunications Association, and the Association for Local Telecommunications Services	MCI *et al.*
Z-Tel Communications, Inc.	Z-Tel

Reply Commenters
WC Docket No. 02-33

Comments	Abbreviation
Ad Hoc Telecommunications Users Committee	Ad Hoc
Alaska Telephone Association	Alaska
Allegiance Telecom, Inc.	Allegiance
American Library Association	American Library
AOL Time Warner Inc.	AOL
Association for Local Telecommunication Services	ALTS

Association of Communications Enterprises, AT&T, Big Planet, Inc., Business Telecom, Inc., Cbeyond Communications, LLC, CTC Communications Corp., DSLNet Communications, LLC, El Paso Networks, LLC, Focal Communications Corporation, Florida Digital Network, New Edge Network, Inc., Pac-West Telecomm, Inc., RCN Telecom Services, Inc., and US LEC Corp.	ASCENT *et al.*
AT&T Corporation	AT&T
Attorney General to Texas, Consumer Protection Division	Texas Attorney General
Beacon Telecommunications Advisors, LLC	Beacon
BellSouth Corporation	BellSouth
Cablevision Systems Corporation	Cablevision
California Internet Service Providers Association	CISPA
Charter Communications, Inc.	Charter
City of Ketchikan d/b/a Ketchikan Public Utilities – Telephone Division	KPU
Comcast Corporation	Comcast
Communications Workers of America	CWA
Covad Communications Company	Covad
DirectTV Broadband, Inc.	DirectTV Broadband
DSLnet Communications, LLC	DSLnet
EarthLink, Inc.	EarthLink
Fred Williamson and Associates, Inc.	FW&A
General Communication Inc.	GCI
GVNW Consulting, Inc.	GVNW
High Tech Broadband Coalition	HTBC
Independent Telephone and Telecommunications Alliance	ITTA
Information Technology Association of America	ITAA
Kenneth Arrow *et al.*	Arrow *et al.*
KMC Telecom and NuVox Communications	KMC/NuVox
McLeodUSA Telecommunications Services, Inc.	McLeodUSA
Mescalero Apache Telecom, Inc.	MATI
National Association of Broadcasters	NAB
National Cable & Telecommunications Association	NCTA
National Rural Telecom Association	NRTA
National Telecommunications Cooperative Association	NTCA
Nebraska Independent Companies	Nebraska Independents
New York State Attorney General	New York Attorney General
New York State Department of Public Service	New York Commission
Next Level Communications	Next Level
Ohio Internet Service Providers Association, Texas Internet Services Providers Association, and Washington Association of Internet Service Providers	Ohio ISP Assoc. *et al.*
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
Pennsylvania Office of Consumer Advocate, Maine Public Advocate, Maryland Office of People's Counsel, Ohio Consumers' Counsel, Utility Reform Network, California Office of Ratepayer Advocates, and New Hampshire Office of Consumer Advocate	Pennsylvania Consumer Advocates *et al.*
Qwest Communications International Inc.	Qwest

Regulatory Commission of Alaska	Alaska Commission
SBC Communications Inc.	SBC
Satellite Industry Association	SIA
SES AMERICOM, Inc.	SES AMERICON
Sprint Corporation	Sprint
Time Warner Telecom	Time Warner
United States Internet Industry Association	USIIA
United States Telecom Association	USTA
Verizon telephone companies	Verizon
WorldCom, Inc., Competitive Telecommunications Association, and Association for Local Telecommunications Services	MCI *et al.*
XO Communications, Inc.	XO

APPENDIX B
REGULATORY FLEXIBILITY ANALYSES

I. FINAL REGULATORY FLEXIBILITY CERTIFICATION

1. The Regulatory Flexibility Act of 1980, as amended (RFA),[1] requires that a regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[2] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[3] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[4] 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).[5]

