

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of ) CC Docket No. 95-155  
Toll Free Service Access Codes )

FOURTH REPORT AND ORDER AND  
MEMORANDUM OPINION AND ORDER

Adopted: March 27, 1998

Released: March 31, 1998

By the Commission: Commissioner Harold Furchtgott-Roth dissenting in part and issuing a statement.

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## I. INTRODUCTION

1. In this Fourth Report and Order, we address the assignment of toll free vanity numbers. A toll free vanity number is a telephone number for which the letters associated with the number's digits on a telephone handset spell a name or word of value to the number holder.<sup>1</sup> For purposes of this Order, vanity numbers also include any numbers in which the holders have a particular interest, economic, commercial, or otherwise.<sup>2</sup> Vanity numbers often spell words or names identifying certain products and services. These numbers are often of value to their subscribers because they can generate high visibility and consumer recognition when used in advertising. Since the 800 toll free code was introduced in 1967, toll free numbers have proven to be a very popular business tool.<sup>3</sup>

2. When 800 toll free numbers became available, vanity numbers in that code were made available on a first-come, first-served basis.<sup>4</sup> Given the popularity of the 800 toll free code, by 1995, few numbers in the 800 toll free code remained unassigned. The industry selected "888" as the next toll free code and planned to deploy 877 and 866, as subsequent toll free codes.<sup>5</sup> In the spring of 1995, the industry informed the Commission that the accelerated pace of reservation and use of 800 numbers was depleting the supply of unassigned 800 numbers. The industry stated that, without Commission intervention, all 800 numbers would be assigned before the next toll free code, 888, could be introduced, or "opened." As the deployment of the 888 toll free code approached, holders of 800 vanity numbers expressed an interest in obtaining the corresponding vanity number in the 888 toll free code. Rather than delay the deployment of the 888 code, the Common Carrier Bureau ordered that those numbers in the 888 code in which 800 subscribers expressed an interest be set aside in an "unavailable pool" of numbers as an interim measure until

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<sup>1</sup> See Toll Free Service Access Codes, *Notice of Proposed Rulemaking*, CC Docket No. 95-155, FCC No. 95-419 (rel. Oct. 5 1995) ("Notice") at para. 35.

<sup>2</sup> *Id.*

<sup>3</sup> See Toll Free Service Access Codes, *Second Report and Order*, 62 Fed. Reg. 20,147, FCC 97-123 (rel. April 11, 1997) ("Second Report and Order") at para. 4. A toll free telephone call differs from a traditional telephone call in that the called party ("toll free subscriber") pays for the completed call. Additionally, unlike the traditional telephone number, the toll free number assigned to a toll free service subscriber does not depend on that subscriber's geographic location. These characteristics proved so valuable to businesses that the service flourished domestically and internationally. *Id.*

<sup>4</sup> To obtain a toll free number, a subscriber must choose an entity, known as a Responsible Organization ("RespOrg"), to be responsible for managing that subscriber's record in the database of toll free numbers. RespOrgs reserve toll free numbers for their customers. A RespOrg can be an interexchange carrier ("IXC"), a local exchange carrier ("LEC"), a wireless carrier, or a large organization such as Westinghouse.

<sup>5</sup> The industry has also set aside the following additional codes for future use in toll free service: 855; 844; 833; and 822.

the Commission resolved how they should be assigned.<sup>6</sup> In 1996, the new toll free code, 888, was opened. In September, 1998, the industry informed the Commission that the accelerated pace of reservation of 888 numbers was depleting the supply of unassigned 888 numbers. Another toll free code, 877, will be become available in April 5, 1998, and additional toll free codes will be made available thereafter, as demand warrants.

3. In this Fourth Report and Order, we conclude that vanity numbers in the 877 toll free code and future toll free codes shall be assigned on a first-come, first-served basis as each code is opened for calling. We also conclude that the vanity numbers in the 888 code shall be assigned pursuant to a right of first refusal. If, however, the current 800 subscriber with the number corresponding to the 888 set-aside vanity number declines to reserve that 888 set-aside number, the number shall be assigned on a first-come, first-served basis. The 888 set-aside numbers will be available for assignment 90 days after the 877 code is deployed.

