

APPENDIX A**Final Rules**

Part 1, Subpart J of Title 47 of the Code of Federal Regulations is amended as follows:

1. The table of contents of Part 1 is revised to read as follows:

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Subpart J—Pole Attachment Complaint Procedures

1.1401 Purpose.

1.1402 Definitions.

1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.

1.1404 Complaint.

1.1405 File numbers.

1.1406 Dismissal of complaints.

1.1407 Response and reply.

1.1408 Numbers of copies and form of pleadings.

1.1409 Commission consideration of the complaint.

1.1410 Remedies.

1.1411 Meetings and hearings.

1.1412 Enforcement.

1.1413 Forfeiture.

1.1414 State certification.

1.1415 Other orders.

1.1416 Imputation of rates; modification costs.

1.1417 Allocation of Unusable Space Costs.

1.1418 Use of presumptions in calculating the space factor.

1.1420 Timeline for access to utility poles.

1.1422 Contractors for survey and make-ready.

1.1424 Complaints by incumbent local exchange carriers.

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2. Section 1.1401 is revised to read as follows:

§ 1.1401 Purpose.

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory

access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable. They also provide complaint and enforcement procedures for incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)) to ensure that the rates, terms, and conditions of their access to pole attachments are just and reasonable.

3. Section 1.1402 is revised to read as follows:

§ 1.1402 Definitions.

* * *

(d) The term *complaint* means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable. It also means a filing by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable.

(e) The term *complainant* means a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, an association of telecommunications carriers, an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers who files a complaint.

4. Section 1.1404 is revised to read as follows:

§ 1.1404 Complaint.

(k) The complaint shall include a certification that the complainant has, in good faith, engaged or attempted to engage in executive-level discussions with the respondent to resolve the pole attachment dispute. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the company they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter to the respondent outlining the allegations that form the basis of the complaint it anticipated filing with the Commission, inviting a response within a reasonable period of time, and offering to hold executive-level discussions regarding the dispute. A refusal by a respondent to engage in the discussions contemplated by this rule shall constitute an unreasonable practice under section 224 of the Act.

* * *

(m) In a case where a cable television system operator or telecommunications carrier as defined in 47 C.F.R. 224(a)(5) claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. 224(f), the complaint shall include the data and information necessary to support the claim, including:

- (1) The reasons given for the denial of access to the utility's poles, ducts, conduits, or rights-of-way;
- (2) The basis for the complainant's claim that the denial of access is unlawful;
- (3) The remedy sought by the complainant;
- (4) A copy of the written request to the utility for access to its poles, ducts, conduits, or rights-of-way; and

(5) A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging unlawful denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a prima facie case.

* * *

(ix) The annual carrying charges attributable to the cost of owning a pole. The utility shall submit these charges separately for each of the following categories: depreciation, rate of return, taxes, maintenance, and administrative. These charges may be expressed as a percentage of the net pole investment. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court that determines the treatment of accumulated deferred taxes if it is at issue in the proceeding and shall note the section that specifically determines the treatment and amount of accumulated deferred taxes.

* * *

5. Section 1.1409(e) is revised to read as follows:

§ 1.1409 Commission consideration of the complaint.

(e) ***

(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by section 1.1409(e)(2)(i) or 1.1409(e)(2)(ii) of this Part.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in section 1.1409(e)(2)(ii):

Rate = Space Factor x Cost

Where Cost

in Urbanized Service Areas = 0.66 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Non-Urbanized Service Areas = 0.44 x (Net Cost of a Bare Pole x Carrying Charge Rate)

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space Occupied}}{\text{Pole Height}} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$

(ii) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in section 1.1409(e)(2)(i):

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\begin{array}{c} \text{Maintenance and Administrative} \\ \text{Carrying Charge Rate} \end{array} \right]$$

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space Occupied}}{\text{Pole Height}} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$

6. Section 1.1410 is revised to read as follows:

§ 1.1410 Remedies.

(a) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

- (1) Terminate the unjust and/or unreasonable rate, term, or condition;
- (2) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission;
- (3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations; and

(b) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms, and conditions.

7. Section 1.1420 is added as follows:

§ 1.1420 Timeline for access to utility poles.

(a) The term “attachment” means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(b) All time limits in this subsection are to be calculated according to section 1.4 of this title.

(c) *Survey.* A utility shall respond as described in section 1.1043(b) to a cable operator or telecommunications carrier within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days, in the case of larger orders as described in subsection (g)). This response may be a notification that the utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles.

(d) *Estimate.* Where a request for access is not denied, a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work within 14 days of providing the response required by section 1.1420(c), or in the case where a prospective attachers’ contractor has performed a survey, within 14 days of receipt by the utility of such survey.

- (1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.
- (2) A cable operator or telecommunications carrier may accept a valid estimate and make payment anytime after receipt of an estimate but before the estimate is withdrawn.

