

standard, the majority of these Interexchange carriers can be considered small entities.¹³⁵ According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.¹³⁶ Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.¹³⁷ Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by rules adopted pursuant to the NPRM.

66. *Operator Service Providers (OSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹³⁸ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Interexchange carriers can be considered small entities.¹³⁹ According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and 2 have more than 1,500 employees.¹⁴⁰ Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed rules.

67. *Local Resellers*. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁴¹ Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000.¹⁴² Thus under this category and the associated small business size standard, the majority of these local resellers can be considered small entities. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.¹⁴³ Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.¹⁴⁴ Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by rules adopted pursuant to the Notice.

68. *Toll Resellers*. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer

¹³⁵ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en

¹³⁶ See *Trends in Telephone Service* at Table 5.3.

¹³⁷ *Id.*

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

¹³⁹ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en

¹⁴⁰ TRENDS IN TELEPHONE SERVICE, tbl. 5.3.

¹⁴¹ 13 C.F.R. § 121.201, NAICS code 517911.

¹⁴² http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=800&-ds_name=EC0751SSSZ5&-lang=en

¹⁴³ See *Trends in Telephone Service* at Table 5.3.

¹⁴⁴ *Id.*

employees.¹⁴⁵ Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000.¹⁴⁶ Thus under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data,¹⁴⁷ 881 carriers have reported that they are engaged in the provision of toll resale services. Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our proposed rules.

69. *Payphone Service Providers (PSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁴⁸ Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these PSPs can be considered small entities.¹⁴⁹ According to Commission data,¹⁵⁰ 657 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 653 have 1,500 or fewer employees and four have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our action.

70. *Prepaid Calling Card Providers*. Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁵¹ Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000.¹⁵² Thus under this category and the associated small business size standard, the majority of these prepaid calling card providers can be considered small entities. According to Commission data, 193 carriers have reported that they are engaged in the provision of prepaid calling cards.¹⁵³ Of these, all 193 have 1,500 or fewer employees and none have more than 1,500 employees.¹⁵⁴ Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by rules adopted pursuant to the Notice.

¹⁴⁵ 13 C.F.R. § 121.201, NAICS code 517911.

¹⁴⁶ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en

¹⁴⁷ TRENDS IN TELEPHONE SERVICE, tbl. 5.3.

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

¹⁴⁹ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en

¹⁵⁰ TRENDS IN TELEPHONE SERVICE, tbl. 5.3.

¹⁵¹ 13 C.F.R. § 121.201, NAICS code 517911.

¹⁵² http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en

¹⁵³ See *Trends in Telephone Service* at Table 5.3.

¹⁵⁴ *Id.*

71. *800 and 800-Like Service Subscribers.*¹⁵⁵ Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service (“toll free”) subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁵⁶ Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000.¹⁵⁷ Thus under this category and the associated small business size standard, the majority of resellers in this classification can be considered small entities. To focus specifically on the number of subscribers than on those firms which make subscription service available, the most reliable source of information regarding the number of these service subscribers appears to be data the Commission collects on the 800, 888, 877, and 866 numbers in use.¹⁵⁸ According to our data for September 2009, the number of 800 numbers assigned was 7,860,000; the number of 888 numbers assigned was 5,888,687; the number of 877 numbers assigned was 4,721,866; and the number of 866 numbers assigned was 7,867,736. The Commission does not have data specifying the number of these subscribers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, the Commission estimates that there are 7,860,000 or fewer small entity 800 subscribers; 5,888,687 or fewer small entity 888 subscribers; 4,721,866 or fewer small entity 877 subscribers; and 7,867,736 or fewer small entity 866 subscribers.

d. Wireless Carriers and Service Providers

72. Below, for those services where licenses are subject to auctions, the Commission notes that, as a general matter, the number of winning bidders that qualify as small businesses at the close of a given auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

73. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.¹⁵⁹ Prior to that time, such firms were within the now-superseded categories of “Paging” and “Cellular and Other Wireless Telecommunications.”¹⁶⁰ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.¹⁶¹ For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.¹⁶² Of those 1,383, 1,368 had

¹⁵⁵ We include all toll-free number subscribers in this category, including those for 888 numbers.

¹⁵⁶ 13 C.F.R. § 121.201, NAICS code 517911.

¹⁵⁷ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en

¹⁵⁸ *Trends in Telephone Service* at Tables 18.4, 18.5, 18.6, 18.7.

¹⁵⁹ U.S. Census Bureau, 2007 NAICS Definitions, “517210 Wireless Telecommunications Categories (Except Satellite)”;
<http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

¹⁶⁰ 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>.

¹⁶¹ 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).

¹⁶² U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009),
http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-
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fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.¹⁶³ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.¹⁶⁴ Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

74. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined “small business” for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the three preceding years.¹⁶⁵ The SBA has approved these definitions.¹⁶⁶ 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, seven bidders won 31 licenses that qualified as very small business entities, and one bidder won one license that qualified as a small business entity.

75. *Common Carrier Paging.* The SBA considers paging to be a wireless telecommunications service and classifies it under the industry classification Wireless Telecommunications Carriers (except satellite). Under that classification, the applicable size standard is that a business is small if it has 1,500 or fewer employees. For the general category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.¹⁶⁷ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.¹⁶⁸ The 2007 census also contains data for the specific category of “Paging” “that is classified under the seven-number NAICS code 5172101.”¹⁶⁹ According to Commission data, 291 carriers have reported that they are engaged in Paging or Messaging Service. Of these, an estimated 289 have 1,500 or fewer employees, and 2 have more than 1,500 employees.¹⁷⁰ Consequently, the Commission estimates that the majority of

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ds_name=EC0751SSSZ5&-_lang=en.

¹⁶³ See *Trends in Telephone Service* at Table 5.3.