4. In this Fourth Report and Order, we also address the Application for Review filed by American Telegram Corporation ("ATC") requesting that the Commission review and reverse the Common Carrier Bureau's decision to deny ATC's request to require MCI Telecommunications Corporation ("MCI") to return two specific 888 numbers to unavailable status pending the Commission's determination of whether 800 subscribers wishing to obtain the corresponding numbers in the 888 code will be afforded any special protection or right to do so.<sup>7</sup> We deny ATC's application requesting Commission review and reversal of the Bureau's decision.

## II. BACKGROUND

5. The Commission, in October 1995, initiated this rulemaking to ensure that toll free numbers would be allocated among domestic users on a fair, equitable, and orderly basis.<sup>8</sup> The Notice sought comment on proposals to: (1) promote the efficient use of toll free numbers; (2) foster the fair and equitable reservation and distribution of toll free numbers; (3) smooth the transition period preceding the introduction of a new toll free code; (4) guard against warehousing, hoarding, and brokering of toll free numbers; and (5) determine how toll free vanity numbers should be treated.<sup>9</sup>

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<sup>6</sup> See discussion in paragraph 35.

<sup>7</sup> Letter from Roger J. Meyers, ATC, to William F. Caton, FCC (February 13, 1997).

<sup>8</sup> See Notice.

<sup>9</sup> *Id.* at para. 2.

6. The Communications Act of 1934,<sup>10</sup> as amended by the Telecommunications Act of 1996,<sup>11</sup> gives the Commission exclusive jurisdiction over "those portions of the North American Numbering Plan that pertain to the United States."<sup>12</sup> In the Second Report and Order in this docket, the Commission concluded that section 1 of Title I of the Act and section 251(e)(1) of Title II of the Act require us to "ensure the efficient, fair, and orderly allocation of toll free numbers."<sup>13</sup> The Commission also determined that it would not alter its prior holdings regarding ownership issues.<sup>14</sup> Additionally, the Commission declined to adopt partitioning of toll free service codes after finding that this option would not serve the public interest.<sup>15</sup> The Commission also declined to adopt any special measures to exempt 888 subscribers from charges for misdialed calls to new 888 numbers that correspond to a high-volume number in the 800 code.<sup>16</sup> Further, the Commission declined to adopt a transitional gateway intercept requirement.<sup>17</sup> The Commission adopted rules prohibiting warehousing, hoarding, and brokering of toll free numbers.<sup>18</sup> These measures were adopted in an effort to conserve the toll free numbering resource. One of the issues left unresolved in the Second Report and Order was how toll free vanity numbers should be distributed. The Commission sought comment on how 888 vanity numbers should be assigned once they were released and how vanity numbers in subsequent toll

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<sup>10</sup> 47 U.S.C. §§ 151 *et seq.* ("the Act").

<sup>11</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

<sup>12</sup> 47 U.S.C. §§ 1 and 251(e)(1).

<sup>13</sup> Second Report and Order at para. 18.

<sup>14</sup> *Id.* at para. 32. The Commission had previously characterized telephone numbers as a public resource and concluded that neither carriers nor subscribers could "own" their telephone numbers. Notice at para. 36 (*citing* In the Matter of Administration of the North American Numbering Plan, *Report and Order*, CC Docket No. 92-237, 11 FCC Rcd 2588 (1995) ("NANP Order")).

<sup>15</sup> Second Report and Order at para. 67. A partitioning requirement would leave the 800 toll free code for use by commercial entities and assign a new toll free code to subscribers for personal and paging use.

<sup>16</sup> *Id.* at para. 72. For example, a telemarketing firm may receive thousands of calls per day through one toll free number. The Commission acknowledged that, soon after the introduction of a new toll free code, there is a strong likelihood that a subscriber with a number in one toll free code corresponding to a high-volume number in another toll free code might receive many misdialed calls. *Id.*

<sup>17</sup> Second Report and Order at para. 75. A transitional gateway intercept is a pre-recorded intercept message prompting the caller to select the correct number. The message would have played for an unspecified period after a new code opened whenever a caller dialed a toll free number in the new code with its last seven digits corresponding to those of a number in another toll free code.