(e) *Make-ready*. Upon receipt of payment specified in subsection (d)(2), a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

- (1) For attachments in the communications space, the notice shall:
 - (i) Specify where and what make-ready will be performed.
 - (ii) Set a date for completion of make-ready that is no later than 60 days after notification is sent (or 105 days in the case of larger orders, as described in subsection (g)).
 - (iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.
 - (iv) State that the utility may assert its right to 15 additional days to complete make-ready.
 - (v) State that if make-ready is not completed by the completion date set by the utility (or, if the utility has asserted its 15-day right of control, 15 days later), the cable operator or telecommunications carrier requesting access may complete the specified make-ready.
 - (vi) State the name, telephone number, and email address of a person to contact for more information about the make-ready procedure.
- (2) For wireless attachments above the communications space, the notice shall:
 - (i) Specify where and what make-ready will be performed.
 - (ii) Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in subsection (g)).
 - (iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.
 - (iv) State that the utility may assert its right to 15 additional days to complete make-ready.
 - (v) State the name, telephone number, and email address of a person to contact for more information about the make-ready procedure.

(f) For wireless attachments above the communications space, a utility shall ensure that make-ready is completed by the date set by the utility in subsection (e)(2)(ii) (or, if the utility has asserted its 15-day right of control, 15 days later).

- (g) For the purposes of compliance with the time periods in this section:
- (1) A utility shall apply the timeline described in subsections (c) through (e) to all requests for pole attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.
 - (2) A utility may add 15 days to the survey period described in subsection (c) to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.
 - (3) A utility may add 45 days to the make-ready periods described in subsection (e) to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.
 - (4) A utility shall negotiate in good faith the timing of all requests for pole attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state.
 - (5) A utility may treat multiple requests from a single cable operator or telecommunications carrier as one request when the requests are filed within 30 days of one another.

- (h) A utility may deviate from the time limits specified in this section:
- (1) Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.
 - (2) During performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete the make-ready work within the prescribed time frame. A utility that so deviates shall immediately notify, in writing, the cable operator or telecommunications carrier requesting attachment and other affected entities with existing attachments, and shall include the reason for and date and duration of the deviation. The utility shall deviate from the time limits specified in this section for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.
- (i) If a utility fails to respond as specified in subsection (c), a cable operator or telecommunications carrier requesting attachment in the communications space may, as specified in section 1.1422, hire a contractor to complete a survey. If make-ready is not complete by the date specified in subsection (e)(1)(ii), a cable operator or telecommunications carrier requesting attachment in the communications space may hire a contractor to complete the make-ready:
- (1) Immediately, if the utility has failed to assert its right to perform remaining make-ready work by notifying the requesting attacher that it will do so; or
 - (2) After 15 days if the utility has asserted its right to perform make-ready by the date specified in subsection (e)(1)(ii) and has failed to complete make-ready.

8. Section 1.1422 is added as follows:

§ 1.1422 Contractors for survey and make-ready.

- (a) A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its utility poles in cases where the utility has failed to meet deadlines specified in section 1.1420.
- (b) If a cable operator or telecommunications carrier hires a contractor for purposes specified in section 1.1420, it shall choose from among a utility's list of authorized contractors.
- (c) A cable operator or telecommunications carrier that hires a contractor for survey or make-ready work shall provide a utility with a reasonable opportunity for a utility representative to accompany and consult with the authorized contractor and the cable operator or telecommunications carrier.
- (d) The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

9. Section 1.1424 is added as follows:

§ 1.1424 Complaints by incumbent local exchange carriers.

Complaints by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this Part, as relevant. In complaint proceedings where an incumbent local exchange carrier (or an association of incumbent local exchange carriers) claims that it is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system for purposes of obtaining comparable rates, terms or conditions, the incumbent local exchange carrier shall bear the burden of demonstrating that it is similarly situated by reference to any relevant evidence, including pole attachment agreements. If a respondent declines or refuses to provide a complainant with access to

agreements or other information upon reasonable request, the complainant may seek to obtain such access through discovery. Confidential information contained in any documents produced may be subject to the terms of an appropriate protective order.

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was included in the *2010 Order and Further Notice* in WC Docket No. 07-245 and GN Docket No. 09-51.² The Commission sought written public comment on the proposals in these dockets, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

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

2. In this *Report and Order and Order on Reconsideration*, the Commission revises its pole attachment rules to promote competition and to reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks. The Commission has historically relied primarily on private negotiations and case-specific adjudications to ensure just and reasonable rates, terms, and conditions, but its experience during the past 15 years has demonstrated the need to provide more guidance. Accordingly, the Commission establishes a four-stage timeline for wireline and wireless access to poles; provides attachers with a self-effectuating contractor remedy in the communications space; improves its enforcement rules; reinterprets the telecommunications rate formula within the existing statutory framework; and addresses rates, terms, and conditions for pole attachments by incumbent LECs. The Commission also resolves multiple petitions for reconsideration and addresses various points regarding the nondiscriminatory use of attachment techniques.

B. Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA and Summary of the Assessment of the Agency of Such Issues

3. One commenter discussed the IRFA from the Further Notice. A group of associations representing rural telephone companies argued specifically that the Commission should adopt the lowest telecom rate for broadband connections,⁴ adopt an incumbent LEC dispute resolution process,⁵ and cap pole attachment orders at 100 poles.⁶ We squarely address these concerns by revising the section 224(e) rental rate for pole attachments used by telecommunications carriers to provide telecommunications services;⁷ permitting incumbent LECs to file complaints with the Commission to ensure reasonable rates,

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

² See Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864 at App. D (2010) (*2010 Order and Further Notice*).

³ See 5 U.S.C. § 604.