2. In the *Wireline Broadband NPRM*, the Commission sought comment generally on the appropriate statutory classification for wireline broadband Internet access service provided over a provider's own facilities, and on what regulatory requirements, if any, should be imposed on the telecommunications component of wireline broadband Internet access service.[6] Specifically, the Commission sought comment on whether the *Computer Inquiry* requirements should be modified or eliminated as applied to self-provisioned wireline broadband Internet access service, as well as how the Commission's tentative conclusion that wireline broadband Internet access service is an information service would affect the CALEA assistance capabilities, the USA PATRIOT Act, other national security or emergency preparedness obligations, network reliability and interoperability, and existing consumer protection requirements, such as section 214 of the Act, CPNI requirements under section 222 of the Act, and requirements for access to persons with disabilities under section 255 of the Act.[7] The Commission also sought comment on how to continue to meet the goals of universal service under section 254 of the Act in a marketplace where competing providers are deploying broadband Internet access, including how the regulatory status of wireline broadband Internet access could impact the system of assessments and contributions to universal service.[8] Finally, the *Wireline Broadband NPRM* also invited comment on the

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] 5 U.S.C. § 605(b).

[3] 5 U.S.C. § 601(6).

[4] 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."

[5] 15 U.S.C. § 632.

[6] *Wireline Broadband NPRM*, 17 FCC Rcd at 3029-48, paras. 17-64.

[7] *Id.* at 3035-47, paras. 30-61.

[8] *Id.* at 3043-54, paras. 54-78.

relationship between the statutory classification of wireline broadband Internet access service and an incumbent LEC's obligation to provide access to UNEs under sections 251 and 252.[9]

3. The Order eliminates the *Computer Inquiry* requirements on facilities-based carriers in their provision of wireline broadband Internet access service. Consequently, BOCs are immediately relieved of the separate subsidiary, CEI, and ONA obligations with respect to wireline broadband Internet access services. In addition, subject to a one-year transition period for existing wireline broadband transmission services, all wireline broadband Internet access service providers are no longer subject to the *Computer II* requirement to separate out the underlying transmission from wireline broadband Internet access service and offer it on a common carrier basis. We determine in this Order that wireline broadband Internet access service is an information service, as that term is defined in the statute. To the extent that the regulatory obligations discussed above apply to the transmission component of wireline broadband Internet access service when provided to ISPs or others on a stand-alone common carrier basis, these obligations will continue to apply when carriers offer broadband Internet access service transmission on a common carrier basis, both during the transition and thereafter.

4. The rule changes adopted in this Order apply, for the most part, only to BOCs (*Computer Inquiry* separate subsidiary, CEI, and ONA obligations with respect to wireline broadband Internet access services). In addition, all facilities-based wireline broadband Internet access service providers are no longer subject to the *Computer II* requirement to separate out the underlying transmission. Neither the Commission nor the SBA has developed a small business size standard specifically applicable to providers of incumbent local exchange service and interexchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers.[10] This provides that such a carrier is small entity if it employs no more than 1,500 employees.[11] None of the four BOCs that would be affected by amendment of these rules meets this standard. To the extent that any other wireline provider would be classified as a small entity, it would not be negatively affected by the regulatory relief we grant in this Order.

5. Therefore, we certify that the requirements of the Order will not have a significant economic impact on a substantial number of small entities. We note that one party, Teletruth, filed comments in response to the IFRAs in the *Wireline Broadband* and *Incumbent LEC Broadband* proceedings. Teletruth argues that that these IRFAs are deficient because they fail to assess the potential impact of the actions proposed in those proceedings on small ISPs and small competitive LECs and that our implementation of the RFA is otherwise deficient.[12] These arguments are identical to, and indeed filed as part of the same pleading as, arguments the Commission previously has rejected.[13] We therefore again reject these arguments for the reasons stated in our prior Orders responding to TeleTruth's comments.[14]

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[9] *Id.* at 3047, para. 61.

[10] 13 C.F.R. § 121.201; NAICS code 517110.

[11] *Id.*

[12] *See* TeleTruth Comments *passim*.

[13] *See* TeleTruth Comments *passim*.

[14] *See* TeleTruth Comments *passim*.