<sup>18</sup> Second Report and Order at paras. 22 & 29. Warehousing occurs when a RespOrg obtains toll free numbers from the toll free database without having an identified subscriber for those reserved numbers. Hoarding occurs when a toll free subscriber acquires more numbers from a RespOrg than it intends to use for the provision of toll free service. Brokering of toll free numbers is the sale of a toll free number by a private entity for a fee.

free codes should be treated.<sup>19</sup> The alternatives on which the Commission sought comment included assigning vanity numbers through a first-come, first-served reservation process, a right of first refusal, Standard industrial classification ("SIC") codes,<sup>20</sup> a lottery, or a competitive bidding process.

7. Assigning vanity numbers on a first-come, first-served basis means that vanity numbers would be afforded no special treatment and would be released as any other number in a particular toll free code. A right of first refusal, however, would mean that, unless a toll free subscriber was first offered, and declined, the corresponding number in a subsequent code, that number would not be assigned to any other customer. The Commission sought comment on whether we should extend a right of first refusal to holders of toll free vanity numbers whenever another toll free code opened.<sup>21</sup> The Commission asked commenters, if we permitted subscribers to exercise a right of first refusal, whether those subscribers should be required to pay a fee for exercising that right, what entity should receive the money, and how the money should be used.<sup>22</sup> Additionally, the Commission questioned the possible international implications of creating such a right for domestic subscribers,<sup>23</sup> the Commission's statutory authority to promulgate these

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<sup>19</sup> *Id.* at paras. 41-46.

<sup>20</sup> *Id.* at paras. 44-45. The SIC code system assigns a seven-digit number to each product and service produced by every establishment in the economy. The system divides the economy into 11 divisions. The first two digits of the SIC code classifies economic activities by major group. The third through seventh digits provide successively finer establishment classification. For example, the four-digit classification for scheduled air transportation, which is a subcategory of the major group 45 (transportation by air), is 4512. Other products, and their four-digit SIC codes, in major group 45 include the following: air transportation, nonscheduled (4522); and airports, flying fields, and airport terminal services (4581). *Standard Industrial Classification Manual*, 1987, Executive Office of the President, Office of Management and Budget ("OMB") 277, 277-78 (1987) ("The SIC Manual").

A current holder of an 800 number, for example, concerned that the corresponding 888 number would be assigned to a business rival, would report its SIC code to its 800 service provider or RespOrg, which in turn would report the code to Database Services Management, Inc. ("DSMI"), which administers the database of toll free numbers. DSMI would then incorporate this code into the subscriber's record and would query the database when applicants request an 888 number to determine if their code matches that of the current holder of the corresponding 800 number. If the applicant for the 888 number and the current holder of the corresponding 800 number share the same SIC code, the applicant for the 888 number would not be permitted to obtain the corresponding 888 number. Commenters were asked to comment on this proposal, to identify the number of digits of the SIC code that should be used to make this an effective remedy against fraud or "free riding" on the good will of a competitor, and to explain how conglomerates should be treated.

<sup>21</sup> *Id.* at para. 42.

<sup>22</sup> *Id.* at para. 41

<sup>23</sup> *Id.* at para. 43. The Commission asked commenters to address whether a right of first refusal is consistent with international intellectual property laws. The Commission specifically requested comments on issues relating to any International Telecommunications Union activities concerning "free phone." Toll free service is known internationally as "free phone."

measures,<sup>24</sup> and the effect this option would have on the Commission's goal "to ensure the efficient, fair, and orderly allocation of toll free numbers."<sup>25</sup> Lastly, the Commission asked whether, in the event that we deny a right of first refusal, trademark law provides sufficient protection to current holders of 800 numbers.<sup>26</sup>

**8.** In the Notice, the Commission also sought comment on the possibility of limiting the assignment of equivalent numbers in different toll free codes to competitors who share the same SIC code. The Commission also sought comment on the possibility of distributing vanity numbers through a lottery or a competitive bidding process.<sup>27</sup>