⁴ Joint Initial Comments of the National Telecommunications Cooperative Association; Organization for the Promotion and Advancement of Small Telecommunications Companies; Western Telecommunications Alliance; and Eastern Rural Telecom Association, WC Docket No. 07-245, GN Docket No. 09-51, at 5–8 (filed Aug. 16, 2010) (collectively, *NTCA et al.*).

⁵ *NTCA et al.* Comments 8–10.

⁶ *NTCA et al.* Comments 10–11.

⁷ See *supra* Part V.B.

terms, and conditions of pole attachments;⁸ and adopting the lesser of a numerical or a percentage-based cap on pole orders.⁹

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

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.¹⁰ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹¹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹² 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 SBA.¹³

5. *Small Businesses.* Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.¹⁴

6. *Small Organizations.* Nationwide, as of 2002, there are approximately 1.6 million small organizations.¹⁵ A “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”¹⁶

7. *Small Governmental Jurisdictions.* The term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”¹⁷ Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.¹⁸ We estimate that, of this total, 84,377 entities were “small governmental jurisdictions.”¹⁹ Thus, we estimate that most governmental jurisdictions are small.

8. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a “small business” under the RFA is one that, inter alia, meets the pertinent small

⁸ See *supra* Part V.C.

⁹ See *supra* para. 63.

¹⁰ 5 U.S.C. § 603(b)(3).

¹¹ 5 U.S.C. § 601(6).

¹² 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.”

¹³ 15 U.S.C. § 632.

¹⁴ See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://web.sba.gov/faqs> (accessed Jan. 2009).

¹⁵ Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

¹⁶ 5 U.S.C. § 601(4).

¹⁷ 5 U.S.C. § 601(5).

¹⁸ U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, Section 8, p. 272, Table 415.

¹⁹ We assume that the villages, school districts, and special districts are small, and total 48,558. See U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, section 8, p. 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”²⁰ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.²¹ We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

9. *Incumbent Local Exchange Carriers (“ILECs”).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²² According to Commission data,²³ 1,311 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,311 carriers, an estimated 1,024 have 1,500 or fewer employees and 287 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

10. *Competitive Local Exchange Carriers (“CLECs”), Competitive Access Providers (“CAPs”), “Shared-Tenant Service Providers,” and “Other Local Service Providers.”* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁴ According to Commission data,²⁵ 1005 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 1005 carriers, an estimated 918 have 1,500 or fewer employees and 87 have more than 1,500 employees. In addition, 16 carriers have reported that they are “Shared-Tenant Service Providers,” and all 16 are estimated to have 1,500 or fewer employees. In addition, 89 carriers have reported that they are “Other Local Service Providers.” Of the 89, all have 1,500 or fewer employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities that may be affected by our proposed action.

11. *Interexchange Carriers (“IXCs”).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁶ According to Commission data,²⁷

²⁰ 15 U.S.C. § 632.

²¹ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (“Small Business Act”); 5 U.S.C. § 601(3) (“RFA”). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

²² 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517110.

²³ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “*Trends in Telephone Service*” at Table 5.3, Page 5-5 (Aug. 2008) (“*Trends in Telephone Service*”). This source uses data that are current as of November 1, 2006.

²⁴ 13 C.F.R. § 121.201, NAICS code 517110.

²⁵ “*Trends in Telephone Service*” at Table 5.3.

²⁶ 13 C.F.R. § 121.201, NAICS code 517110.

²⁷ “*Trends in Telephone Service*” at Table 5.3.

300 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 268 have 1,500 or fewer employees and 32 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXC's are small entities that may be affected by our proposed action.

12. *Satellite Telecommunications and All Other Telecommunications.* These two economic census categories address the satellite industry. The first category has a small business size standard of \$15 million or less in average annual receipts, under SBA rules.²⁸ The second has a size standard of \$25 million or less in annual receipts.²⁹ The most current Census Bureau data in this context, however, are from the (last) economic census of 2002, and we will use those figures to gauge the prevalence of small businesses in these categories.³⁰

13. 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.”³¹ For this category, Census Bureau data for 2002 show that there were a total of 371 firms that operated for the entire year.³² Of this total, 307 firms had annual receipts of under \$10 million, and 26 firms had receipts of \$10 million to \$24,999,999.³³ Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

14. The second category of All Other Telecommunications comprises, *inter alia*, “establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.”³⁴ For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year.³⁵ Of this total, 303 firms had annual receipts of under \$10 million and 15 firms had annual receipts of \$10 million to \$24,999,999.³⁶ Consequently, we estimate that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

15. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.³⁷ Prior to that time, such

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

²⁹ 13 C.F.R. § 121.201, NAICS code 517919.

³⁰ 13 C.F.R. § 121.201, NAICS codes 517410 and 517910 (2002).

³¹ U.S. Census Bureau, 2007 NAICS Definitions, “517410 Satellite Telecommunications”; <http://www.census.gov/naics/2007/def/ND517410.HTM>.

³² 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).

³³ *Id.* An additional 38 firms had annual receipts of \$25 million or more.

³⁴ U.S. Census Bureau, 2007 NAICS Definitions, “517919 All Other Telecommunications”; <http://www.census.gov/naics/2007/def/ND517919.HTM#N517919>.

³⁵ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 517910 (issued Nov. 2005).

³⁶ *Id.* An additional 14 firms had annual receipts of \$25 million or more.

