

received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed \$15 million for the preceding three years (“very small business”) received a 25 percent discount on its winning bid. A bidder that had a combined total assets of less than \$500 million and combined gross revenues of less than \$125 million in each of the last two years qualified for entrepreneur status.²⁹ Four winning bidders that identified themselves as very small businesses won 17 licenses.³⁰ Three of the winning bidders that identified themselves as small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

15. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.³¹ A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (“BETRS”).³² In the present context, we will use the SBA small business size standard applicable to Wireless Telecommunication Carriers (except satellite), *i.e.*, an entity employing no more than 1,500 persons.³³ 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.

16. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses in the 2305-2320 MHz and 2345-2360 MHz bands. The Commission defined “small business” for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million or less for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million or less for each of the three preceding years.³⁴ The SBA has approved these definitions.³⁵ The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

17. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.³⁶ There is presently one licensee in this service. We do not have information whether that licensee would qualify as small under the SBA’s small business size standard for Wireless Telecommunications Carriers (except Satellite) services.³⁷ Under the SBA small business size standard, a

²⁹ *Id.* at 7521-22.

³⁰ See “Auction of AWS-1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period”, *Public Notice*, 23 FCC Rcd 12749 (2008).

³¹ The service is defined in Section 22.99 of the Commission’s Rules, 47 C.F.R. § 22.99.

³² BETRS is defined in Sections 22.757 and 22.759 of the Commission’s Rules, 47 C.F.R. §§ 22.757 and 22.759.

³³ 13 C.F.R. § 121.201, NAICS code 517210.

³⁴ Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (WCS), *Report and Order*, 12 FCC Rcd 10785, 10879 ¶ 194 (1997).

³⁵ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated December 2, 1998.

³⁶ This service is governed by Subpart I of Part 22 of the Commission’s rules. See 47 C.F.R. §§ 22.1001-22.1037.

³⁷ 13 C.F.R. § 121.201, NAICS code 517210.

business is small if it has 1,500 or fewer employees.³⁸

18. *Broadband Radio Service and Educational Broadband Service.* The Broadband Radio Service (“BRS”), formerly known as the Multipoint Distribution Service (“MDS”), and the Educational Broadband Service (“EBS”), formerly known as the Instructional Television Fixed Service (“ITFS”),³⁹ use 2 GHz band frequencies to transmit video programming and provide broadband services to residential subscribers.⁴⁰ These services, collectively referred to as “wireless cable,” were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services.⁴¹ We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. The SBA small business size standard for the broad census category of Cable and Other Program Distribution, which consists of such entities generating \$13.5 million or less in annual receipts, appears applicable to MDS and ITFS.⁴² Note that the census category of “Cable and Other Program Distribution” is no longer used and has been superseded by the larger category “Wireless Telecommunications Carriers (except satellite). This category provides that a small business is a wireless company employing no more than 1,500 persons.⁴³ However, since currently available data was gathered when “Cable and Other Program Distribution” was the relevant category, earlier Census Bureau data collected under the category of “Cable and Other Program Distribution” will be used here. Other standards also apply, as described.

19. The Commission has defined small MDS (now BRS) entities in the context of Commission license auctions. In the 1996 MDS auction,⁴⁴ the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.⁴⁵ This definition of a small entity in the context of MDS auctions has been approved by the SBA.⁴⁶ In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations,

³⁸ *Id.*

³⁹ See 47 C.F.R. Part 27, subpart M; Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission’s Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission’s Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, 19 FCC Rcd 14165 (2004).

⁴⁰ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report*, 20 FCC Rcd 2507, 2565 ¶ 131 (2006).

⁴¹ *Id.*

⁴² 13 C.F.R. § 121.201, NAICS code 515210.

⁴³ 13 C.F.R. § 121.201, NAICS code 517210.

⁴⁴ MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996. (67 bidders won 493 licenses.)

⁴⁵ 47 C.F.R. § 21.961(b)(1).

⁴⁶ See Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Docket No. 94-131, *Report and Order*, 10 FCC Rcd 9589 (1995).

there are hundreds of MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction and that fall under the former SBA small business size standard for Cable and Other Program Distribution.⁴⁷ Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$13.5 million annually. Therefore, we estimate that there are approximately 850 of these small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

20. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).⁴⁸ We estimate that there are currently 2,452 EBS licenses, held by 1,524 EBS licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,424 EBS licensees are small entities.

21. *Government Transfer Bands.* The Commission adopted small business size standards for the unpaired 1390-1392 MHz, 1670-1675 MHz, and the paired 1392-1395 MHz and 1432-1435 MHz bands.⁴⁹ Specifically, with respect to these bands, the Commission defined an entity with average annual gross revenues for the three preceding years not exceeding \$40 million as a "small business," and an entity with average annual gross revenues for the three preceding years not exceeding \$15 million as a "very small business."⁵⁰ SBA has approved these small business size standards for the aforementioned bands.⁵¹ Correspondingly, the Commission adopted a bidding credit of 15 percent for "small businesses" and a bidding credit of 25 percent for "very small businesses."⁵² This bidding credit structure was found to have been consistent with the Commission's schedule of bidding credits, which may be found at

⁴⁷ Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for "Cable and Other Program Distribution" (annual receipts of \$13.5 million or less). See 13 C.F.R. § 121.201, NAICS code 515210.

⁴⁸ In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on EBS licensees.

⁴⁹ See Amendments to Parts 1, 2, 27 and 90 of the Commission's Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, AND 2385-2390 MHz Government Transfer Bands, 17 FCC Rcd 9980 (2002).

⁵⁰ See Reallocation of the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, WT Docket No. 02-8, *Notice of Proposed Rulemaking*, 17 FCC Rcd 2500, 2550-51 ¶¶ 144-146 (2002). To be consistent with the size standard of "very small business" proposed for the 1427-1432 MHz band for those entities with average gross revenues for the three preceding years not exceeding \$3 million, the *Service Rules Notice* proposed to use the terms "entrepreneur" and "small business" to define entities with average gross revenues for the three preceding years not exceeding \$40 million and \$15 million, respectively. Because the Commission is not adopting small business size standards for the 1427-1432 MHz band, it instead uses the terms "small business" and "very small business" to define entities with average gross revenues for the three preceding years not exceeding \$40 million and \$15 million, respectively.

⁵¹ See Letter from Hector V. Barreto, Administrator, Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated Jan. 18, 2002.

⁵² Such bidding credits are codified for the unpaired 1390-1392 MHz, paired 1392-1395 MHz, and the paired 1432-1435 MHz bands in 47 C.F.R. § 27.807. Such bidding credits are codified for the unpaired 1670-1675 MHz band in 47 C.F.R. § 27.906.

Section 1.2110(f)(2) of the Commission's rules.⁵³ The Commission found that these two definitions will provide a variety of businesses seeking to provide a variety of services with opportunities to participate in the auction of licenses for this spectrum and will afford such licensees, who may have varying capital costs, substantial flexibility for the provision of services.⁵⁴ The Commission noted that it had long recognized that bidding preferences for qualifying bidders provide such bidders with an opportunity to compete successfully against large, well-financed entities.⁵⁵ The Commission also noted that it had found that the use of tiered or graduated small business definitions is useful in furthering its mandate under Section 309(j) to promote opportunities for and disseminate licenses to a wide variety of applicants.⁵⁶ An auction for one license in the 1670-1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

22. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment." The SBA has developed a small business size standard for firms in this category, which is: all such firms having 750 or fewer employees.⁵⁷ According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year. Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999. Thus, under this size standard, the majority of firms can be considered small.