¹⁶⁴ *Id.*.

¹⁶⁵ *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS)*, GN Docket No. 96-228, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

¹⁶⁶ See Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (filed Dec. 2, 1998) (*Alvarez Letter 1998*).

¹⁶⁷ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

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

¹⁶⁹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en In this specific category, there were 248 firms that operated for the entire year in 2007. Of that number 247 operated with fewer than 100 employees and one (1) operated with more than 1000 employees. Based on this classification and the associated size standard, the majority of paging firms must be considered small.

¹⁷⁰ See *Trends in Telephone Service* at Table 5.3.

paging providers are small entities that may be affected by our action. In addition, in the *220 MHz Third Report and Order*, the Commission developed a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.¹⁷¹ A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.¹⁷² The SBA has approved these small business size standards.¹⁷³ An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.¹⁷⁴ Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won.

76. *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).¹⁷⁵ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.¹⁷⁶ Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.¹⁷⁷ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. According to Trends in Telephone Service data, 434 carriers reported that they were engaged in wireless telephony.¹⁷⁸ Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees.¹⁷⁹ Therefore, approximately half of these entities can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.¹⁸⁰ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.¹⁸¹ Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

¹⁷¹ *Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70, paras. 291-295 (1997) (“*220 MHz Third Report and Order*”).

¹⁷² See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (Dec. 2, 1998).

¹⁷³ *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, 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, paras. 98-107 (1999).

¹⁷⁴ *Id.* at 10085, para. 98.

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

¹⁷⁶ *Id.*

¹⁷⁷ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁷⁸ TRENDS IN TELEPHONE SERVICE, tbl. 5.3.

¹⁷⁹ *Id.*

¹⁸⁰ See *Trends in Telephone Service* at Table 5.3.

¹⁸¹ See *id.*

77. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a “small business” for C- and F-Block licenses as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.¹⁸² For F-Block licenses, 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.¹⁸³ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.¹⁸⁴ 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 claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small business status won approximately 40 percent of the 1,479 licenses in the first auction for the D, E, and F Blocks.¹⁸⁵ On April 15, 1999, the Commission completed the reauction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22.¹⁸⁶ Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

78. On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 claimed small business status.¹⁸⁷ 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. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No. 58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses.¹⁸⁸ On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71.¹⁸⁹ Of the 12 winning bidders in that auction, five claimed small business status and won 18 licenses.¹⁹⁰ On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block

¹⁸² See *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule*; WT Docket No. 96-59, GN Docket No. 90-314, 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).

¹⁸³ See *PCS Report and Order*, 11 FCC Rcd at 7852, para. 60.

¹⁸⁴ See *Alvarez Letter 1998*.

¹⁸⁵ See *Broadband PCS, D, E and F Block Auction Closes*, Public Notice, Doc. No. 89838 (rel. Jan. 14, 1997).

¹⁸⁶ See *C, D, E, and F Block Broadband PCS Auction Closes*, Public Notice, 14 FCC Rcd 6688 (WTB 1999). Before Auction No. 22, the Commission established a very small standard for the C Block to match the standard used for F Block. *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, Fourth Report and Order, 13 FCC Rcd 15743, 15768, para. 46 (1998).

¹⁸⁷ See *C and F Block Broadband PCS Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 2339 (2001).

¹⁸⁸ See *Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58*, Public Notice, 20 FCC Rcd 3703 (2005).

¹⁸⁹ See *Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71*, Public Notice, 22 FCC Rcd 9247 (2007).

¹⁹⁰ *Id.*

Broadband PCS licenses in Auction No. 78.¹⁹¹ Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.¹⁹²

79. *Narrowband Personal Communications Services.* To date, two auctions of narrowband personal communications services (PCS) licenses have been conducted. For purposes of the two auctions that have already been held, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.¹⁹³ A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million. A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million. The SBA has approved these small business size standards.¹⁹⁴

80. *220 MHz Radio Service – Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, the Commission applies the small business size standard under the SBA rules applicable. The SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.¹⁹⁵ For this service, the SBA uses the category of Wireless Telecommunications Carriers (except Satellite). Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.¹⁹⁶ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

81. *220 MHz Radio Service – Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, the Commission adopted a small business size standard for “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.¹⁹⁷ This small business size standard

¹⁹¹ See *Auction of AWS-1 and Broadband PCS Licenses Closes; Winning Bidders Announced for Auction 78*, Public Notice, 23 FCC Rcd 12749 (WTB 2008).

¹⁹² *Id.*

¹⁹³ *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS*, GEN Docket No. 90-314, ET Docket No. 92-100, PP Docket No. 93-253, Second Report and Order and Second Further Notice of Proposed Rulemaking, 15 FCC Rcd 10456 (2000) (“*Narrowband PCS Second Report and Order*”).

¹⁹⁴ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Dec. 2, 1998).

¹⁹⁵ 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).

¹⁹⁶ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

¹⁹⁷ *220 MHz Third Report and Order*, 12 FCC Rcd at 11068-70, at paras. 291-95.

indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.¹⁹⁸ A “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years. The SBA has approved these small business size standards.¹⁹⁹ Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.²⁰⁰ In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.²⁰¹

82. *800 MHz and 900 MHz Specialized Mobile Radio Licenses.* The Commission awards small business bidding credits in auctions for Specialized Mobile Radio (“SMR”) geographic area licenses in the 800 MHz and 900 MHz bands to entities that had revenues of no more than \$15 million in each of the three previous calendar years.²⁰² The Commission awards very small business bidding credits to entities that had revenues of no more than \$3 million in each of the three previous calendar years.²⁰³ The SBA has approved these small business size standards for the 800 MHz and 900 MHz SMR Services.²⁰⁴ The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction was completed in 1996.²⁰⁵ 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.²⁰⁶ The 800 MHz SMR auction for the upper 200 channels was conducted in 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.²⁰⁷ A second auction for the 800 MHz band was conducted in 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.²⁰⁸

83. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels was conducted in 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15

¹⁹⁸ *Id.* at 11068-70, para. 291.