³⁷ U.S. Census Bureau, 2007 NAICS Definitions, “517210 Wireless Telecommunications Categories (Except Satellite)”; <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

firms were within the now-superseded categories of "Paging" and "Cellular and Other Wireless Telecommunications."³⁸ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.³⁹ Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year.⁴⁰ Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.⁴¹ For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year.⁴² Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.⁴³ Thus, we estimate that the majority of wireless firms are small.

16. *Common Carrier Paging.* As noted, since 2007 the Census Bureau has placed paging providers within the broad economic census category of Wireless Telecommunications Carriers (except Satellite).⁴⁴ Prior to that time, such firms were within the now-superseded category of "Paging."⁴⁵ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.⁴⁶ Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior category and associated data. The data for 2002 show that there were 807 firms that operated for the entire year.⁴⁷ Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.⁴⁸ Thus, we estimate that the majority of paging firms are small.

17. In addition, in the *Paging Second Report and Order*, the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as

³⁸ U.S. Census Bureau, 2002 NAICS Definitions, "517211 Paging"; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>; U.S. Census Bureau, 2002 NAICS Definitions, "517212 Cellular and Other Wireless Telecommunications"; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

³⁹ 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

⁴⁰ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 517211 (issued Nov. 2005).

⁴¹ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

⁴² 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).

⁴³ *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."

⁴⁴ U.S. Census Bureau, 2007 NAICS Definitions, "517210 Wireless Telecommunications Categories (Except Satellite)"; <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

⁴⁵ U.S. Census Bureau, 2002 NAICS Definitions, "517211 Paging"; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

⁴⁶ 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

⁴⁷ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 517211 (issued Nov. 2005).

⁴⁸ *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."

bidding credits and installment payments.⁴⁹ A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.⁵⁰ The SBA has approved this definition.⁵¹ An initial auction of Metropolitan Economic Area (“MEA”) licenses was conducted in the year 2000. Of the 2,499 licenses auctioned, 985 were sold.⁵² Fifty-seven companies claiming small business status won 440 licenses.⁵³ A subsequent auction of MEA and Economic Area (“EA”) licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold.⁵⁴ One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.⁵⁵

18. Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service*, 281 carriers reported that they were engaged in the provision of “paging and messaging” services.⁵⁶ Of these, an estimated 279 have 1,500 or fewer employees and two have more than 1,500 employees.⁵⁷ We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

19. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).⁵⁸ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.⁵⁹ According to *Trends in Telephone Service* data, 434 carriers reported that they were engaged in wireless telephony.⁶⁰ Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees.⁶¹ We have estimated that 222 of these are small under the SBA small business size standard.

20. *Broadband Personal Communications Service.* The broadband personal communications

⁴⁹ *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, Second Report and Order, 12 FCC Rcd 2732, 2811–12, paras. 178–181 (“*Paging Second Report and Order*”); see also *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 10030, 10085–88, paras. 98–107 (1999).

⁵⁰ *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

⁵¹ See Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau (“WTB”), FCC (Dec. 2, 1998) (“*Alvarez Letter 1998*”).

⁵² See “929 and 931 MHz Paging Auction Closes,” Public Notice, 15 FCC Rcd 4858 (WTB 2000).

⁵³ See *id.*

⁵⁴ See “Lower and Upper Paging Band Auction Closes,” Public Notice, 16 FCC Rcd 21821 (WTB 2002).

⁵⁵ See “Lower and Upper Paging Bands Auction Closes,” Public Notice, 18 FCC Rcd 11154 (WTB 2003). The current number of small or very small business entities that hold wireless licenses may differ significantly from the number of such entities that won in spectrum auctions due to assignments and transfers of licenses in the secondary market over time. In addition, some of the same small business entities may have won licenses in more than one auction.

⁵⁶ “Trends in Telephone Service” at Table 5.3.

⁵⁷ “Trends in Telephone Service” at Table 5.3.

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

⁵⁹ *Id.*

⁶⁰ “Trends in Telephone Service” at Table 5.3.

⁶¹ “Trends in Telephone Service” at Table 5.3.

services ("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.⁶² 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.⁶³ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.⁶⁴ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.⁶⁵ In 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.⁶⁶

21. In 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses.⁶⁷ 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.⁶⁸ 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 71.⁶⁹ Of the 14 winning bidders, six were designated entities.⁷⁰ In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F block licenses in Auction 78.⁷¹

22. *Advanced Wireless Services.* In 2008, the Commission conducted the auction of Advanced Wireless Services ("AWS") licenses.⁷² This auction, which as 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")

⁶² See *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, 11 FCC Rcd 7824, 7850–52, paras. 57–60 (1996) ("PCS Report and Order"); see also 47 C.F.R. § 24.720(b).

⁶³ See *PCS Report and Order*, 11 FCC Rcd at 7852, para. 60.

⁶⁴ See *Alvarez Letter 1998*.

⁶⁵ FCC News, "Broadband PCS, D, E and F Block Auction Closes," No. 71744 (rel. Jan. 14, 1997).

⁶⁶ See "C, D, E, and F Block Broadband PCS Auction Closes," *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

⁶⁷ See "C and F Block Broadband PCS Auction Closes; Winning Bidders Announced," *Public Notice*, 16 FCC Rcd 2339 (2001).

⁶⁸ See "Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58," *Public Notice*, 20 FCC Rcd 3703 (2005).

⁶⁹ See "Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71," *Public Notice*, 22 FCC Rcd 9247 (2007).