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

23. The Commission adopts several reporting, recordkeeping, and other compliance requirements which could affect small entities. First, as an interim measure, the Commission extends to all handsets that incorporate new frequency bands and air interfaces usable for voice services other than Wi-Fi the same counting and disclosure rules that currently apply to handsets with Wi-Fi. In other words, a handset that meets hearing aid compatibility requirements over all air interfaces and frequency bands for which technical standards have been established, but that also accommodates voice operations for which standards do not exist, may be counted as hearing aid-compatible provided consumers are clearly informed that it has not been tested for the operations for which there are not standards.

⁵³ In the *Part 1 Third Report and Order*, the Commission adopted a standard schedule of bidding credits, the levels of which were developed based on its auction experience. *Part 1 Third Report and Order*, 13 FCC Rcd at 403-04 ¶ 47; see also 47 C.F.R. § 1.2110(f)(2).

⁵⁴ See *Service Rules Notice*, 17 FCC Rcd at 2550-51 ¶ 145.

⁵⁵ See, e.g., *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, WT Docket No. 96-18, PR Docket No. 93-253, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10091 ¶ 112 (1999).

⁵⁶ 47 U.S.C. § 309(j)(3)(B), (4)(C)-(D). The Commission will also not adopt special preferences for entities owned by minorities or women, and rural telephone companies. The Commission did not receive any comments on this issue, and it does not have an adequate record to support such special provisions under the current standards of judicial review. See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (requiring a strict scrutiny standard of review for government mandated race-conscious measures); *United States v. Virginia*, 518 U.S. 515 (1996) (applying an intermediate standard of review to a state program based on gender classification).

⁵⁷ 13 C.F.R. § 121.201, NAICS code 334220.

24. The Commission further requires that for newly manufactured handsets covered by this rule, the following disclosure language be used: “This phone has been tested and rated for use with hearing aids for some of the wireless technologies that it uses. However, there may be some newer wireless technologies used in this phone that have not been tested yet for use with hearing aids. It is important to try the different features of this phone thoroughly and in different locations, using your hearing aid or cochlear implant, to determine if you hear any interfering noise. Consult your service provider or phone retailer about its return and exchange policies. Consult your service provider or the manufacturer of this phone for information on hearing aid compatibility. If you have questions about return or exchange policies, consult your service provider or phone retailer.” The Commission concludes that a uniform text will ensure that consumers are provided with consistent and sufficient information. However, handsets that are already on the market with other disclosure language that complies with the current rule will not be required to replace this with the newly prescribed language. This disclosure rule will apply to all handsets that operate in part over an air interface or frequency band that is not covered by the current hearing aid compatibility technical standard until the date that rules adopting any new standard become effective.

25. In order to ensure that consumers who use hearing aids and cochlear implants have access to a variety of phones, while preserving competitive opportunities for small companies as well as opportunities for innovation and investment, the Commission modifies the *de minimis* rule as applied to companies that are not small entities. Specifically, the Commission decides that beginning two years after it offers its first handset model over an air interface, a manufacturer or service provider that is not a small entity must offer at least one model that is rated M3 or higher and at least one model that is rated T3 or higher if it offers between one and three total handset models. Consistent with the SBA size standards, a “small entity” is defined as a service provider that, together with its parent, subsidiary, or affiliate companies under common ownership or control, has 1500 or fewer employees or a manufacturer that, together with its parent, subsidiary, or affiliate companies under common ownership or control, has 750 or fewer employees. In order to maintain parity and to allow entities that have been relying on the *de minimis* rule a reasonable period for transition, this obligation will become effective for manufacturers and service providers that offer one or two handset models over an air interface two years after the latest of the following: the date the manufacturer or service provider began offering handsets over the air interface, the date the amended rule is published in the *Federal Register*, the date a hearing aid compatibility technical standard is adopted for the relevant operation, or the date a previously small entity no longer meets our small entity definition. The Commission also revises the “refresh” rule to require manufacturers that are not small entities that offer two models over an air interface, after the first two years, to introduce at least one new model rated M3 or higher every other year.

26. In recognition of the special technical challenges of meeting hearing aid compatibility technical standards for handsets with certain desirable form factors operating over the legacy 2G GSM air interface in the 1900 MHz band, the Commission permits companies that would come under the amended *de minimis* rule but for their size to satisfy the hearing aid-compatible handset deployment requirement for GSM using a handset that allows the customer to reduce the maximum output power for GSM operations in the 1900 MHz band by up to 2.5 decibels, except for emergency calls to 911, in order to meet the standard for radio frequency interference reduction. Wherever a manufacturer or service provider provides the hearing aid compatibility rating for such a handset, it shall indicate that user activation of a special mode is necessary to meet the hearing aid compatibility standard. In addition, the handset manual or product insert must explain how to activate the special mode and that doing so may result in a diminution of coverage. These actions are taken to ensure that consumers who use hearing aids and cochlear implants have access to a variety of phones and are adequately informed about the functionality and the limitations of the handsets, while preserving competitive opportunities for small companies as well as opportunities for innovation and investment.

27. Currently, wireless handsets are increasingly distributed through channels other than

service providers. The Commission therefore amends Section 20.19(c) and (d) to apply the hearing aid-compatible handset deployment benchmarks to all handsets that a wireless handset manufacturer produces for distribution in the United States that are within the scope of Section 20.19(a) of the rule. Manufacturers will have until 12 months from publication of the rule in the *Federal Register* to come into compliance with it. The Commission clarifies that handsets covered by this rule include handsets that manufacturers sell to businesses for distribution to their employees. This rule change will address new handset manufacturer distribution models in existing networks and ensure that wireless handsets will be covered by the Commission's hearing aid compatibility obligations regardless of distribution and sales channels. The Commission finds that this rule change will serve the public interest as a better and more proactive approach to ensure the availability of hearing aid-compatible handsets in the developing handset marketplace.

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

28. The RFA requires an agency to describe in the IRFA any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁵⁸ The Commission considered these alternatives with respect to all of the requirements that it is imposing on small entities in the Second Report and Order, and this FRFA incorporates by reference all discussion in the Second Report and Order that considers the impact on small entities of the rules adopted by the Commission. In addition, the Commission's consideration of those issues as to which the impact on small entities was specifically discussed in the record is summarized below:

29. Until such time as any revision of the hearing aid compatibility technical standard may be adopted by the Commission, the Commission extends to all handsets that incorporate frequency bands and air interfaces other than Wi-Fi usable for voice services for which no hearing aid compatibility standards exist the same counting and disclosure rules that currently apply to handsets with Wi-Fi capability. The disclosure requirement is necessary in order to count these handsets as hearing aid-compatible without misleading consumers, and therefore no exception is appropriate for small entities. The Commission further prescribes uniform disclosure language to ensure that consumers are provided with consistent and sufficient information. This uniform language will also streamline and simplify the disclosure process, thereby easing the burden on regulated entities. However, handsets that are already on the market bearing another label that complies with the current rule will not be required to replace this label with the newly prescribed language. This transitional exception will ease the regulatory burden on small service providers that may have a slower turnover of their inventory.