¹⁹⁹ See letter to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

²⁰⁰ See generally *220 MHz Service Auction Closes*, Public Notice, 14 FCC Rcd 605 (1998).

²⁰¹ *Phase II 220 MHz Service Spectrum Auction Closes*, Public Notice, 14 FCC Rcd 11218 (1999).

²⁰² 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

²⁰³ 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

²⁰⁴ See *Alvarez Letter 1999*.

²⁰⁵ “FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas: Down Payments due April 22, 1996, FCC Form 600s due April 29, 1996,” *Public Notice*, 11 FCC Rcd 18599 (WTB 1996).

²⁰⁶ *Id.*

²⁰⁷ 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*, 11 FCC Rcd 18,637 (WTB 1996).

²⁰⁸ See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

million size standard.²⁰⁹ In an auction completed in 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.²¹⁰ 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 claimed status as small business.

84. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR 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 1,500 or fewer employees.²¹¹ We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

85. *700 MHz Guard Band Licensees.* In 2000, in the 700 MHz Guard Band 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.²¹² 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.²¹³ 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.²¹⁴ SBA approval of these definitions is not required.²¹⁵ An auction of 52 Major Economic Area licenses commenced on September 6, 2000, and closed on September 21, 2000.²¹⁶ Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.²¹⁷

86. *Air-Ground Radiotelephone Service.* The Commission has previously used 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.²¹⁸ There are approximately 100 licensees in the Air-

²⁰⁹ See “800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Closes; Winning Bidders Announced,” *Public Notice*, 15 FCC Rcd 17162 (WTB 2000).

²¹⁰ See, “800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 1736 (WTB 2000).

²¹¹ See generally 13 C.F.R. § 121.201, NAICS code 517210.

²¹² See *Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 99-168, Second Report and Order, 15 FCC Rcd 5299 (2000) (*746–764 MHz Band Second Report and Order*).

²¹³ See *746–764 MHz Band Second Report and Order*, 15 FCC Rcd at 5343, para. 108.

²¹⁴ *Id.*

²¹⁵ See *id.* at 5343, para. 108 n.246 (for the 746–764 MHz and 776–794 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

²¹⁶ See *700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 15 FCC Rcd 18026 (WTB 2000).

²¹⁷ See *700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 16 FCC Rcd 4590 (WTB 2001).

²¹⁸ 13 C.F.R. § 121.201, NAICS codes 517210.

Ground Radiotelephone Service, and under that definition, the Commission estimates that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined “small business” as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$40 million.²¹⁹ A “very small business” is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$15 million.²²⁰ These definitions were approved by the SBA.²²¹ In May 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction No. 65). On June 2, 2006, the auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

87. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.²²² A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS).²²³ For purposes of its analysis of the Rural Radiotelephone Service, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite),” which is 1,500 or fewer employees.²²⁴ Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.²²⁵ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms in the Rural Radiotelephone Service can be considered small.

88. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite),” which is 1,500 or fewer employees.²²⁶ Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.²²⁷ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100

²¹⁹ *Amendment of Part 22 of the Commission’s Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission’s Rules, Amendment of Parts 1 and 22 of the Commission’s Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service*, WT Docket Nos. 03-103, 05-42, Order on Reconsideration and Report and Order, 20 FCC Rcd 19663, paras. 28–42 (2005).

²²⁰ *Id.*

²²¹ See Letter from Hector V. Barreto, Administrator, SBA, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, FCC (filed Sept. 19, 2005).

²²² The service is defined in section 22.99 of the Commission’s Rules, 47 C.F.R. § 22.99.

²²³ BETRS is defined in sections 22.757 and 22.759 of the Commission’s Rules, 47 C.F.R. §§ 22.757 and 22.759.

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

²²⁵ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

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

²²⁷ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&- (continued....)

employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

89. *Fixed Microwave Services.* Microwave services include common carrier,²²⁸ private-operational fixed,²²⁹ and broadcast auxiliary radio services.²³⁰ They also include the Local Multipoint Distribution Service (LMDS),²³¹ the Digital Electronic Message Service (DEMS),²³² and the 24 GHz Service,²³³ where licensees can choose between common carrier and non-common carrier status.²³⁴ The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, the Commission will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons is considered small.²³⁵ For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.²³⁶ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

90. *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.²³⁷ There are presently approximately 55 licensees in this service. The Commission is unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for the category of Wireless Telecommunications Carriers (except Satellite). Under that standard.²³⁸ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.²³⁹ Census data for 2007, which supersede data from the 2002 Census, show that there

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²²⁸ See 47 C.F.R. Part 101, Subparts C and I.

²²⁹ See 47 C.F.R. Part 101, Subparts C and H.

²³⁰ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. Part 74. 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 TV pickups, which relay signals from a remote location back to the studio.

²³¹ See 47 C.F.R. Part 101, Subpart L.

²³² See 47 C.F.R. Part 101, Subpart G.

²³³ See *id.*

²³⁴ See 47 C.F.R. §§ 101.533, 101.1017.

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

²³⁶ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

²³⁷ This service is governed by Subpart I of Part 22 of the Commission's Rules. See 47 C.F.R. §§ 22.1001-22.1037.

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

²³⁹ *Id.*

were 1,383 firms that operated that year.²⁴⁰ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

91. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of \$40 million or less in the three previous calendar years.²⁴¹ An additional size standard for “very small business” is: an entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.²⁴² The SBA has approved these small business size standards.²⁴³ The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by our action.