⁷⁰ *Id.*

⁷¹ See *Auction of AWS-1 and Broadband PCS Licenses Rescheduled For August 13, 3008, 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").

⁷² See *AWS-1 and Broadband PCS Procedures Public Notice*, 23 FCC Rcd 7496. Auction 78 also included an auction of Broadband PCS licenses.

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 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.⁷³ Four winning bidders that identified themselves as very small businesses won 17 licenses.⁷⁴ Three of the winning bidders that identified themselves as a small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

23. *Narrowband Personal Communications Services.* In 1994, the Commission conducted an auction for Narrowband PCS licenses. A second auction was also conducted later in 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less.⁷⁵ Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.⁷⁶ To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order.⁷⁷ A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.⁷⁸ A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.⁷⁹ The SBA has approved these small business size standards.⁸⁰ A third auction was conducted in 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.⁸¹ Three of these claimed status as a small or very small entity and won 311 licenses.

24. *Cellular Radiotelephone Service.* Auction 77 was held to resolve one group of mutually exclusive applications for Cellular Radiotelephone Service licenses for unserved areas in New Mexico.⁸² Bidding credits for designated entities were not available in Auction 77.⁸³ In 2008, the Commission

⁷³ *Id.* at 23 FCC Rcd at 7521–22.

⁷⁴ 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 12749–65 (2008).

⁷⁵ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

⁷⁶ See “Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674,” *Public Notice*, PNWL 94-004 (rel. Aug. 2, 1994); “Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787,” *Public Notice*, PNWL 94-27 (rel. Nov. 9, 1994).

⁷⁷ *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476, para. 40 (2000) (“*Narrowband PCS Second Report and Order*”).

⁷⁸ *Narrowband PCS Second Report and Order*, 15 FCC Rcd at 10476, para. 40.

⁷⁹ *Id.*

⁸⁰ See *Alvarez Letter 1998*.

⁸¹ See “Narrowband PCS Auction Closes,” *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

⁸² See *Closed Auction of Licenses for Cellular Unserved Service Area Scheduled for June 17, 2008, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 77*, *Public Notice*, 23 FCC Rcd 6670 (2008).

⁸³ *Id.* at 6685.

completed the closed auction of one unserved service area in the Cellular Radiotelephone Service, designated as Auction 77. Auction 77 concluded with one provisionally winning bid for the unserved area totaling \$25,002.⁸⁴

25. *Private Land Mobile Radio ("PLMR").* PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we use the broad census category, Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.⁸⁵ The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. We note that PLMR licensees generally use the licensed facilities in support of other business activities, and therefore, it would also be helpful to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.⁸⁶

26. As of March 2010, there were 424,162 PLMR licensees operating 921,909 transmitters in the PLMR bands below 512 MHz. We note that any entity engaged in a commercial activity is eligible to hold a PLMR license, and that any revised rules in this context could therefore potentially impact small entities covering a great variety of industries.

27. *Fixed Microwave Services.* Fixed microwave services include common carrier,⁸⁷ private operational-fixed,⁸⁸ and broadcast auxiliary radio services.⁸⁹ At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.⁹⁰ The Commission does not have data specifying the number of these licensees that have no more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer common carrier fixed licensees and 61,670 or fewer private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that

⁸⁴ See Auction of Cellular Unserved Service Area License Closes, Winning Bidder Announced for Auction 77, Down Payment due July 2, 2008, Final Payment due July 17, 2008, *Public Notice*, 23 FCC Rcd 9501 (2008).

⁸⁵ See 13 C.F.R. § 121.201, NAICS code 517210.

⁸⁶ See generally 13 C.F.R. § 121.201.

⁸⁷ See 47 C.F.R. §§ 101 *et seq.* for common carrier fixed microwave services (except Multipoint Distribution Service).

⁸⁸ Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. See 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

⁸⁹ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

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

may be small and may be affected by the rules and policies proposed herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

28. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (“LMDS”) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.⁹¹ The auction of the 986 LMDS licenses began and closed in 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.⁹² An additional small business size standard for “very small business” was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁹³ The SBA has approved these small business size standards in the context of LMDS auctions.⁹⁴ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. In 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

29. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.⁹⁵ A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (“BETRS”).⁹⁶ In the present context, we will use the SBA’s small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.⁹⁷ 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 proposed herein.

30. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (“MDS”) and Multichannel Multipoint Distribution Service (“MMDS”) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) (previously referred to as the Instructional Television Fixed Service (“ITFS”).⁹⁸ In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.⁹⁹ The BRS auctions resulted

⁹¹ See *Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission’s Rules to Redesignate the 27.5–29.5 GHz Frequency Band, Reallocate the 29.5–30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689–90, para. 348 (1997) (“*LMDS Second Report and Order*”).

⁹² See *LMDS Second Report and Order*, 12 FCC Rcd at 12689–90, para. 348.

⁹³ See *id.*

⁹⁴ See *Alvarez to Phythyon Letter 1998*.

⁹⁵ The service is defined in § 22.99 of the Commission’s Rules, 47 C.F.R. § 22.99.

⁹⁶ BETRS is defined in §§ 22.757 and 22.759 of the Commission’s Rules, 47 C.F.R. §§ 22.757 and 22.759.

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

⁹⁸ *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*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995) (“*MDS Auction R&O*”).