30. The Commission modifies the *de minimis* rule as applied to companies that are not small entities. Specifically, the Commission decides that beginning two years after it offers its first handset model over an air interface, a manufacturer or service provider that is not a small entity, as defined herein, must offer at least one model that is rated M3 or higher and at least one model that is rated T3 or higher if it offers between one and three total handset models. The Commission also revises the "refresh" rule to require manufacturers that are not small entities that offer two models over an air interface, after the first two years, to introduce at least one new model rated M3 or higher every other year. Consistent with the SBA size standards, a "small entity" is defined as a service provider that, together with its parent,

⁵⁸ 5 U.S.C. § 603(c).

subsidiary, or affiliate companies under common ownership or control, has 1500 or fewer employees or a manufacturer that, together with its parent, subsidiary, or affiliate companies under common ownership or control, has 750 or fewer employees. In order to minimize the economic impact on small manufacturers and service providers and preserve their opportunity to compete in the market and innovate, the existing *de minimis* rule will continue to apply to small entities. In addition, in order to ease the burden of transition, the new rule will become applicable to a manufacturer or service provider two years after the latest of: the date the manufacturer or service provider began offering handsets over the air interface, the date the amended rule is published in the *Federal Register*, the date a hearing aid compatibility technical standard is adopted for the relevant operation, or the date a previously small entity no longer meets our small entity definition.

31. In recognition of the special technical challenges of meeting hearing aid compatibility technical standards for handsets with certain desirable form factors operating over the legacy 2G GSM air interface in the 1900 MHz band, the Commission permits companies that would come under the amended *de minimis* rule but for their size to satisfy the hearing aid-compatible handset deployment requirement for GSM using a handset that allows the customer, except for emergency calls to 911, to reduce the maximum output power for GSM operations in the 1900 MHz band in order to meet the RF interference standard. However, wherever a manufacturer or service provider provides the hearing aid compatibility rating for such a handset, it shall indicate that user activation of a special mode is necessary to meet the hearing aid compatibility standard. In addition, the handset manual or product insert must explain how to activate the special mode and that doing so may result in a diminution of coverage. These actions will reduce the regulatory burden on small businesses that do not come under the *de minimis* rule by making it easier to satisfy hearing aid compatibility requirements for this class of handsets, while ensuring that consumers who use hearing aids and cochlear implants have access to a variety of phones and are adequately informed about the functionality and the limitations of their handsets.

32. The Commission amends Section 20.19 to expand its scope for manufacturers such that the rule will apply to all covered handsets that they manufacture for sale and use in the United States, regardless of whether those handsets are offered to service providers, intermediaries, businesses for use by their employees, or directly to the public. Manufacturers will have until 12 months from publication of the rule in the *Federal Register* to come into compliance with it. The Commission finds that this rule change will serve the public interest as a better and more proactive approach to ensure the availability of hearing aid-compatible handsets in the developing handset marketplace, and that no exception to or modification of the rule for small entities is appropriate consistent with the rule's purpose. The 12-month transition period will ease the burden of coming into compliance for small entities.

F. Report to Congress

33. The Commission will send a copy of the Second Report and Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.⁵⁹ In addition, the Commission will send a copy of the Second Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Second Report and Order and FRFA (or summaries thereof) will also be published in the *Federal Register*.⁶⁰

⁵⁹ See 5 U.S.C. § 801(a)(1)(A).

⁶⁰ See 5 U.S.C. § 604(b).

APPENDIX E

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the policies and rules proposed in this Further Notice of Proposed Rule Making (Further 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 Further Notice provided in Section VI.F.2. of the item. The Commission will send a copy of the Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the Further Notice and IRFA (or summaries thereof) will be published in the Federal Register.³

2. Although Section 213 of the Consolidated Appropriations Act of 2000 provides that the RFA shall not apply to the rules and competitive bidding procedures for frequencies in the 746-806 MHz Band,⁴ the Commission believes that it would serve the public interest to analyze the possible significant economic impact of the proposed policy and rule changes in this band on small entities. Accordingly, this IRFA contains an analysis of this impact in connection with all spectrum that falls within the scope of this Further Notice, including spectrum in the 746-806 MHz Band.

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

3. The Further Notice proposes to find that the scope of the Commission's hearing aid compatibility rules should be extended so as to cover all customer equipment used to provide wireless communications among members of the public or a substantial portion of the public via a built-in speaker where the equipment is typically held to the ear, so long as meeting hearing aid compatibility standards is technologically feasible and would not raise costs to an extent that would preclude successful marketing of the equipment. The Further Notice seeks comment on: (1) whether considerations of technological feasibility or marketability prevent application of the hearing aid compatibility requirements, or require modification of those requirements, as to any class of handsets; and (2) what transition period is appropriate for applying the requirements to newly covered handsets. This proposed rule change would ensure that people with hearing loss will have access to new and advanced handsets regardless of the frequency over which they operate or the voice technology mode deployed, while maintaining consistency with the technological feasibility and marketability criteria set forth in the Hearing Aid Compatibility Act.⁵

4. The Further Notice also seeks comment on whether the current requirement to make hearing aid-compatible handsets available in-store for consumer testing should be extended to some or all retail outlets other than those owned or operated by service providers. The Commission seeks comment

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 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See 5 U.S.C. § 603(a).

⁴ In particular, this exemption extends to the requirements imposed by Chapter 6 of Title 5, United States Code, Section 3 of the Small Business Act (15 U.S.C. 632) and Section 3507 and 3512 of Title 44, United States Code. Consolidated Appropriations Act 2000, Pub. L. No. 106-113, 113 Stat. 2502, App. E, Sec. 213(a)(4)(A)-(B); *see* 145 Cong. Rec. H12493-94 (Nov. 17, 1999); 47 U.S.C.A. 337 note at Sec. 213(a)(4)(A)-(B).

⁵ 47 U.S.C. § 610.

on how to define the class of independent retailers that would be required to make hearing aid-compatible handsets available for in-store testing. This rule change would ensure that consumers have the information they need to choose a handset that will operate correctly with their hearing aid or cochlear implant.

5. Additionally, the Further Notice seeks comment on whether the Commission should treat handsets that allow consumers to reduce the maximum transmit power only for operations over the GSM air interface in the 1900 MHz band by up to 2.5 decibels, except for calls to 911, and that meet the criteria for an M3 rating after such power reduction, as hearing aid-compatible for all purposes. This rule change would help ensure the near-term availability of desirable handsets over the legacy GSM air interface while still affording substantial access to people with hearing loss. The Commission also proposes, for all such handsets, that the manufacturer or service provider would have to disclose that activation of a special mode is required to meet the hearing aid compatibility standard, how to activate the special mode, and the possibility of a loss of coverage if the special mode is activated. This rule change would ensure that consumers have the information they need to choose and operate a handset that will best function with their hearing aid or cochlear implant.

B. Legal Basis

6. The potential actions about which comment is sought in this Notice would be authorized pursuant to the authority contained in Sections 4(i), 303(r), and 710 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 610.

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

7. 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 proposed rules.⁶ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁷ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁸ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (“SBA”).⁹ To assist the Commission in analyzing the total number of potentially affected small entities, the Commission requests commenters to estimate the number of small entities that may be affected by any rule changes that might result from this Further Notice.

8. *Small Businesses.* Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.¹⁰

9. *Cellular Licensees.* The SBA has developed a small business size standard for small

⁶ 5 U.S.C. § 604(a)(3).

⁷ 5 U.S.C. § 601(6).

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

⁹ 15 U.S.C. § 632.

¹⁰ See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://web.sba.gov/faqs> (last visited Jan. 2009).

businesses in the category “Wireless Telecommunications Carriers (except satellite).”¹¹ Under that SBA category, a business is small if it has 1,500 or fewer employees.¹² The census category of “Cellular and Other Wireless Telecommunications” is no longer used and has been superseded by the larger category “Wireless Telecommunications Carriers (except satellite)”. However, since currently available data was gathered when “Cellular and Other Wireless Telecommunications” was the relevant category, earlier Census Bureau data collected under the category of “Cellular and Other Wireless Telecommunications” will be used here. Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.¹³ Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.¹⁴ Thus, under this category and size standard, the majority of firms can be considered small.