92. *Wireless Cable Systems. 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)).²⁴⁴ 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.²⁴⁵ The BRS auctions resulted 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.²⁴⁶ 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

²⁴⁰ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

²⁴¹ See *Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, PP Docket No. 93-253, Report and Order, 12 FCC Rcd 18600 (1998).

²⁴² *Id.*

²⁴³ See Letter to Kathleen O’Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998).

²⁴⁴ *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, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

²⁴⁵ 47 C.F.R. § 21.961(b)(1).

²⁴⁶ 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 of 1500 or fewer employees.

conducted Auction 86, the sale of 78 licenses in the BRS areas.²⁴⁷ 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.²⁴⁸ Auction 86 concluded in 2009 with the sale of 61 licenses.²⁴⁹ 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.

93. 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.²⁵⁰ 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."²⁵¹ For these services, the Commission uses the SBA small business size standard for the category "Wireless Telecommunications Carriers (except satellite)," which is 1,500 or fewer employees.²⁵² To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.²⁵³ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census' use the classifications "firms" does not track the number of "licenses".

²⁴⁷ *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).

²⁴⁸ *Id.* at 8296.

²⁴⁹ *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).

²⁵⁰ 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.

²⁵¹ U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110.

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

²⁵³ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-lang=en.

94. In the 1998 and 1999 LMDS auctions,²⁵⁴ the Commission defined a small business as an entity that has annual average gross revenues of less than \$40 million in the previous three calendar years.²⁵⁵ Moreover, the Commission added an additional classification for a “very small business,” which was defined as an entity that had annual average gross revenues of less than \$15 million in the previous three calendar years.²⁵⁶ These definitions of “small business” and “very small business” in the context of the LMDS auctions have been approved by the SBA.²⁵⁷ In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, the Commission believes that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission’s auction rules.

95. *218-219 MHz Service.* The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.²⁵⁸ In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, the Commission established a small business size standard for a “small business” as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed \$15 million for the preceding three years.²⁵⁹ A “very small business” is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed \$3 million for the preceding three years.²⁶⁰ These size standards will be used in future auctions of 218-219 MHz spectrum.

96. *24 GHz – Incumbent Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. For this service, the Commission uses the SBA small business size standard for the category “Wireless Telecommunications Carriers (except satellite),” which is 1,500 or fewer employees.²⁶¹ To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.²⁶² Of those 1,383, 1,368 had fewer than 100 employees,

²⁵⁴ The Commission has held two LMDS auctions: Auction 17 and Auction 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998. (104 bidders won 864 licenses.) Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999. (40 bidders won 161 licenses.)

²⁵⁵ See *LMDS Order*, 12 FCC Rcd at 12545.

²⁵⁶ *Id.*

²⁵⁷ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

²⁵⁸ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

²⁵⁹ *Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999)(“*218-219 MHz Report and Order and Memorandum Opinion and Order*”).

²⁶⁰ *Id.*

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

²⁶² U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), (continued....)

and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census' use of the classifications "firms" does not track the number of "licenses". The Commission believes that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent²⁶³ and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

97. *24 GHz – Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for "small business" is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of \$15 million.²⁶⁴ "Very small business" in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.²⁶⁵ The SBA has approved these small business size standards.²⁶⁶ These size standards will apply to the future auction, if held.

98. *Satellite Telecommunications Providers.* 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.²⁶⁷ The second has a size standard of \$25 million or less in annual receipts.²⁶⁸

99. 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."²⁶⁹ Census Bureau data for 2007 show that 512 Satellite Telecommunications firms that operated for that entire year.²⁷⁰ Of this total, 464 firms had annual receipts of under \$10 million, and 18 firms had receipts of \$10 million to \$24,999,999.²⁷¹ Consequently,

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http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

²⁶³ Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

²⁶⁴ *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967 at para. 77 (2000); *see also* 47 C.F.R. § 101.538(a)(2).

²⁶⁵ *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967 at para. 77 (2000); *see also* 47 C.F.R. § 101.538(a)(1).

²⁶⁶ *See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

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

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

²⁶⁹ U.S. Census Bureau, 2007 NAICS Definitions, "517410 Satellite Telecommunications," .

²⁷⁰ *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

²⁷¹ . http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en

the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

100. The second category, i.e. “All Other Telecommunications” comprises “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. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.”²⁷² For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year.²⁷³ Of this total, 2,347 firms had annual receipts of under \$25 million and 12 firms had annual receipts of \$25 million to \$49, 999,999.²⁷⁴ Consequently, the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

e. Cable and OVS Operators

101. Because section 706 requires us to monitor the deployment of broadband regardless of technology or transmission media employed, the Commission anticipates that some broadband service providers may not provide telephone service. Accordingly, the Commission describes below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

102. *Cable and Other Program Distributors.* 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.”²⁷⁵ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year.²⁷⁶ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of such firms can be considered small.

103. *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

²⁷² <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search>

²⁷³ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

²⁷⁴ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

²⁷⁵ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers,” (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110> (last visited Oct. 21, 2009).

²⁷⁶ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

cable company” is one serving 400,000 or fewer subscribers, nationwide.²⁷⁷ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.²⁷⁸ In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.²⁷⁹ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers.²⁸⁰ Thus, under this second size standard, most cable systems are small.

104. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a 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.”²⁸¹ 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.²⁸² Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.²⁸³ 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,²⁸⁴ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

105. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.²⁸⁵ 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.²⁸⁶ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,²⁸⁷ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications

²⁷⁷ 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).

²⁷⁸ See BROADCASTING & CABLE YEARBOOK 2006, at A-8, C-2 (Harry A. Jessell ed., 2005) (data current as of June 30, 2005); TELEVISION & CABLE FACTBOOK 2006, at D-805 to D-1857 (Albert Warren ed., 2005).