⁹⁹ 47 C.F.R. § 21.961(b)(1).

in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (“BTAs”). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.¹⁰⁰ After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission’s rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.¹⁰¹ The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid.¹⁰² Auction 86 concluded in 2009 with the sale of 61 licenses.¹⁰³ Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

31. In addition, the SBA’s Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.¹⁰⁴ Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”¹⁰⁵ The SBA has developed a small business-size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.¹⁰⁶ According to Census Bureau data for 2002, there were a total of

¹⁰⁰ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard.

¹⁰¹ Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86, *Public Notice*, 24 FCC Rcd 8277 (2009).

¹⁰² *Id.* at 8296.

¹⁰³ Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period, *Public Notice*, 24 FCC Rcd 13572 (2009).

¹⁰⁴ The term “small entity” within 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.

¹⁰⁵ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

¹⁰⁶ 13 C.F.R. § 121.201, NAICS code 517110.

1,191 firms in this previous category that operated for the entire year.¹⁰⁷ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.¹⁰⁸ Thus, the majority of these firms can be considered small.

32. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”¹⁰⁹ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.¹¹⁰ According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.¹¹¹ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.¹¹² Thus, the majority of these firms can be considered small.

33. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.¹¹³ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.¹¹⁴ In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.¹¹⁵ Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have fewer than 10,000 subscribers, and an additional 302 systems have 10,000-19,999 subscribers.¹¹⁶ Thus, under this second size standard, most cable systems are small.

34. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a

¹⁰⁷ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

¹⁰⁸ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

¹⁰⁹ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

¹¹⁰ 13 C.F.R. § 121.201, NAICS code 517110.

¹¹¹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

¹¹² *Id.* An additional 61 firms had annual receipts of \$25 million or more.

¹¹³ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

¹¹⁴ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

¹¹⁵ 47 C.F.R. § 76.901(c).

¹¹⁶ Warren Communications News, *Television & Cable Factbook 2008*, “U.S. Cable Systems by Subscriber Size,” page F-2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”¹¹⁷ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.¹¹⁸ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.¹¹⁹ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,¹²⁰ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

35. *Open Video Systems.* The open video system (“OVS”) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.¹²¹ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,¹²² OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”¹²³ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for such services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.¹²⁴ According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.¹²⁵ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.¹²⁶ Thus, the majority of cable firms can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service.¹²⁷ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or

¹¹⁷ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn.1-3.

¹¹⁸ 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

¹¹⁹ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

¹²⁰ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. See 47 C.F.R. § 76.909(b).

¹²¹ 47 U.S.C. § 571(a)(3)-(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report*, 24 FCC Rcd 542, 606 para. 135 (2009) (“*Thirteenth Annual Cable Competition Report*”).

¹²² See 47 U.S.C. § 573.

¹²³ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

¹²⁴ 13 C.F.R. § 121.201, NAICS code 517110.

¹²⁵ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

¹²⁶ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

¹²⁷ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsr.html>.

local OVS franchises.¹²⁸ The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

36. *Cable Television Relay Service.* This service includes transmitters generally used to relay cable programming within cable television system distribution systems. This cable service is defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."¹²⁹ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.¹³⁰ According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.¹³¹ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.¹³² Thus, the majority of these firms can be considered small.

37. *Multichannel Video Distribution and Data Service.* MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding \$40 million for the preceding three years.¹³³ These definitions were approved by the SBA.¹³⁴ On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.¹³⁵ Eight of the ten winning bidders claimed small business status and won 144 of the licenses.

¹²⁸ See *Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07 para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

¹²⁹ U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

¹³⁰ 13 C.F.R. § 121.201, NAICS code 517110.

¹³¹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

¹³² *Id.* An additional 61 firms had annual receipts of \$25 million or more.

¹³³ *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licenses and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to provide A Fixed Service in the 12.2-12.7 GHz Band*, ET Docket No. 98-206, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, para. 252 (2002).

¹³⁴ See Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb.13, 2002).

¹³⁵ See "Multichannel Video Distribution and Data Service Auction Closes," Public Notice, 19 FCC Rcd 1834 (2004).

The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.¹³⁶

38. *Internet Service Providers.* The 2007 Economic Census places these firms, whose services might include voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications connections (e.g. cable and DSL, ISPs), or over client-supplied telecommunications connections (e.g. dial-up ISPs). The former are within the category of Wired Telecommunications Carriers,¹³⁷ which has an SBA small business size standard of 1,500 or fewer employees.¹³⁸ The latter are within the category of All Other Telecommunications,¹³⁹ which has a size standard of annual receipts of \$25 million or less.¹⁴⁰ The most current Census Bureau data for all such firms, however, are the 2002 data for the previous census category called Internet Service Providers.¹⁴¹ That category had a small business size standard of \$21 million or less in annual receipts, which was revised in late 2005 to \$23 million. The 2002 data show that there were 2,529 such firms that operated for the entire year.¹⁴² Of those, 2,437 firms had annual receipts of under \$10 million, and an additional 47 firms had receipts of between \$10 million and \$24,999,999.¹⁴³ Consequently, we estimate that the majority of ISP firms are small entities.

39. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer."¹⁴⁴ This category includes Electric Power Distribution, Hydroelectric Power Generation, Fossil Fuel Power Generation, Nuclear Electric Power Generation, and Other Electric Power Generation. The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours."¹⁴⁵ According to Census Bureau data for 2002, there

¹³⁶ See "Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63," Public Notice, 20 FCC Rcd 19807 (2005).