10. *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 has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.¹⁵ For Block F, an additional small business size standard 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.¹⁶ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.¹⁷ 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 C Block auctions. A total of 93 “small” and “very small” business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.¹⁸ On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.¹⁹

11. On January 26, 2001, the Commission completed the auction of 422 C and F Block PCS licenses in Auction 35.²⁰ Of the 35 winning bidders in this auction, 29 qualified as “small” or “very

¹¹ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517210.

¹² *Id.*

¹³ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517212 (issued Nov. 2005).

¹⁴ *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 for firms with “1000 employees or more.”

¹⁵ See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7850-7852 ¶¶ 57-60 (1996); see also 47 C.F.R. § 24.720(b).

¹⁶ See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7852 ¶ 60.

¹⁷ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated December 2, 1998.

¹⁸ FCC News, “Broadband PCS, D, E and F Block Auction Closes,” No. 71744 (rel. Jan. 14, 1997).

¹⁹ See “C, D, E, and F Block Broadband PCS Auction Closes,” *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

²⁰ See “C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 2339 (2001).

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. In 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction 58. There were 24 winning bidders for 217 licenses.²¹ Of the 24 winning bidders, 16 claimed small business status and won 156 licenses. In 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction 71.²² Of the 14 winning bidders, six were designated entities.²³ In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F Block licenses in Auction 78.²⁴

12. *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.²⁵ 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.²⁶ The SBA has approved these small business size standards for the 900 MHz Service.²⁷ 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.²⁸ A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 licenses. One bidder claiming small business status won five licenses.²⁹

13. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders that won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed “small business” status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band

²¹ See “Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58,” *Public Notice*, 20 FCC Rcd 3703 (2005).

²² See “Auction of Broadband PCS Spectrum License Closes; Winning Bidders Announced for Auction No. 71,” *Public Notice*, 22 FCC Rcd 9247 (2007).

²³ *Id.*

²⁴ See Auction of AWS-1 and Broadband PCS Licenses Rescheduled For August 13, 2008, Notice of Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures For Auction 78, *Public Notice*, 23 FCC Rcd 7496 (2008) (*AWS-1 and Broadband PCS Procedures Public Notice*).

²⁵ 47 C.F.R. § 90.814(b)(1).

²⁶ *Id.*

²⁷ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, dated August 10, 1999.

²⁸ 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).

²⁹ See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

claimed status as small business.

14. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR services pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. In addition, we do not know how many of these firms have 1500 or fewer employees. The Commission assumes, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities.

15. *Advanced Wireless Services.* In 2008, the Commission conducted the auction of Advanced Wireless Services (“AWS”) licenses.³⁰ This auction, which was designated as Auction 78, offered 35 licenses in the AWS 1710-1755 MHz and 2110-2155 MHz bands (“AWS-1”). The AWS-1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A bidder with attributed average annual gross revenues that exceeded \$15 million and did not exceed \$40 million for the preceding three years (“small business”) received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed \$15 million for the preceding three years (“very small business”) received a 25 percent discount on its winning bid. A bidder that had a combined total assets of less than \$500 million and combined gross revenues of less than \$125 million in each of the last two years qualified for entrepreneur status.³¹ Four winning bidders that identified themselves as very small businesses won 17 licenses.³² Three of the winning bidders that identified themselves as small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

16. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.³³ A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (“BETRS”).³⁴ In the present context, we will use the SBA small business size standard applicable to Wireless Telecommunication Carriers (except satellite), *i.e.*, an entity employing no more than 1,500 persons.³⁵ 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.

17. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses in the 2305-2320 MHz and 2345-2360 MHz bands. The Commission defined “small business” for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million or less for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million or less for each

³⁰ See AWS-1 and Broadband PCS Procedures Public Notice, 23 FCC Rcd 7496. Auction 78 also included an auction of Broadband PCS licenses.

³¹ *Id.* at 7521-22.

³² See “Auction of AWS-1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period”, *Public Notice*, 23 FCC Rcd 12749 (2008).

³³ The service is defined in Section 22.99 of the Commission’s Rules, 47 C.F.R. § 22.99.

³⁴ BETRS is defined in Sections 22.757 and 22.759 of the Commission’s Rules, 47 C.F.R. §§ 22.757 and 22.759.

³⁵ 13 C.F.R. § 121.201, NAICS code 517210.

of the three preceding years.³⁶ The SBA has approved these definitions.³⁷ The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

18. 700 MHz Guard Bands Licenses. In the *700 MHz Guard Bands Order*, the Commission adopted size standards for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.³⁸ 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.³⁹ 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.⁴⁰ SBA approval of these definitions is not required.⁴¹ An auction of 52 Major Economic Area (MEA) licenses for each of two spectrum blocks commenced on September 6, 2000, and closed on September 21, 2000.⁴² 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 remaining 700 MHz Guard Bands 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.⁴³ Subsequently, in the *700 MHz Second Report and Order*, the Commission reorganized the licenses pursuant to an agreement among most of the licensees, resulting in a spectral relocation of the first set of paired spectrum block licenses, and an elimination of the second set of paired spectrum block licenses (many of which were already vacant, reclaimed by the Commission from Nextel).⁴⁴ A single licensee that did not participate in the agreement was grandfathered in the initial spectral location for its two licenses in the second set of paired spectrum blocks.⁴⁵ Accordingly, at this time there are 54 licenses in the 700 MHz Guard Bands.

³⁶ Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (WCS), *Report and Order*, 12 FCC Rcd 10785, 10879 ¶ 194 (1997).

³⁷ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated December 2, 1998.

³⁸ 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).

³⁹ *Id.* at 5343 ¶ 108.

⁴⁰ *Id.*

⁴¹ *Id.* at 5343 ¶ 108 n.246 (for the 746-764 MHz and 776-704 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain Small Business Administration approval before adopting small business size standards).

⁴² See “700 MHz Guard Bands Auction Closes: Winning Bidders Announced,” *Public Notice*, 15 FCC Rcd 18026 (WTB 2000).

⁴³ See “700 MHz Guard Bands Auctions Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 4590 (WTB 2001).

⁴⁴ See In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket 06-150, *Second Report and Order*, 22 FCC Rcd 15289, 15339-15344 ¶¶ 118-134 (2007) (*700 MHz Second Report and Order*).

⁴⁵ *Id.*

19. 700 MHz Band Commercial Licenses. There is 80 megahertz of non-Guard Band spectrum in the 700 MHz Band that is designated for commercial use: 698-757, 758-763, 776-787, and 788-793 MHz Bands. With one exception, the Commission adopted criteria for defining two groups of small businesses for purposes of determining their eligibility for bidding credits at auction. These two categories are: (1) “small business,” which is defined as an entity with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years; and (2) “very small business,” which is defined as an entity with attributed average annual gross revenues that do not exceed \$15 million for the preceding three years.⁴⁶ In Block C of the Lower 700 MHz Band (710-716 MHz and 740-746 MHz), which was licensed on the basis of 734 Cellular Market Areas, the Commission adopted a third criterion for determining eligibility for bidding credits: an “entrepreneur,” which is defined as 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.⁴⁷ The SBA has approved these small size standards.⁴⁸

20. An auction of 740 licenses for Blocks C (710-716 MHz and 740-746 MHz) and D (716-722 MHz) of the Lower 700 MHz Band commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business, or entrepreneur status and won a total of 329 licenses.⁴⁹ A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: five EAG licenses and 251 CMA licenses.⁵⁰ Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.⁵¹