²⁷⁹ 47 C.F.R. § 76.901(c).

²⁸⁰ TELEVISION & CABLE FACTBOOK 2006, at F-2 (Albert Warren ed., 2005) (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

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

²⁸² 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

²⁸³ See BROADCASTING & CABLE YEARBOOK 2006, at A-8, C-2 (Harry A. Jessell ed., 2005) (data current as of June 30, 2005); TELEVISION & CABLE FACTBOOK 2006, at D-805 to D-1857 (Albert Warren ed., 2005).

²⁸⁴ 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).

²⁸⁵ See 47 U.S.C. § 573.

²⁸⁶ 47 U.S.C. § 571(a)(3)-(4). See *13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

²⁸⁷ See 47 U.S.C. § 573.

Carriers.”²⁸⁸ 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 the OVS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small.²⁸⁹ In addition, we note that the Commission has certified some OVS operators, with some now providing service.²⁹⁰ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.²⁹¹ 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, at least some of the OVS operators may qualify as small entities. The Commission further notes that it has certified approximately 45 OVS operators to serve 75 areas, and some of these are currently providing service.²⁹² Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 44 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

f. Internet Service Providers, Web Portals and Other Information Services

106. *Internet Service Providers, Web Portals and Other Information Services.* In 2007, the SBA recognized two new small business, economic census categories. They are (1) Internet Publishing and Broadcasting and Web Search Portals,²⁹³ and (2) All Other Information Services.²⁹⁴

107. *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 facilities (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,²⁹⁵ which has an SBA small business size standard of 1,500 or fewer employees.²⁹⁶ These are also labeled “broadband.” The latter are within the

²⁸⁸ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

²⁸⁹ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-skip=600&-ds_name=EC0751SSSZ5&-lang=en.

²⁹⁰ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsцер.html>.

²⁹¹ See *13th Annual Report*, 24 FCC Rcd at 606-07, ¶ 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.

²⁹² See <http://www.fcc.gov/mb/ovs/csovsцер.html> (current as of February 2007).

²⁹³ 13 C.F.R. § 121.201, NAICS code 519130 (establishing a \$500,000 revenue ceiling).

²⁹⁴ 13 C.F.R. § 121.201, NAICS code 519190 (establishing a \$6.5 million revenue ceiling).

²⁹⁵ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

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

category of All Other Telecommunications,²⁹⁷ which has a size standard of annual receipts of \$25 million or less.²⁹⁸ These are labeled non-broadband.

108. The most current Economic Census data for all such firms are 2007 data, which are detailed specifically for ISPs within the categories above. For the first category, the data show that 396 firms operated for the entire year, of which 159 had nine or fewer employees.²⁹⁹ For the second category, the data show that 1,682 firms operated for the entire year.³⁰⁰ Of those, 1,675 had annual receipts below \$25 million per year, and an additional two had receipts of between \$25 million and \$ 49,999,999. Consequently, we estimate that the majority of ISP firms are small entities.

109. *Internet Publishing and Broadcasting and Web Search Portals.* This industry comprises establishments primarily engaged in 1) publishing and/or broadcasting content on the Internet exclusively or 2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such as e-mail, connections to other web sites, auctions, news, and other limited content, and serve as a home base for Internet users.³⁰¹ The SBA has developed a small business size standard for this category; that size standard is fewer than 500 employees.³⁰² Thus, a firm in this category with less than 500 employees is considered a small business.³⁰³ According to Census Bureau data for 2007, there were 2,705 firms that provided one or more of these services for that entire year. Of these, 2,682 operated with less than 500 employees and 13 operated with 500 to 999 employees.³⁰⁴ Consequently, we estimate the majority of these firms are small entities that may be affected by our proposed actions.

110. *Data Processing, Hosting, and Related Services.* This industry comprises establishments primarily engaged in providing infrastructure for hosting or data processing services. These establishments may provide specialized hosting activities, such as web hosting, streaming services or application hosting; provide application service provisioning; or may provide general time-share mainframe facilities to clients. Data processing establishments provide complete processing and specialized reports from data supplied by clients or provide automated data processing and data entry services.³⁰⁵ The SBA has developed a small business size standard for this category; that size standard is

²⁹⁷ U.S. Census Bureau, 2007 NAICS Definitions, "517919 All Other Telecommunications"; <http://www.census.gov/naics/2007/def/ND517919.HTM#N517919>.

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

²⁹⁹ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, "Establishment and Firm Size," NAICS code 5171103 (rel. Nov. 19, 2010) (employment size). The data show only two categories within the whole: the categories for 1-4 employees and for 5-9 employees.

³⁰⁰ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, "Establishment and Firm Size," NAICS code 5179191 (rel. Nov. 19, 2010) (receipts size).

³⁰¹ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=519130&search=2007%20NAICS%20Search>

³⁰² http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf

³⁰³ 13 C.F.R. § 121.201, NAICS code 519130.

³⁰⁴ http://factfinder.census.gov/servlet/IBQTTable?_bm=y&-geo_id=&-_skip=1000&-ds_name=EC0751SSSZ5&-lang=en.

³⁰⁵ U.S. Census Bureau, 2007 NAICS Definitions, "518210 Data Processing, Hosting, and Related Services"; <http://www.census.gov/naics/2007/def/ND518210.HTM#N518210>.

\$25 million or less in average annual receipts.³⁰⁶ According to Census Bureau data for 2007, there were 8,060 firms in this category that operated for the entire year.³⁰⁷ Of these, 6,726 had annual receipts of under \$25 million, and 155 had receipts between \$25 million and \$49,999,999 million.³⁰⁸ Consequently, we estimate that the majority of these firms are small entities that may be affected by our proposed actions.