6. The Commission will send a copy of the Order, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act.[15] In addition, the Order and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and a summary of the Order and final certification will be published in the Federal Register.[16]

II. INITIAL REGULATORY FLEXIBILITY ANALYSIS

7. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[17] the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities that might result from this *Notice*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice* provided above. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[18] In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.[19]

A. Need for, and Objectives of, the Proposed Rules

8. The broadband marketplace before us today is an emerging and rapidly changing one. Nevertheless, consumer protection remains a priority for the Commission. We initiate this rulemaking to ensure that consumer protection objectives in the Act are met as the industry shifts from narrowband to broadband services. Through this *Notice*, the Commission's objective is to develop a framework for consumer protection in the broadband age – a framework that ensures that consumer protection needs are met by all providers of broadband Internet access service, regardless of the underlying technology.[20] The *Notice* seeks comment on whether the Commission should impose, for example, privacy requirements similar to the Act's CPNI requirements, slamming, truth-in-billing, network outage reporting, section 214 discontinuance, or section 254(g) rate averaging requirements on providers of broadband Internet access service. We also seek comment on how best to harmonize federal regulations with the states' efforts and expertise in consumer protection issues.

B. Legal Basis

9. The legal basis for any action that may be taken pursuant to the *Notice* is contained in sections 1-4, 201-205, 251, 252, 254, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 251, 252, 254, 256, 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

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[15] *See* 5 U.S.C. § 801(a)(1)(A).

[16] *See* 5 U.S.C. § 605(b).

[17] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 857 (1996).

[18] *See* 5 U.S.C. § 603(a).

[19] *See* 5 U.S.C. § 603(a).

[20] *See supra Notice* at para. 146.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules May 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 proposed rules.[21] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[22] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[23] 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).[24]

11. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.[25]

12. *Small* Organizations. Nationwide, there are approximately 1.6 million small organizations.[26]

13. *Small Governmental Jurisdictions.* The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[27] As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.[28] This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

14. We note that the list of potentially affected entities below is perhaps more expansive than is necessary. We have, for instance, included services that are apparently currently not a part of the Internet industry, as well as manufacturers.

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[21] 5 U.S.C. §§ 603(b)(3), 604(a)(3).

[22] 5 U.S.C. § 601(6).

[23] 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 terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

[24] 15 U.S.C. § 632.

[25] *See* SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

[26] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[27] 5 U.S.C. § 601(5).

[28] U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299-300, Tables 490 and 492.

1. Telecommunications Service Entities

a. Wireline Carriers and Service Providers

15. 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."[29] 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.[30] We have therefore included small incumbent local exchange 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.

1. *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.[31] According to Commission data,[32] 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 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 action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[33]

16. *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.[34] According to Commission data,[35]

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[29] 15 U.S.C. § 632.

[30] 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. *See* 13 C.F.R. § 121.102(b).

[31] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[32] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (June 2004) ("Trends in Telephone Service"). This source uses data that are current as of October 1, 2004.

[33] *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513310 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" increased from 20,815 to 27, 891. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

[34] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees. In addition, 12 carriers have reported that they are "Shared-Tenant Service Providers," and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are "Other Local Service Providers." Of the 39, an estimated 38 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 action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[36]

17. *Local Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[37] According to Commission data,[38] 143 carriers have reported that they are engaged in the provision of local resale services. Of these, an estimated 141 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by our action.

18. *Toll Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[39] According to Commission data,[40] 770 carriers have reported that they are engaged in the provision of toll resale services. Of these, an estimated 747 have 1,500 or fewer employees and 23 have more than 1,500 employees. Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our action.

19. *Payphone Service Providers (PSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services 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.[41] According to Commission data,[42] 654 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 652 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our

(continued from previous page)

[35] "Trends in Telephone Service" at Table 5.3.

[36] *See supra* note 33.

[37] 13 C.F.R. § 121.201, NAICS code 517310 (changed from 513330 in Oct. 2002).

[38] "Trends in Telephone Service" at Table 5.3.

[39] 13 C.F.R. § 121.201, NAICS code 517310 (changed from 513330 in Oct. 2002).

[40] "Trends in Telephone Service" at Table 5.3.