21. The remaining 62 megahertz of commercial spectrum was auctioned on January 24 through March 18, 2008. As explained above, bidding credits for all of these licenses were available to “small businesses” and “very small businesses.” Auction 73 concluded with 1090 provisionally winning bids covering 1091 licenses and totaling \$19,592,420,000. The provisionally winning bids for the A, B, C, and E Block licenses exceeded the aggregate reserve prices for those blocks. The provisionally winning bid for the D Block license, however, did not meet the applicable reserve price and thus did not become a winning bid. Approximately 55 small businesses had winning bids.⁵² Currently, the 10 remaining megahertz associated with the D block have not yet been assigned.⁵³

22. Offshore Radiotelephone Service. This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of

⁴⁶ See Auction of 700 MHz Band Licenses Scheduled for Jan. 24, 2008, AU Docket No. 07-157, *Notice and Filing Requirements, Minimum Opening Bids, Reserve Prices, Upfront Payments, and Other Procedures for Auctions 73 and 76*, DA 07-4171 at ¶ 70 (WTB rel. Oct. 5, 2007); Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022, 1087-88 (2002).

⁴⁷ *Id.* at 1088.

⁴⁸ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, dated August 10, 1999.

⁴⁹ See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 17 FCC Rcd 17272 (WTB 2002).

⁵⁰ See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

⁵¹ *Id.*

⁵² See “Auction of 700 MHz Band Licenses Closes,” *Public Notice*, 23 FCC Rcd 4572 (WTB 2008).

⁵³ See fcc.gov website at http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=73.

Mexico.⁵⁴ There is presently one licensee in this service. We do not have information whether that licensee would qualify as small under the SBA's small business size standard for Wireless Telecommunications Carriers (except Satellite) services.⁵⁵ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.⁵⁶

23. *Broadband Radio Service and Educational Broadband Service.* The Broadband Radio Service ("BRS"), formerly known as the Multipoint Distribution Service ("MDS"),⁵⁷ and the Educational Broadband Service ("EBS"), formerly known as the Instructional Television Fixed Service ("ITFS"),⁵⁸ use 2 GHz band frequencies to transmit video programming and provide broadband services to residential subscribers.⁵⁹ These services, collectively referred to as "wireless cable," were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services.⁶⁰ We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. The SBA small business size standard for the broad census category of Cable and Other Program Distribution, which consists of such entities generating \$13.5 million or less in annual receipts, appears applicable to MDS and ITFS.⁶¹ Note that the census category of "Cable and Other Program Distribution" is no longer used and has been superseded by the larger category "Wireless Telecommunications Carriers (except satellite). This category provides that a small business is a wireless company employing no more than 1,500 persons.⁶² However, since currently available data was gathered when "Cable and Other Program Distribution" was the relevant category, earlier Census Bureau data collected under the category of "Cable and Other Program Distribution" will be used here. Other standards also apply, as described.

24. The Commission has defined small MDS (now BRS) entities in the context of Commission license auctions. In the 1996 MDS auction,⁶³ the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar

⁵⁴ This service is governed by Subpart I of Part 22 of the Commission's rules. See 47 C.F.R. §§ 22.1001-22.1037.

⁵⁵ 13 C.F.R. § 121.201, NAICS code 517210.

⁵⁶ *Id.*

⁵⁷ See 47 C.F.R. Part 21, subpart K; Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, 19 FCC Rcd 14165 (2004).

⁵⁸ See 47 C.F.R. Part 74, subpart I; *MDS/ITFS Order*, 19 FCC Rcd 14165 (2004).

⁵⁹ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report*, 20 FCC Rcd 2507, 2565 ¶ 131 (2006).

⁶⁰ *Id.*

⁶¹ 13 C.F.R. § 121.201, NAICS code 515210.

⁶² 13 C.F.R. § 121.201, NAICS code 517210.

⁶³ MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996. (67 bidders won 493 licenses.)

years.⁶⁴ This definition of a small entity in the context of MDS auctions has been approved by the SBA.⁶⁵ In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are hundreds of MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction and that fall under the former SBA small business size standard for Cable and Other Program Distribution.⁶⁶ Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$13.5 million annually. Therefore, we estimate that there are approximately 850 of these small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

25. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).⁶⁷ We estimate that there are currently 2,452 EBS licenses, held by 1,524 EBS licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,424 EBS licensees are small entities.

26. *Government Transfer Bands.* The Commission adopted small business size standards for the unpaired 1390-1392 MHz, 1670-1675 MHz, and the paired 1392-1395 MHz and 1432-1435 MHz bands.⁶⁸ Specifically, with respect to these bands, the Commission defined an entity with average annual gross revenues for the three preceding years not exceeding \$40 million as a "small business," and an entity with average annual gross revenues for the three preceding years not exceeding \$15 million as a "very small business."⁶⁹ SBA has approved these small business size standards for the aforementioned

⁶⁴ 47 C.F.R. § 21.961(b)(1).

⁶⁵ See Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Docket No. 94-131, *Report and Order*, 10 FCC Rcd 9589 (1995).

⁶⁶ Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for "Cable and Other Program Distribution" (annual receipts of \$13.5 million or less). See 13 C.F.R. § 121.201, NAICS code 515210.

⁶⁷ In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on EBS licensees.

⁶⁸ See Amendments to Parts 1, 2, 27 and 90 of the Commission's Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, 17 FCC Rcd 9980 (2002) (*Government Transfer Bands Service Rules Report and Order*).

⁶⁹ See Reallocation of the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, WT Docket No. 02-8, *Notice of Proposed Rulemaking*, 17 FCC Rcd 2500, 2550-51 ¶¶ 144-146 (2002). To be consistent with the size standard of "very small business" proposed for the 1427-1432 MHz band for those entities with average gross revenues for the three preceding years not exceeding \$3 million, the *Service Rules Notice* proposed to use the terms "entrepreneur" and "small business" to define entities with average gross revenues for the three preceding years not exceeding \$40 million and \$15 million, respectively. Because the Commission is not adopting small business size standards for the 1427-1432 MHz band, it instead uses the terms "small business" and "very small business" to define entities with average gross revenues for the three preceding years not exceeding \$40 million and \$15 million, respectively.

bands.⁷⁰ Correspondingly, the Commission adopted a bidding credit of 15 percent for “small businesses” and a bidding credit of 25 percent for “very small businesses.”⁷¹ This bidding credit structure was found to have been consistent with the Commission’s schedule of bidding credits, which may be found at Section 1.2110(f)(2) of the Commission’s rules.⁷² The Commission found that these two definitions will provide a variety of businesses seeking to provide a variety of services with opportunities to participate in the auction of licenses for this spectrum and will afford such licensees, who may have varying capital costs, substantial flexibility for the provision of services.⁷³ The Commission noted that it had long recognized that bidding preferences for qualifying bidders provide such bidders with an opportunity to compete successfully against large, well-financed entities.⁷⁴ The Commission also noted that it had found that the use of tiered or graduated small business definitions is useful in furthering its mandate under Section 309(j) to promote opportunities for and disseminate licenses to a wide variety of applicants.⁷⁵ An auction for one license in the 1670-1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

27. Mobile Satellite Service Carriers. Neither the Commission nor the U.S. Small Business Administration has developed a small business size standard specifically for mobile satellite service licensees. The appropriate size standard is therefore the SBA standard for Satellite Telecommunications. The category of Satellite Telecommunications “comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”⁷⁶ The category has a small business size standard of \$15 million or less in average annual receipts, under SBA rules.⁷⁷ For this category, Census Bureau data for 2002 show that

⁷⁰ See Letter from Hector V. Barreto, Administrator, Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated Jan. 18, 2002.