111. *All Other Information Services.* “This industry comprises establishments primarily engaged in providing other information services (except new syndicates and libraries and archives).”³⁰⁹ Our action pertains to interconnected VoIP services, which 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 \$7.0 million or less in average annual receipts.³¹⁰ According to Census Bureau data for 2007, there were 367 firms in this category that operated for the entire year.³¹¹ Of these, 334 had annual receipts of under \$5 million, and an additional 11 firms had receipts of between \$5 million and \$9,999,999.³¹² Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

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

112. We summarize below the requirements in the NPRM and proposed rules regarding compliance with Sections 716 and 717, including recordkeeping and reporting obligations. Additional information on each of these requirements can be found in the NPRM.

113. *Recordkeeping.* The NPRM proposes, beginning one year after the effective date of regulations promulgated by the Commission pursuant to Section 716(e), to require that each manufacturer of equipment (including software) used to provide ACS and each provider of such services subject to Sections 255, 716, and 718, not exempted under rules proposed in that NPRM, maintain, in the ordinary course of business and for a reasonable period, certain records.³¹³ These records are to document the efforts taken by such manufacturer or service provider to implement Sections 255, 716, and 718, including: (1) information about the manufacturer's or provider's efforts to consult with individuals with disabilities; (2) descriptions of the accessibility features of its products and services; and (3) information about the compatibility of such products and services with peripheral devices or specialized customer

³⁰⁶ 13 C.F.R. § 121.201, NAICS code 518210.

³⁰⁷ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1000&-ds_name=EC0751SSSZ4&-_lang=en.

³⁰⁸ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1000&-ds_name=EC0751SSSZ4&-_lang=en

³⁰⁹ U.S. Census Bureau, “2002 NAICS Definitions: 519190 All Other Information Services”; <http://www.census.gov/epcd/naics02/def/NDEF519.HTM>.

³¹⁰ 13 C.F.R. § 121.201, NAICS code 519190. See also http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf

³¹¹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1200&-ds_name=EC0751SSSZ4&-_lang=en

³¹² http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1100&-ds_name=EC0751SSSZ4&-_lang=en

³¹³ See NPRM at paras. 117-123.

premise equipment commonly used by individuals with disabilities to achieve access.³¹⁴

114. *Reporting Obligations.* The CVAA and the Commission's proposed rules require that an officer of each manufacturer of equipment (including software) used to provide ACS and an officer of each provider of such services submit to the Commission an annual certificate that records are being kept in accordance with the above recordkeeping requirements, unless such manufacturer or provider has been exempted from compliance with Section 716 under applicable rules.³¹⁵

115. *Costs of Compliance.* Because of the diverse manufacturers of equipment used to provide ACS and diverse providers of ACS that may be subject to Section 716, the possible exemption of certain small entities from compliance with that Section, the multiple general and entity-specific factors used in determining, whether for a given manufacturer (or service provider) accessibility for a particular item of ACS equipment (or a particular service) is achievable, and the various provisions of Section 716 and the proposed rules on when and to what extent accessibility must be incorporated into a given item of ACS equipment or service, it is difficult to estimate the costs of compliance for those small entities that may not be covered by an exemption or waiver, should the Commission choose to adopt any such exemptions or waivers. Accordingly, the NPRM seeks comment on the costs of compliance with these proposed rules.³¹⁶

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

116. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."³¹⁷

117. In addition to the factors in the RFA identified above, the achievability factors in the CVAA also serve to mitigate adverse impacts and reduce burdens on small entities. In the NPRM, the Commission proposes to make determinations about what is achievable by giving four factors equal weight.³¹⁸ Two of these factors take into account the resources available to covered entities and may have a direct impact on small entities and the obligations they face under the CVAA: the second factor, the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, and the third factor, the type of operations of the manufacturer or provider. In addition, consideration of the first factor (the nature and cost of the steps needed to meet the requirements with respect to the specific equipment or service in question) and the fourth factor (the extent to which the service provider or manufacturer in question offers accessibility services or equipment containing varying degrees of functionality and features, and offered at different price points) would benefit all entities subject to Section 716, including small entities.

118. The Commission proposes not to consider additional factors and only to consider the factors enumerated in the statute, in light of legislative history directing the Commission to weigh the

³¹⁴ See NPRM at para. 117 (citing 47 U.S.C. § 618(a)(5)(i) – (iii)).

³¹⁵ See NPRM at para. 117 (citing 47 U.S.C. § 618(a)(5)(B)).

³¹⁶ See NPRM at paras. 68-69, 71.

³¹⁷ 5 U.S.C. § 603(c)(1)-(c)(4).

³¹⁸ Para. 8 of this IRFA, *supra*, lists these four factors.

factors equally. While adoption of this proposal would prevent the Commission from considering additional factors that may benefit small entities, it would also require that the Commission consider only the factors listed above, which clearly serve to reduce the burden on small entities. The Commission does, however, seek comment on whether it might have the discretion to weigh other factors not specified in the statute.³¹⁹ In addition, the Commission proposes to construe the factors broadly and to weigh any relevant considerations in determining their meaning.³²⁰

119. The Commission also proposes to consider exemptions from Section 716 for small entities and, if one or more such exemptions were adopted, further proposes to consider various criteria in setting standards for such exemptions.³²¹ The Commission could have proposed not to exercise its discretionary authority to exempt small entities or could have proposed one or more specific size standards for any such exemptions but determined that it was necessary to build a more complete factual record on what factors it should consider in making this determination. Specifically, before making a specific proposal, the Commission seeks to understand the impact any such proposal would have on small entities, the marketplace of ACS services and equipment, and on people with disabilities.