[41] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[42] "Trends in Telephone Service" at Table 5.3.

action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[43]

20. *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.[44] According to Commission data,[45] 316 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 292 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[46]

21. *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.[47] According to Commission data,[48] 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 20 have 1,500 or fewer employees and three have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[49]

22. *Prepaid Calling Card Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[50] According to Commission data,[51] 89 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, 88 are estimated to have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that all or the majority of prepaid calling card providers are small entities that may be affected by our action.

23. *800 and 800-Like Service Subscribers.*[52] Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service ("toll free") subscribers. The

[43] *See supra* note 33.

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

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

[46] *See supra* note 33.

[47] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[48] "Trends in Telephone Service" at Table 5.3.

[49] *See supra* note 33.

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

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

[52] We include all toll-free number subscribers in this category, including those for 888 numbers.

appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[53] The most reliable source of information regarding the number of these service subscribers appears to be data the Commission collects on the 800, 888, and 877 numbers in use.[54] According to our data, at the end of January, 1999, the number of 800 numbers assigned was 7,692,955; the number of 888 numbers assigned was 7,706,393; and the number of 877 numbers assigned was 1,946,538. We do not have data specifying the number of these subscribers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, we estimate that there are 7,692,955 or fewer small entity 800 subscribers; 7,706,393 or fewer small entity 888 subscribers; and 1,946,538 or fewer small entity 877 subscribers.

b. International Service Providers

24. The Commission has not developed a small business size standard specifically for providers of international service. The appropriate size standards under SBA rules are for the two broad categories of Satellite Telecommunications and Other Telecommunications. Under both categories, such a business is small if it has $12.5 million or less in average annual receipts.[55] For the first category of Satellite Telecommunications, Census Bureau data for 1997 show that there were a total of 324 firms that operated for the entire year.[56] Of this total, 273 firms had annual receipts of under $10 million, and an additional 24 firms had receipts of $10 million to $24,999,999. Thus, the majority of Satellite Telecommunications firms can be considered small.

25. The second category – Other Telecommunications – includes "establishments primarily engaged in . . . providing satellite terminal stations and associated facilities operationally connected with one or more terrestrial communications systems and capable of transmitting telecommunications to or receiving telecommunications from satellite systems."[57] According to Census Bureau data for 1997, there were 439 firms in this category that operated for the entire year.[58] Of this total, 424 firms had annual receipts of $5 million to $9,999,999 and an additional six firms had annual receipts of $10 million to $24,999,990. Thus, under this second size standard, the majority of firms can be considered small.

c. Wireless Telecommunications Service Providers

26. Below, for those services subject to auctions, 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

[53] 13 C.F.R. § 121.201, NAICS code 517310 (changed from 513330 in Oct. 2002).

[54] *See* FCC, Common Carrier Bureau, Industry Analysis Division, *Study on Telephone Trends*, Tables 21.2, 21.3, and 21.4 (Feb. 1999).

[55] 13 C.F.R. § 121.201, NAICS codes 517410 and 517910 (changed from 513340 and 513390 in Oct. 2002).

[56] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513340 (issued Oct. 2000).

[57] Office of Management and Budget, North American Industry Classification System 513 (1997) (NAICS code 513390, changed to 517910 in Oct. 2002).

[58] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513390 (issued Oct. 2000).

subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

27. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging"[59] and "Cellular and Other Wireless Telecommunications."[60] 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.[61] 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.[62] Thus, under this category and associated small business size standard, the 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.[63] 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.[64] Thus, under this second category and size standard, the majority of firms can, again, be considered small. In addition, limited preliminary census data for 2002 indicate that the total number of paging providers decreased approximately 51 percent from 1997 to 2002.[65] In addition, limited preliminary census data for 2002 indicate that the total number of cellular and other wireless telecommunications carriers increased approximately 321 percent from 1997 to 2002.[66]

28. *Cellular Licensees.* The SBA has developed a small business size standard for wireless firms within the broad economic census category "Cellular and Other Wireless Telecommunications."[67] Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category Cellular and Other Wireless Telecommunications firms, Census Bureau data for 1997 show that

[59] 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

[60] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[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 513321 (issued October 2000).