⁷¹ Such bidding credits are codified for the unpaired 1390-1392 MHz, paired 1392-1395 MHz, and the paired 1432-1435 MHz bands in 47 C.F.R. § 27.807. Such bidding credits are codified for the unpaired 1670-1675 MHz band in 47 C.F.R. § 27.906.

⁷² In the *Part 1 Third Report and Order*, the Commission adopted a standard schedule of bidding credits, the levels of which were developed based on its auction experience. *Part 1 Third Report and Order*, 13 FCC Rcd at 403-04 ¶ 47; see also 47 C.F.R. § 1.2110(f)(2).

⁷³ See *Service Rules Notice*, 17 FCC Rcd at 2550-51 ¶ 145.

⁷⁴ See, e.g., Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, WT Docket No. 96-18, PR Docket No. 93-253, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10091 ¶ 112 (1999).

⁷⁵ 47 U.S.C. § 309(j)(3)(B), (4)(C)-(D). The Commission will also not adopt special preferences for entities owned by minorities or women, and rural telephone companies. The Commission did not receive any comments on this issue, and it does not have an adequate record to support such special provisions under the current standards of judicial review. See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (requiring a strict scrutiny standard of review for government mandated race-conscious measures); *United States v. Virginia*, 518 U.S. 515 (1996) (applying an intermediate standard of review to a state program based on gender classification).

⁷⁶ U.S. Census Bureau, 2007 NAICS Definitions, “517410 Satellite Telecommunications”; <http://www.census.gov/naics/2007/def/ND517410.HTM>.

⁷⁷ 13 C.F.R. § 121.201, NAICS code 517410.

there were a total of 371 firms that operated for the entire year.⁷⁸ Of this total, 307 firms had annual receipts of under \$10 million, and 26 firms had receipts of \$10 million to \$24,999,999.⁷⁹ Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

28. Internet Service Providers. In the Notice, the Commission seeks comment on whether to extend hearing aid compatibility requirements to entities offering access to Voice over Internet Protocol (VoIP) applications over Wi-Fi⁸⁰ and other wireless technologies that may fall outside the definition of CMRS and/or the criteria in Section 20.19(a), such as those operating on networks that do not employ “an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs.” Such applications may be provided, for example, by Internet Service Providers (ISPs). ISPs are Internet Publishing and Broadcasting and Web Search Portals⁸¹ that provide clients access to the Internet and generally provide related services such as web hosting, web page designing, and hardware or software consulting related to Internet connectivity. To gauge small business prevalence for these Internet Publishing and Broadcasting and Web Search Portals, we must, however, use current census data that are based on the previous category of Internet Service Providers and its associated size standard. That standard was: all such firms having \$23.5 million or less in annual receipts. Accordingly, to use data available to us under the old standard and Census Bureau data for 2002, there were 2,529 firms in this category that operated for the entire year.⁸² Of these, 2,437 firms had annual receipts of under \$10 million, and an additional 47 firms had receipts of between \$10 million and \$24,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

29. All Other Information Services. “This industry comprises establishments primarily engaged in providing other information services (except new syndicates and libraries and archives).”⁸³ VoIP services over wireless technologies could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The SBA has developed a small business size standard for this category; that size standard is \$6.5 million or less in average annual receipts.⁸⁴ According to Census Bureau data for 1997, there were 195 firms in this category that operated for the entire year.⁸⁵ Of these, 172 had annual receipts of under

⁷⁸ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 517410 (issued Nov. 2005).

⁷⁹ *Id.* An additional 38 firms had annual receipts of \$25 million or more.

⁸⁰ Wi-Fi (Wireless Fidelity) is a wireless technology that is based on the Institute of Electrical and Electronics Engineers 802.11 standards.

⁸¹ U.S. Census Bureau, “Internet Publishing and Broadcasting and Web Search Portals,” NAICS code 519130.

⁸² U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 518111 (issued Nov. 2005).

⁸³ U.S. Census Bureau, “2002 NAICS Definitions: 519190 All Other Information Services” (Feb. 2004) <www.census.gov>. We note that the Commission has not reached conclusions as to whether, or under what conditions, VoIP services constitute communications or information services under the Communications Act, and our identification of this group of small entities as providers of “information services” under the Census Bureau definition is not intended to indicate any conclusions in this regard.

⁸⁴ 13 C.F.R. § 121.201, NAICS code 519190.

⁸⁵ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 514199 (issued Oct. 2000). This category was created for the 2002 Economic Census by taking a portion of the superseded 1997 category, “All Other Information Services,” NAICS code 514199. The data cited in the text above are derived from the superseded category.

\$5 million, and an additional nine firms had receipts of between \$5 million and \$9,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

30. *Part 15 Handset Manufacturers.* Manufacturers of unlicensed wireless handsets may also become subject to requirements in this proceeding for their handsets used to provide VoIP applications. The Commission has not developed a definition of small entities applicable to unlicensed communications handset manufacturers. Therefore, we will utilize the SBA definition applicable to Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.”⁸⁶ The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees.⁸⁷ According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year.⁸⁸ Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999.⁸⁹ Thus, under this size standard, the majority of firms can be considered small.

31. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.” The SBA has developed a small business size standard for firms in this category, which is: all such firms having 750 or fewer employees.⁹⁰ According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year. Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999. Thus, under this size standard, the majority of firms can be considered small.

32. *Radio, Television, and Other Electronics Stores.* The Census Bureau defines this economic census category as follows: “This U.S. industry comprises: (1) establishments known as consumer electronics stores primarily engaged in retailing a general line of new consumer-type electronic

⁸⁶ U.S. Census Bureau, 2002 NAICS Definitions, “334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing”; <http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342>.

⁸⁷ 13 C.F.R. § 121.201, NAICS code 334220.

⁸⁸ U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334220 (rel. May 26, 2005); <http://factfinder.census.gov>. The number of “establishments” is a less helpful indicator of small business prevalence in this context than would be the number of “firms” or “companies,” because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks out data for firms or companies only to give the total number of such entities for 2002, which was 929.

⁸⁹ *Id.* An additional 18 establishments had employment of 1,000 or more.

⁹⁰ 13 C.F.R. § 121.201, NAICS code 334220.

products; (2) establishments specializing in retailing a single line of consumer-type electronic products (except computers); or (3) establishments primarily engaged in retailing these new electronic products in combination with repair services.⁹¹ The SBA has developed a small business size standard for Radio, Television, and Other Electronics Stores, which is: all such firms having \$9 million or less in annual receipts.⁹² According to Census Bureau data for 2002, there were 10,380 firms in this category that operated for the entire year.⁹³ Of this total, 10,080 firms had annual sales of under \$5 million, and 177 firms had sales of \$5 million or more but less than \$10 million.⁹⁴ Thus, the majority of firms in this category can be considered small.