¹³⁷ U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers", <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

¹³⁸ 13 C.F.R. § 121.201, NAICS code 517110 (updated for inflation in 2008).

¹³⁹ U.S. Census Bureau, 2007 NAICS Definitions, "517919 All Other Telecommunications"; <http://www.census.gov/naics/2007/def/ND517919.HTM#N517919>.

¹⁴⁰ 13 C.F.R. § 121.201, NAICS code 517919 (updated for inflation in 2008).

¹⁴¹ U.S. Census Bureau, "2002 NAICS Definitions, "518111 Internet Service Providers"; <http://www.census.gov/eped/naics02/def/NDEF518.HTM>.

¹⁴² 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).

¹⁴³ An additional 45 firms had receipts of \$25 million or more.

¹⁴⁴ U.S. Census Bureau, 2002 NAICS Definitions, "2211 Electric Power Generation, Transmission and Distribution"; <http://www.census.gov/eped/naics02/def/NDEF221.HTM>.

¹⁴⁵ 13 C.F.R. § 121.201, NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, footnote 1.

were 1,644 firms in this category that operated for the entire year.¹⁴⁶ Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

40. *Natural Gas Distribution.* This economic census category comprises: “(1) establishments primarily engaged in operating gas distribution systems (e.g., mains, meters); (2) establishments known as gas marketers that buy gas from the well and sell it to a distribution system; (3) establishments known as gas brokers or agents that arrange the sale of gas over gas distribution systems operated by others; and (4) establishments primarily engaged in transmitting and distributing gas to final consumers.”¹⁴⁷ The SBA has developed a small business size standard for this industry, which is: all such firms having 500 or fewer employees.¹⁴⁸ According to Census Bureau data for 2002, there were 468 firms in this category that operated for the entire year.¹⁴⁹ Of this total, 424 firms had employment of fewer than 500 employees, and 18 firms had employment of 500 to 999 employees.¹⁵⁰ Thus, the majority of firms in this category can be considered small.

41. *Water Supply and Irrigation Systems.* This economic census category “comprises establishments primarily engaged in operating water treatment plants and/or operating water supply systems.”¹⁵¹ The SBA has developed a small business size standard for this industry, which is: all such firms having \$6.5 million or less in annual receipts.¹⁵² According to Census Bureau data for 2002, there were 3,830 firms in this category that operated for the entire year.¹⁵³ Of this total, 3,757 firms had annual sales of less than \$5 million, and 37 firms had sales of \$5 million or more but less than \$10 million.¹⁵⁴ Thus, the majority of firms in this category can be considered small.

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

42. The timeline for access to poles that we adopt today will marginally affect recordkeeping and compliance requirements for utilities and attachers. We anticipate that utilities and attachers will modify their recordkeeping regarding the performance of make-ready work, including timeliness, safety, and capacity, in order to show compliance with the timeline in the case of a dispute.¹⁵⁵ The notification

¹⁴⁶ U.S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS codes 221111, 221112, 221113, 221119, 221121, 221122 (issued Nov. 2005).

¹⁴⁷ U.S. Census Bureau, 2007 NAICS Definitions, “221210 Natural Gas Distribution”; <http://www.census.gov/epcd/naics02/def/ND221210.HTM>.

¹⁴⁸ 13 C.F.R. § 121.201, NAICS code 221210.

¹⁴⁹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: 2002 (Including Legal Form of Organization),” Table 5, NAICS code 221210 (issued November 2005).

¹⁵⁰ *Id.* An additional 26 firms had employment of over 1,000 employees.

¹⁵¹ U.S. Census Bureau, 2007 NAICS Definitions, “221310 Water Supply and Irrigation Systems” (partial definition); <http://www.census.gov/naics/2007/def/ND221310.HTM>.

¹⁵² 13 C.F.R. § 121.201, NAICS code 221310.

¹⁵³ U.S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: 2002 (Including Legal Form of Organization),” Table 4, NAICS code 221310 (issued November 2005).

¹⁵⁴ *Id.* An additional 36 firms had annual sales of \$10 million or more.

¹⁵⁵ *See supra* App. A (47 C.F.R. § 1.1420).

rule requires the inclusion of certain information in make-ready notifications sent to other attachers.¹⁵⁶ We also anticipate that the rule regarding the publication of qualified third-party contract workers will involve more recordkeeping for utilities that must maintain and make available the list to prospective attachers.¹⁵⁷ However, we expect the costs of complying with these rules to be minimal, since they do not measurably differ from the requirements in place before the adoption of this order.

43. The changes we adopt today in the enforcement process, specifically for pole attachment complaints, similarly do not produce significant differences in recordkeeping and compliance requirements from the requirements in place before the adoption of this order. For example, although our decision to permit recovery of a monetary award to extend as far back as the appropriate statute of limitations allows, rather than beginning the award period with the filing of the complaint (*see* Section IV.C. *supra*), may increase the period of time over which a complainant must produce data to support its monetary claim, we have not adopted any requirements of data collection or filing *per se*.

44. We expect the costs of complying with the new rules affecting attachment rates to be minimal, since any of these compliance costs do not significantly differ from requirements in place before the adoption of this Order.