[62] *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."

[63] 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).

[64] *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."

[65] *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513321 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" decreased from 3,427 to 1,664. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

[66] *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513322 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" increased from 2,959 to 9,511. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

[67] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

there were 977 firms in this category, total, that operated for the entire year.[68] 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.[69] Thus, under this category and size standard, the great majority of firms can be considered small. Also, according to Commission data, 437 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio (SMR) Telephony services, which are placed together in the data.[70] We have estimated that 260 of these are small, under the SBA small business size standard.[71]

29. *Common Carrier Paging.* The SBA has developed a small business size standard for wireless firms within the broad economic census category, "Cellular and Other Wireless Telecommunications."[72] 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.[73] 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.[74] Thus, under this category and associated small business size standard, the majority of firms can be considered small. In the Paging *Third Report and Order*, we developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[75] A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[76] The SBA has approved these small business size standards.[77] An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.[78] Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. Also, according to

[68] 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).

[69] *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."

[70] "Trends in Telephone Service" at Table 5.3.

[71] *Id.*

[72] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[73] 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).

[74] *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."

[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*, PR Docket No. 89-552, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70, paras. 291-295, 62 FR 16004 (Apr. 3, 1997).

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

[77] *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 and Third Report and Order, 14 FCC Rcd 10030, paras. 98-107 (1999).

[78] *Id.* at 10085, para. 98.

Commission data, 375 carriers reported that they were engaged in the provision of paging and messaging services.[79] Of those, we estimate that 370 are small, under the SBA-approved small business size standard.[80]

30. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction.[81] A "small business" is an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" is an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these small business size standards.[82] The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as "very small business" entities, and one that qualified as a "small business" entity.

31. *Wireless Telephony*. Wireless telephony includes cellular, personal communications services (PCS), and specialized mobile radio (SMR) telephony carriers. As noted earlier, the SBA has developed a small business size standard for "Cellular and Other Wireless Telecommunications" services.[83] Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[84] According to Commission data, 445 carriers reported that they were engaged in the provision of wireless telephony.[85] We have estimated that 245 of these are small under the SBA small business size standard.

32. *Broadband Personal Communications Service*. The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years.[86] 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."[87] These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[88] 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

[79] "Trends in Telephone Service" at Table 5.3.

[80] *Id.*

[81] Public Notice, "Auction of Wireless Communications Services, Auction Notes and Filing Requirements for 128 WCS Licenses Scheduled for April 15, 1997," DA 97-386, Feb. 21, 1997.

[82] SBA Dec. 2, 1998 Letter.

[83] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[84] *Id.*

[85] "Trends in Telephone Service" at Table 5.3.

[86] *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, 61 FR 33859 (July 1, 1996) (*PCS Order*); *see also* 47 C.F.R. § 24.720(b).

[87] *See PCS Order*, 11 FCC Rcd 7824.

[88] *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, 59 FR 37566 (July 22, 1994).

approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[89] On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

33. *Narrowband Personal Communications Services.* To date, two auctions of narrowband personal communications services (PCS) licenses have been conducted. For purposes of the two auctions that have already been held, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.[90] A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards.[91] In the future, the Commission will auction 459 licenses to serve Metropolitan Trading Areas (MTAs) and 408 response channel licenses. There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future auctions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined. The Commission assumes, for purposes of this analysis that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

34. *220 MHz Radio Service – Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to "Cellular and Other Wireless Telecommunications" companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.[92] For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977

[89] FCC News, Broadband PCS, D, E and F Block Auction Closes, No. 71744 (rel. Jan. 14, 1997); *see also Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, Second Report and Order, 12 FCC Rcd 16436, 62 FR 55348 (Oct. 24, 1997).

[90] *Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS*, Docket No. ET 92-100, Docket No. PP 93-253, Second Report and Order and Second Further Notice of Proposed Rulemaking, 15 FCC Rcd 10456, 65 FR 35875 (June 6, 2000).

[91] *See* SBA Dec. 2, 1998 Letter.

[92] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).