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

33. The Commission proposes to extend broadly to providers of wireless communications among members of the public or a substantial portion of the public using equipment that contains a built-in speaker and is typically held to the ear, and to the manufacturers of such equipment, the same hearing aid compatibility rules that currently apply to a defined category of commercial mobile radio service (CMRS). These regulations include: (1) requirements to deploy a certain number or percentage of handset models that meet hearing aid compatibility standards, (2) “refresh” requirements on manufacturers to meet their hearing aid-compatible handset deployment benchmarks in part using new models, (3) a requirement that service providers offer hearing aid-compatible handsets with varying levels of functionality, (4) a requirement that service providers make their hearing aid-compatible models available to consumers for testing at their owned or operated stores, (5) point of sale disclosure requirements, (6) requirements to make consumer information available on the manufacturer’s or service provider’s website, and (7) annual reporting requirements. There is a *de minimis* exception from all of the requirements except reporting for small entities, and for all entities during their first two years of offering handsets, that offer two or fewer handset models over an air interface. The Commission seeks comment on whether there are any classes of handsets for which either it is technically infeasible to meet the hearing aid compatibility requirements or satisfying those requirements would increase costs to the point where the handsets could not be successfully marketed. The Commission also seeks comment on the appropriate transition period for applying hearing aid compatibility requirements to telephones that are outside the currently covered subset of CMRS.

34. The Commission’s rules require that wireless service providers make their hearing aid-compatible handset models available for consumer testing in each retail store that they own or operate. The Commission seeks comment on whether it should extend the in-store testing requirement to some or all entities that sell handsets to consumers through physical locations. In addition, the Commission seeks comment about whether it should adopt a rule providing that a return policy allowing a customer with hearing loss to return a handset without penalty would qualify as an alternative means of satisfying the in-store testing requirement.

35. Under the Commission’s rules, handsets must be tested for hearing aid compatibility at their maximum output power. The Commission seeks comment on whether it should treat as hearing aid-

⁹¹ U.S. Census Bureau, 2002 NAICS Definitions, “443112 Radio, Television, and Other Electronics Stores”; <http://www.census.gov/epcd/naics02/def/NDEF443.HTM>.

⁹² 13 C.F.R. § 121.201, NAICS code 443112.

⁹³ U.S. Census Bureau, 2002 Economic Census, Industry Series: Retail Trade, Table 4, Sales Size of Firms for the United States: 2002, NAICS code 443112 (issued Nov. 2005).

⁹⁴ *Id.* An additional 123 firms had annual sales of \$10 million or more. As a measure of small business prevalence, the data on annual sales are roughly equivalent to what one would expect from data on annual receipts.

compatible for all purposes handsets that allow consumers to reduce the maximum transmit power only for operations over the GSM air interface in the 1900 MHz band by up to 2.5 decibels and that meet the criteria for an M3 rating after such power reduction. The Commission proposes that if it were to extend the ability to meet hearing aid compatibility standards in this manner, it should require the handset to operate at full power when calling 911, the manufacturer or service provider would have to disclose that activation of a special mode is required to meet the hearing aid compatibility standard, and the device manual or product insert would have to explain how to activate the special mode and the possibility of a loss of coverage. The Commission seeks comment on these and any other possible conditions on this rule change.

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

36. The RFA requires an agency to describe any significant, specifically small business alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) exemption from coverage of the rule, or any part thereof, for small entities.”⁹⁵

37. The Commission seeks comment generally on the effect the rule changes considered in this Further Notice would have on small entities, on whether alternative rules should be adopted for small entities in particular, and on what effect such alternative rules would have on those entities. The Commission invites comment on ways in which it can achieve its goals while minimizing the burden on small wireless service providers, equipment manufacturers, and other entities.

38. More specifically, the Commission seeks comment on whether there are any classes of handsets that provide wireless communications among members of the public or a substantial portion of the public via a built-in speaker where the equipment is typically held to the ear for which either it is technologically infeasible to meet hearing aid compatibility requirements or satisfying those requirements would increase costs to the point where the handsets could not be successfully marketed. The Commission seeks comment on whether, for reasons of technological infeasibility or prohibitive costs, the specific numerical benchmarks set forth in the Commission’s rules or other rule provisions cannot be applied to any class of handsets. The Commission seeks specific evidence as to why particular requirements cannot be met and what alternative requirements would be feasible and appropriate. The Commission also asks commenters to suggest alternatives that may further reduce possible burdens on small entities regarding meeting the hearing aid compatibility requirements.

39. The Commission recognizes that it takes time for handsets with new specifications to be designed, produced, and brought to market. The Commission therefore seeks comment on the appropriate transition period for applying hearing aid compatibility requirements to telephones that are outside the subset of CMRS that is currently covered by Section 20.19(a). In recognition that smaller service providers may encounter delays in obtaining new model handsets from manufacturers and vendors, the Commission specifically asks whether smaller service providers should have a longer transition period than Tier I carriers. The Commission also asks commenters to suggest other alternative transition periods that could further lessen the burden on small businesses.

40. The Commission also seeks comment as to whether the Commission should extend the in-store testing requirement to some or all entities other than those owned or operated by service

⁹⁵ 5 U.S.C. §§ 603(c)(1)-(c)(4).

providers that sell handsets to consumers through physical locations. The Commission further seeks comment, if it decides to extend this requirement to some but not all retail outlets, on how the scope of the requirement should be defined. Among other things, the Commission asks whether the size of an entity should be a factor in this definition. The Commission's goal is to arrive at a definition that is clear and easy to apply, and at the same time closely identifies those retailers for which the benefits of the rule outweigh the burdens while reducing the burden on small entities. The Commission also seeks comment on alternatives to extending the in-store testing requirement, including whether a return policy allowing a customer with hearing loss to return a handset without penalty should qualify as an alternative means of satisfying the requirement. The Commission asks commenters to suggest alternatives that may further reduce the impact on small entities.

41. Additionally, the Further Notice seeks comment on whether the Commission should treat handsets that allow consumers to reduce the maximum transmit power only for operations over the GSM air interface in the 1900 MHz band by up to 2.5 decibels and that meet criteria for an M3 rating after such power reduction as hearing aid-compatible for all purposes. This rule change would ease the burden on small entities by making it easier to satisfy hearing aid compatibility requirements for this class of handsets.

42. Finally, if the Commission were to extend the ability to meet hearing aid compatibility standards by allowing the user to reduce the maximum power for GSM operations in the 1900 MHz band, it proposes to do so subject to the same conditions that it has imposed in the context of the *de minimis* rule. Thus, the handset would have to operate at full power when calling 911, the manufacturer or service provider would have to disclose that activation of a special mode is required to meet the hearing aid compatibility standard, and the device manual or product insert would have to explain how to activate the special mode and the possibility of a loss of coverage. This rule change would ensure that consumers have the information they need to choose and operate a handset that will best function with their hearing aid or cochlear implant. The Commission seeks to receive alternative proposals that would achieve this goal while further reducing the burdens on small business.

43. For each of the proposals in the Further Notice, the Commission seeks discussion, and where relevant, alternative proposals, on the effect that each prospective new requirement, or alternative rules, might have on small entities. For each proposed rule or alternative, the Commission seeks discussion about the burden that the prospective regulation would impose on small entities and how the Commission could impose such regulations while minimizing the burdens on small entities. For each proposed rule, the Commission asks whether there are any alternatives the Commission could implement that could achieve the Commission's goals while at the same time minimizing the burdens on small entities. For the duration of this docketed proceeding, the Commission will continue to examine alternatives with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

44. None.

**STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI**

Re: *Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets, WT Docket No. 07-250.*

Today we take important steps in our ongoing effort to ensure that Americans with disabilities have access to modern communications technology. This is part of our broader mission to bring the benefits of broadband and other modern communications to all Americans. It is almost befitting of our recent celebration of the 20th anniversary of the Americans with Disabilities Act, an act that has sought to achieve full integration, independence and self-sufficiency of all persons with disabilities in our democracy, our economy and in other facets of our society.

This item addresses the challenges faced by the 8 million Americans who use hearing aids. The Commission's actions today will help Americans with hearing loss have meaningful access to the most exciting and innovative wireless communications devices on the market.