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

45. The RFA requires an agency to describe 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.¹⁵⁸

46. The specific timeline and additional rules adopted in this Order provide a predictable, timely process for parties to seek and obtain pole attachments, while maintaining a utility's interest in preserving safety, reliability, and sound engineering. We do not adopt different requirements for small entities because we expect the economic impact on small entities to be minimal. Since we cap the number of poles subject to the timeline based on the lesser of a numerical cap or a percentage of poles owned by a utility in a state, small entities do not undergo any disproportionate hardship.¹⁵⁹ The 100 pole order cap proposed by NTCA *et al.* does not achieve the same benefit for small entities because it is not specifically tailored to the size of the entity. Also, it is unlikely that the timeline will result in any significant recordkeeping burdens for small entities since prudent utilities and attachers already keep records regarding make-ready work and pole capacity and we do not impose any additional information collection requirements. Similarly, identifying the contractors that utilities themselves already use to prospective attachers should not require an additional resource burden. Finally, the Commission does not have authority to regulate (and the proposed rules, thus, do not apply to) small utilities that are municipally or cooperatively owned.

47. Further, in this Order, the Commission revises the section 224(e) rental rate for pole attachments used by telecommunications carriers to provide telecommunications services. This new telecom rate generally will recover the same portion of pole costs as the current cable rate. The new formula will minimize the difference in rental rates paid for attachments that are used to provide voice,

¹⁵⁶ *See supra* App. A (47 C.F.R. § 1.1420).

¹⁵⁷ *See supra* App. A (47 C.F.R. § 1.1422).

¹⁵⁸ 5 U.S.C. § 603(c).

¹⁵⁹ *See supra* para. 63.

data, and video services, and thus will help remove market distortions that pose barriers to deployment of new services by small cable and telecommunications providers. The Commission also revisits its prior interpretation of the statute and allows incumbent LECs to file pole attachment complaints before the Commission if they are unable to negotiate just and reasonable rates, terms, and conditions with other pole owners. Thus, we believe that the rules adopted in this Order to ensure that pole attachment rates are just and reasonable will have a positive economic benefit on small entities in areas that fall under the Commission's regulatory jurisdiction, rather than an adverse impact.

48. Specifically, NTCA *et al.* asserts that small rural incumbent LECs are concerned about unreasonably high rates and “face difficulties in negotiating and, in some cases, litigating contractual terms for pole attachments.”¹⁶⁰ NCTA *et al.* also asserts that “[t]he Commission’s current pole attachment rules effectively deny rural ILECs a remedy against unreasonable pole attachment provisions which has a significant economic impact on a substantial number of small ILECs.”¹⁶¹ NTCA requested that the Commission adopt a “remedy mechanism by which [rural ILECs] can present claims of unjust or unreasonable pole attachment rates, terms and conditions imposed by utilities” – and stated that such a provision “would reduce the economic impact on small rural communications providers.”¹⁶² The Commission, in fact, adopts such a rule in this Order – allowing incumbent LECs to file pole attachment complaints. Further, the Commission provides guidance regarding its approach to evaluating those complaints and what the appropriate rate may be.

49. Also in this Order, the Commission responds to small cable operator concerns about “possible increases in rates for comingled Internet and video services,” as noted by the U.S. Small Business Administration.¹⁶³ Addressing the role of the new telecom rate in the context of comingled services, the Commission recognized concerns by some cable operators¹⁶⁴ that pole owners may seek to impose rates higher than both the cable rate and the new telecom rate where cable operators or telecommunications carriers also provide services, such as VoIP, that have not been classified.¹⁶⁵ The Commission stated that this outcome would be contrary to its policy goals here in which it adopts a lower and more uniform attachment rate to reduce the disparity in pole rental rates among providers of competing services to minimize disputes resulting from the disparity between cable and pre-existing higher telecom rates.¹⁶⁶ This disparity has acted to deter investment and network expansion for new services by cable providers because of the risk that some of those services could potentially be classified as “telecommunications services” – triggering disputes and litigation as to whether the higher telecom rate should be applied over their entire pole attachment network. The Commission also makes clear that the use of pole attachments by telecommunications carriers or cable operators to provide comingled services does not remove them from the pole rate regulation framework, and that rates generally will not be considered just and reasonable if they exceed the new telecom rate.¹⁶⁷

50. In addition, the new rate for attachments used by telecommunications carriers will have a positive economic impact on small competitive LECs. It will minimize competitive disadvantages that

¹⁶⁰ NTCA *et al.* at 6.

¹⁶¹ NTCA *et al.* at 9.

¹⁶² NTCA *et al.* at 9–10.

¹⁶³ U.S. Small Business Administration, Office of Advocacy, Comments, GN Docket No. 10-188, at 8 (filed Oct. 15, 2010).

¹⁶⁴ See, e.g., Bright House Comments at 2, 12–14; Bright House Reply at 3–5.

¹⁶⁵ See *supra* Part V.B.1.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

these carriers faced by having to pay higher rates for these key inputs to communications services. The Order also confirms that wireless carriers are entitled to the same rate under the statute as other telecommunications carriers. Specifically, the Commission explains that wireless carriers are entitled to the benefits and protection of section 224, including the right to the telecom rate under section 224(e), in response to reports by the wireless industry of cases where wireless providers were not afforded the regulated rate and instead had been charged higher rates that were unreasonable.¹⁶⁸

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

51. None.

¹⁶⁸ *See id.*