**9.** In the Notice, the Commission proposed to identify 888 equivalent vanity numbers, set them aside as "unavailable," and then possibly release them at the end of the 888 assignment pool when the 888 toll free code was exhausted.<sup>28</sup> The Commission reasoned that delaying release of the 888 vanity numbers until the 888 assignment pool was exhausted would give the public adequate time to become familiar with the use of multiple toll free codes.<sup>29</sup> On January 24, 1996, the Commission issued an Order delegating authority to the Chief of the Common Carrier Bureau to resolve the issues raised in the Notice that were essential to opening the 888 toll-free code.<sup>30</sup> In an Order released January 25, 1996, the Bureau directed RespOrgs to poll their 800 commercial subscribers to determine which numbers the subscribers wished to replicate in the 888 toll free code.<sup>31</sup> The Bureau also directed the database administrator,<sup>32</sup> Database Service Management, Inc. ("DSMI"), to place these identified replicated 888 vanity numbers in "unavailable status" until the Commission resolved how these numbers should be allocated.<sup>33</sup> Additionally, the Bureau concluded that the remaining 888 numbers should be available on a first-

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<sup>24</sup> *Id.* at para. 41.

<sup>25</sup> *Id.* at para. 42.

<sup>26</sup> *Id.* at para. 40.

<sup>27</sup> Notice at para. 41.

<sup>28</sup> Notice at para. 46.

<sup>29</sup> *See generally* Notice at para. 35.

<sup>30</sup> In the Matter of Toll Free Service Access Codes, *Order*, 11 FCC Rcd 3045 (1996).

<sup>31</sup> In the Matter of Toll Free Service Access Codes, *Report and Order*, 11 FCC Rcd 2496 (1996) ("First Report and Order").

<sup>32</sup> The database system provides a user-friendly environment for RespOrgs to enter data regarding toll free numbers within their control. The system also permits toll free subscribers to change service providers without having to change their toll free numbers.

<sup>33</sup> First Report and Order at para. 2.

come, first-served basis.<sup>34</sup> On March 1, 1996, the 888 toll free code was deployed. As of February 8, 1996, 374,199 numbers were marked unavailable within the toll-free database.<sup>35</sup>

**10.** Because the record on the Notice is almost two years old, and the 877 code is scheduled for opening in April 1998,<sup>36</sup> the Common Carrier Bureau issued a Public Notice on July 2, 1997, requesting comments to refresh the record on issues relating to the treatment of toll free vanity numbers.<sup>37</sup>

### III. DISCUSSION

#### A. Overview

**11.** Toll free vanity numbers spell words or names identifying certain products and services. These numbers are of value to their subscribers since they can generate high visibility and consumer recognition when used in advertising. Because of these characteristics, many subscribers to 800 toll free numbers have invested and continue to invest substantial resources in advertising these numbers and associating them with the subscribers' particular products and services. As a result, these subscribers have expressed concern over the effects multiple toll free codes will have on their businesses if new subscribers obtain corresponding numbers in different codes. Specifically, 800 subscribers have expressed concern over new subscribers in the same line of business deriving benefit from the advertising and good will associated with their preexisting 800 vanity numbers. In addition, subscribers are concerned over misdialing that may occur if consumers fail to realize that each number in each toll free code is distinct.

**12.** The Commission's goal pursuant to Section 251(e)(1) of the Act is to ensure that toll free number allocation is 1) orderly and efficient, and 2) fair.<sup>38</sup> An orderly allocation of toll free numbers will simplify the administrative requirements necessary to assign toll free numbers and avoid the need to resolve competing claims among subscribers to particular numbers. An efficient allocation of toll free numbers will minimize exhaustion of the toll free numbering resource. A fair allocation of toll free numbers will provide all subscribers reasonable opportunity to obtain vanity numbers. This final goal must be furthered in light of the well-established

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<sup>34</sup> *Id.* at para. 22.

<sup>35</sup> Letter from Michael J. Wade, President, DDMI, to Kathleen Levitz, Deputy Chief, Common Carrier Bureau, FCC (Feb. 15, 1996).

<sup>36</sup> The Alliance for Telecommunications Industry Solutions ("ATIS") - sponsored Service Management System ("SMS") Number Administration Committee ("SNAC") is responsible for planning implementation of the 877 toll free code.

<sup>37</sup> 62 Fed. Reg. 36,476 (July 8, 1997). See Appendix D for a summary of parties' comments.

<sup>38</sup> Second Report and Order at para. 2.