120. In addition, the Commission proposes consideration of specific performance objectives and seeks comment on alternative ways to develop procedures and timelines to develop these objectives.³²² Such alternatives could be structured to reduce the burdens on small entities of compliance with Section 716.

121. The Commission also proposes not to adopt technical standards as safe harbors at this time. It determined that it needed to develop a more complete record on this issue before taking action.³²³

122. Finally, the Commission does not propose separate recordkeeping and reporting obligations for small entities. The Commission, however, has proposed that it will not mandate any one form in which records must be kept, to take into account that covered entities have a variety of business models and modes of operation.³²⁴

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

123. Section 255(e) of the Communications Act, as amended, 47 U.S.C. § 255(e), directs the United States Access Board (Access Board) to develop equipment accessibility guidelines “in conjunction with” the Commission, and periodically to review and update those guidelines. We view the Board’s current guidelines as well as its draft guidelines³²⁵ as starting points for our interpretation and implementation of Sections 716 and 717 of the Communications Act, as amended, 47 U.S.C. §§ 617, 618, as well as Section 255, but because they do not currently cover ACS or equipment used to provide or access ACS, we must necessarily adapt these guidelines in our comprehensive implementation scheme. As such, it is our tentative view that our proposed rules do not overlap, duplicate, or conflict with either Access Board Final Rules,³²⁶ or (if later adopted) the Access Board Draft Guidelines.

³¹⁹ See NPRM at para. 70.

³²⁰ *Id.*

³²¹ *Id.* at para. 66.

³²² *Id.* at paras. 106-111.

³²³ *Id.* at paras. 112-113.

³²⁴ *Id.* at para. 123.

³²⁵ United States Access Board, *Draft Information and Communication Technology (ICT) Standards and Guidelines*, (March 2010), (“Access Board Draft Guidelines”), <http://www.access-board.gov/sec508/refresh/draft-rule.pdf>

³²⁶ See Part 1193 of the Access Board Rules, 36 C.F.R. Part 1193

APPENDIX D

Text of Senate Bill 3304 and Senate Bill 3828 as Enacted Into Law

Bill Text
111th Congress (2009-2010)
S.3304.ENR

S.3304

Twenty-First Century Communications and Video Accessibility Act of 2010 (Enrolled Bill
[Final as Passed Both House and Senate] - ENR)

SEC. 101. DEFINITIONS.

Section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended--

(1) by adding at the end the following new paragraphs:

`(53) ADVANCED COMMUNICATIONS SERVICES- The term `advanced communications services' means--

- `(A) interconnected VoIP service;
- `(B) non-interconnected VoIP service;
- `(C) electronic messaging service; and
- `(D) interoperable video conferencing service.

`(54) CONSUMER GENERATED MEDIA- The term `consumer generated media' means content created and made available by consumers to online websites and services on the Internet, including video, audio, and multimedia content.

`(55) DISABILITY- The term `disability' has the meaning given such term under section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).

`(56) ELECTRONIC MESSAGING SERVICE- The term `electronic messaging service' means a service that provides real-time or near real-time non-voice messages in text form between individuals over communications networks.

`(57) INTERCONNECTED VOIP SERVICE- The term `interconnected VoIP service' has the meaning given such term under section 9.3 of title 47, Code of Federal Regulations, as such section may be amended from time to time.

`(58) NON-INTERCONNECTED VOIP SERVICE- The term `non-interconnected VoIP service'--

- `(A) means a service that--
 - `(i) enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and
 - `(ii) requires Internet protocol compatible customer premises equipment; and

`(B) does not include any service that is an interconnected VoIP service.

`(59) INTEROPERABLE VIDEO CONFERENCING SERVICE- The term `interoperable video conferencing service' means a service that provides real-time video communications, including audio, to enable users to share information of the user's choosing; and

(2) by reordering paragraphs (1) through (52) and the paragraphs added by paragraph (1) of this section in alphabetical order based on the headings of such paragraphs and renumbering such paragraphs as so reordered.

SEC. 102. HEARING AID COMPATIBILITY.**(a) Compatibility Requirements-**

(1) TELEPHONE SERVICE FOR THE DISABLED- Section 710(b)(1) of the Communications Act of 1934 (47 U.S.C. 610(b)(1)) is amended to read as follows:

(b)(1) Except as provided in paragraphs (2) and (3) and subsection (c), the Commission shall require that customer premises equipment described in this paragraph provide internal means for effective use with hearing aids that are designed to be compatible with telephones which meet established technical standards for hearing aid compatibility. Customer premises equipment described in this paragraph are the following:

(A) All essential telephones.

(B) All telephones manufactured in the United States (other than for export) more than one year after the date of enactment of the Hearing Aid Compatibility Act of 1988 or imported for use in the United States more than one year after such date.

(C) All customer premises equipment used with advanced communications services that is designed to provide 2-way voice communication via a built-in speaker intended to be held to the ear in a manner functionally equivalent to a telephone, subject to the regulations prescribed by the Commission under subsection (e).