We adopt today an unprecedented agency Statement of Policy that emphasizes to developers of new technologies the necessity of considering and planning for hearing aid compatibility at the earliest stages of the product design process. For too many years, Americans who have hearing loss have faced the uphill battle of attempting to obtain hearing aid compatibility long after essential communications devices completed their development cycle and went on the market. By turning the collective focus to the development stage, innovators and entrepreneurs can account for compatibility issues *before* devices are produced. This is an important change, which will result in real benefits to Americans with hearing loss.

To ensure our policies will yield real-world results, I am pleased to announce that the FCC will convene a roundtable of industry and disability group leaders to renew the collaborative process to address the challenges of hearing aid compatibility up front in the development process.

Today's item does something else. It sets the stage for some of the latest wireless phones – such as the iPhone – to meet hearing aid compatibility standards. It does so in a way designed to incentivize the broadest possible innovation and investment. As a result of positive discussions with both industry and the hearing loss community, the Commission has refocused the *de minimis* exception to our hearing aid compatibility rules on the small companies and new entrants it was originally designed to protect, while creating appropriate transition periods and an alternative route to compliance for larger manufacturers who develop innovative devices.

The bottom line: what we do today will ensure as quickly as possible that a wider range of smartphones will be usable by people with hearing aids.

I thank the staff for their hard work and collaboration on this item, and my colleagues for working together to tackle this important issue.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets, WT Docket No. 07-250.*

Today we reaffirm our commitment that every American has a right to full inclusion in this age of technology revolution. Throughout my time at the Commission, I have had countless inspiring opportunities to work with the disabilities communities. These experiences have reinforced in me the critical role this agency must play in ensuring that these Americans are not left behind as technology advances—that their accessibility needs are being met when communicating over the telephone (as we address here), watching television or accessing and using broadband. We have made progress, to be sure—good progress. But there is more to do and, as opportunity-creating new technologies keep coming at us, we need to be always ready to make sure these new products and services—so full of promise for our disabilities communities—are available to them.

So I welcome the clear going-forward statement of policy we make today that persons with hearing aids and cochlear implants must have access to the most advanced and innovative technologies that science and markets allow. And I am pleased that we tighten our existing hearing aid compatibility rules by modifying the *de minimis* exception that applied to companies offering two or fewer handsets over a given air interface to now require all large companies to offer at least one hearing aid-compatible model after an initial two-year period. Strong and clear rules are critical to accomplishing our statutory obligation of ensuring that our nation's telecommunications networks are accessible to Americans with hearing loss.

Our decision will ensure that the hearing loss community has far greater access to the newest and most popular smartphones. And, I am particularly pleased that the outcome we reach today was shaped in no small measure by the input and contributions of the Hearing Loss Association of America and others from the hearing loss community. If I have learned one thing from my years of fighting for greater inclusion for persons with disabilities, it is that accessibility must be addressed at the earliest stages of both product design and agency rule-making. It is far more efficient and cost-effective to have these communities present at the creation of new products and services and new government regulations than it is to retrofit after it's discovered that something wasn't properly designed or considered.

I want to express my gratitude to Ruth Milkman and her team in the Wireless Telecommunications Bureau for their hard work on this item. I would also like to express my deep thanks to the Consumer and Governmental Affairs Bureau, especially Joel Gurin and Karen Peltz Strauss, for their ongoing work on accessibility. In the wake of last month's celebrations in honor of the twentieth anniversary of the landmark Americans with Disabilities Act, I hope that we are all re-energized to tackle the outstanding issues in this proceeding as well as the wide range of accessibility issues facing this Commission.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re: *Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets, WT Docket No. 07-250.*

I am pleased to support today's policy statement, order and notice of proposed rulemaking. Workable and effective hearing aid compatibility is a matter that I have supported with enthusiasm throughout my time at the Commission, and I am proud of the leadership role that the Commission continues to play in this area. Coordinating with industry and representatives of citizens with hearing loss, our action today collectively preserves conditions for innovation and investment while also ensuring that these consumers are positioned to enjoy the benefit of new technologies as they are introduced into the marketplace.

I thank the Chairman and my colleagues for their willingness to indulge me by supporting my edits to today's order. The teamwork was outstanding. I am confident that we have created certainty for the marketplace, thereby ensuring a smooth and timely glide path for compliance.

I also congratulate Ruth Milkman and the team from the Wireless Telecommunications Bureau for your efforts here. Thanks to all of you for your creativity and thoughtful work.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets, WT Docket No. 07-250.*

When Congress enacted the Hearing Aid Compatibility Act of 1988, it found that "to the fullest extent made possible by technology and medical science, hearing-impaired persons should have equal access to the national telecommunications network." Today's item will help achieve that goal by adopting policies that are intended to ensure that the more than seven million Americans who currently use hearing aids, have continuing access to the most advanced communications technologies as they develop. Therefore, I am pleased that the Commission was able to reach unanimous consent on the policy decisions in this item.

The Policy Statement we adopt today makes two points that have been missing from the Commission's principles on hearing aid compatibility. The first point is that the goal of this Commission is "[t]o maximize the number of accessible products for [the hearing-impaired] population." The second point is that, to achieve this goal, the Commission's policies must adhere to the principle of "encourag[ing] manufacturers of new technologies, to consider hearing aid compatibility at the earliest stages of the product design process." I have long been a proponent of the idea that those living with disabilities should not be an afterthought in our policymaking process. Similarly, industry should be encouraged to consider how it can design networks and devices to allow those with disabilities equivalent access to communications services. Thus, I am pleased that my colleagues agree on this score with respect to hearing aid compatibility.

The changes that the Report and Order adopt should significantly increase the number of advanced handsets that are accessible to those that use hearing aids. Modifying the *de minimis* exception so all large entities will be required to offer at least one hearing aid-compatible model within two years after entry, will ensure, that more handsets are covered by our hearing aid compatibility rules. It should also lead to the most advanced handsets, such as the popular iPhone, being accessible earlier to those with hearing loss. I applaud the recent efforts of handset manufacturers and consumer advocates to find consensus on such an important issue in order to expedite our decision.

I also support the rule changes proposed in the Further Notice. As new technologies take hold, it is important that our hearing aid compatibility rules apply so that all consumers, including the hearing-impaired, benefit. I hope the Commission will expeditiously consider the record on the tentative conclusion that our hearing aid compatibility rules should extend beyond just CMRS services, to include customer equipment used for wireless voice communications over any type of network by a substantial portion of the public. This would allow the hearing aid compatibility rules to apply to telephone services such as Voice over Internet Protocol Services, when provided through a handset that is designed to make phone calls. I look forward to seeing the innovations that unfold in the design of hearing aid compatible equipment. But I am most excited to see the opportunities that will flourish as more members of the hearing impaired community, gain access to more advanced handsets.

I thank the staffs of the Wireless Telecommunications Bureau, the Consumer and Governmental Affairs Bureau, and the Office of the General Counsel, for their hard work on this item.

**STATEMENT OF
COMMISSIONER MEREDITH ATTWELL BAKER**

Re: *Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets, WT Docket No. 07-250.*

Today we have taken an important step to update our rules on hearing aid compatibility. We are acting to ensure that people across America who rely on hearing aids will be able to join those who already use the most advanced handsets that are driving the wireless broadband revolution. Informed through close consultation with a broad cross section of stakeholders, our approach balances the needs of the hearing impaired community with the need to promote and encourage investment and innovation in handsets. It is a significant achievement and a good result. I would like add my thanks to everyone for their hard work on this item.