(2) ADDITIONAL AMENDMENTS- Section 710(b) of the Communications Act of 1934 (47 U.S.C. 610(b)) is further amended--

(A) in paragraph (2)--

(i) in subparagraph (A)--

(I) in the matter preceding clause (i)--

(aa) by striking 'initial';

(bb) by striking 'of this subsection after the date of enactment of the Hearing Aid Compatibility Act of 1988'; and

(cc) by striking 'paragraph (1)(B) of this subsection' and inserting 'subparagraphs (B) and (C) of paragraph (1)';

(II) by inserting 'and' at the end of clause (ii);

(III) by striking clause (iii); and

(IV) by redesignating clause (iv) as clause (iii);

(ii) by striking subparagraph (B) and redesignating subparagraph (C) as subparagraph (B); and

(iii) in subparagraph (B) (as so redesignated)--

(I) by striking the first sentence and inserting 'The Commission shall periodically assess the appropriateness of continuing in effect the exemptions for telephones and other customer premises equipment described in subparagraph (A) of this paragraph.'; and
(II) in each of clauses (iii) and (iv), by striking 'paragraph (1)(B)' and inserting 'subparagraph (B) or (C) of paragraph (1)';

- (B) in paragraph (4)(B)--
- (i) by striking `public mobile' and inserting `telephones used with public mobile';
 - (ii) by inserting `telephones and other customer premises equipment used in whole or in part with' after `means';
 - (iii) by striking `and' after `public land mobile telephone service,' and inserting `or';
 - (iv) by striking `part 22 of'; and
 - (v) by inserting after `Regulations' the following: `, or any functionally equivalent unlicensed wireless services'; and
- (C) in paragraph (4)(C)--
- (i) by striking `term `private radio services' and inserting `term `telephones used with private radio services'; and
 - (ii) by inserting `telephones and other customer premises equipment used in whole or in part with' after `means'.

(b) Technical Standards- Section 710(c) of the Communications Act of 1934 (47 U.S.C. 610(c)) is amended by adding at the end the following: `A telephone or other customer premises equipment that is compliant with relevant technical standards developed through a public participation process and in consultation with interested consumer stakeholders (designated by the Commission for the purposes of this section) will be considered hearing aid compatible for purposes of this section, until such time as the Commission may determine otherwise. The Commission shall consult with the public, including people with hearing loss, in establishing or approving such technical standards. The Commission may delegate this authority to an employee pursuant to section 5(c). The Commission shall remain the final arbiter as to whether the standards meet the requirements of this section.'.

(c) Rulemaking- Section 710(e) of the Communications Act of 1934 (47 U.S.C. 610(e)) is amended--

- (1) by striking `impairments' and inserting `loss'; and
- (2) by adding at the end the following sentence: `In implementing the provisions of subsection (b)(1)(C), the Commission shall use appropriate timetables or benchmarks to the extent necessary (1) due to technical feasibility, or (2) to ensure the marketability or availability of new technologies to users.'.

(d) Rule of Construction- Section 710(h) of the Communications Act of 1934 (47 U.S.C. 610(h)) is amended to read as follows:

`(h) Rule of Construction- Nothing in the Twenty-First Century Communications and Video Accessibility Act of 2010 shall be construed to modify the Commission's regulations set forth in section 20.19 of title 47 of the Code of Federal Regulations, as in effect on the date of enactment of such Act.'.

SEC. 103. RELAY SERVICES.

(a) Definition- Paragraph (3) of section 225(a) of the Communications Act of 1934 (47 U.S.C. 225(a)(3)) is amended to read as follows:

`(3) TELECOMMUNICATIONS RELAY SERVICES- The term `telecommunications relay services' means telephone transmission services that provide the ability for an individual who is deaf, hard of hearing, deaf-blind, or who has a speech disability to engage in communication by wire or radio with one or more individuals, in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services by wire or radio.'.

(b) Internet Protocol-based Relay Services- Title VII of such Act (47 U.S.C. 601 et seq.)

is amended by adding at the end the following new section:

SEC. 715. INTERNET PROTOCOL-BASED RELAY SERVICES.

Within one year after the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010, each interconnected VoIP service provider and each provider of non-interconnected VoIP service shall participate in and contribute to the Telecommunications Relay Services Fund established in section 64.604(c)(5)(iii) of title 47, Code of Federal Regulations, as in effect on the date of enactment of such Act, in a manner prescribed by the Commission by regulation to provide for obligations of such providers that are consistent with and comparable to the obligations of other contributors to such Fund.

SEC. 104. ACCESS TO ADVANCED COMMUNICATIONS SERVICES AND EQUIPMENT.

(a) Title VII Amendment- Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.), as amended by section 103, is further amended by adding at the end the following new sections:

SEC. 716. ACCESS TO ADVANCED COMMUNICATIONS SERVICES AND EQUIPMENT.

(a) Manufacturing-

(1) In general- With respect to equipment manufactured after the effective date of the regulations established pursuant to subsection (e), and subject to those regulations, a manufacturer of equipment used for advanced communications services, including end user equipment, network equipment, and software, shall ensure that the equipment and software that such manufacturer offers for sale or otherwise distributes in interstate commerce shall be accessible to and usable by individuals with disabilities, unless the requirements of this subsection are not achievable.

(2) Industry flexibility- A manufacturer of equipment may satisfy the requirements of paragraph (1) with respect to such equipment by--

(A) ensuring that the equipment that such manufacturer offers is accessible to and usable by individuals with disabilities without the use of third party applications, peripheral devices, software, hardware, or customer premises equipment; or

(B) if such manufacturer chooses, using third party applications, peripheral devices, software, hardware, or customer premises equipment that is available to the consumer at nominal cost and that individuals with disabilities can access.

(b) Service Providers-

(1) In general- With respect to services provided after the effective date of the regulations established pursuant to subsection (e), and subject to those regulations, a provider of advanced communications services shall ensure that such services offered by such provider in or affecting interstate commerce are accessible to and usable by individuals with disabilities, unless the requirements of this subsection are not achievable.

(2) Industry flexibility- A provider of services may satisfy the requirements of paragraph (1) with respect to such services by--

(A) ensuring that the services that such provider offers are accessible to and usable by individuals with disabilities without the use of third party applications, peripheral devices, software, hardware, or customer