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principle that toll free numbers are a public resource and cannot be owned by carriers or subscribers.<sup>39</sup>

**13.** With respect to toll free codes to be made available henceforth, we have evaluated four options in light of the three stated criteria with a two-part test. We rule out the use of SIC codes, lotteries, and auctions as inappropriate assignment methods for vanity numbers because these options fail to provide an orderly allocation method. In contrast, we find that the use of a first-come, first-served assignment leads to an orderly and efficient allocation of vanity numbers. In addition, we conclude that the use of a first-come, first-served assignment method is a more equitable method of allocating these numbers. Finally, we find that the use of a right of first refusal method to assign vanity numbers is generally a less orderly, efficient and equitable system than a first-come, first-served method. With respect to the 888 vanity numbers that have been set aside, however, we conclude that because of the special circumstances concerning those numbers, a right of first refusal method should be used to assign those numbers.

## **B. Order and Efficiency**

**14.** As a threshold matter, we evaluate each of the four options to determine whether they are both orderly and efficient. We conclude that SIC codes, lotteries, and auctions will not lead to an orderly allocation of toll free numbers. We also conclude that a right of first refusal, when used generally for all numbers in the 877 and subsequent toll free codes, is neither orderly nor efficient.

**15. SIC Codes.** Adopting a SIC-code system would be inconsistent with our goal of ensuring the efficient, fair, and orderly allocation of toll free vanity numbers. A SIC-code system would be administratively burdensome and difficult to apply in part because, as businesses change, merge, and overlap, SIC-code changes would also be required. In addition, a SIC-code system would not assure orderly allocation of numbers because of the potentially heavy enforcement burden that may be required to prevent incumbent or prospective subscribers from misrepresenting or manipulating classifications in an attempt to obtain or protect numbers of value to them. We find that use of SIC codes would not provide a useful method for identifying potential competitors because of the difficulties involved in identifying those subscribers engaged in manipulation of classifications as well as the problems associated with categorizing businesses that do not clearly fit into one category. No commenters proposed viable methods for determining the specific SIC codes to assign to conglomerates that operate in multiple areas of the economy. We agree with commenters that assert that a SIC-code system likely would impose

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<sup>39</sup> See NANP Order at 2591 (stating that telephone numbers are a public resource); The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, *Memorandum Opinion and Order*, 59 Rad. Reg. 2d 1275, 1284 (1986); The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, *Declaratory Ruling*, Report No. CL-379, 2 FCC Rcd 2910, 2912 (1987), *recon.*, 4 FCC Rcd 2369 (1989) (stating that NXX codes are a national resource); see also Radio Common Carrier Service, Appendix B Commission Policy Statement, 59 Rad. Reg. 2d (P&F) 1275, 1284 (1986).

significant enforcement costs on the Commission because it would involve the Commission in numerous disputes between subscribers over the proper classification.<sup>40</sup> For the foregoing reasons, we decline to use a SIC-code system to determine assignments of toll free vanity numbers.

**16. Lottery or Auction.** Although a lottery or an auction would offer all participants an equal opportunity to obtain a particular vanity number, we are concerned that lotteries could encourage brokering and manipulation of the system to bypass eligibility requirements, as some commenters suggest.<sup>41</sup> For example, in a lottery situation, a prospective subscriber might commission multiple RespOrgs or other subscribers to seek the number in order to increase its chances of winning the number. Additionally, lotteries and auctions are more difficult to administer than a first-come, first-served reservation process because they require greater oversight and would likely result in delay in the issuance of numbers. Finally, in the international context, it is unclear what entity would receive the proceeds from an auction. The North American Numbering Plan is used by eighteen countries, including the United States, Canada, and several Caribbean countries.<sup>42</sup> Because the Commission has no authority over subscribers in other countries, it would be unable to dictate what entity should receive auction proceeds when toll free subscribers in other countries are involved. Although auctions are generally efficient, we cannot say on the present record that auctions of vanity numbers would produce efficiencies that would outweigh the practical difficulties that we have just detailed. Therefore, at this time, we find that lotteries or auctions are not likely to lead to an orderly or efficient allocation of toll free vanity numbers.

**17. Right of First Refusal.** We find that granting a right of first refusal for all vanity numbers in the 877 and subsequent toll free codes is inefficient because it would lead to more rapid exhaustion of toll free numbers, which are a limited and valuable public resource. If offered a right of first refusal, some subscribers may elect to reserve corresponding numbers in new codes and then minimally use those numbers solely to prevent competitors from obtaining those numbers. Moreover, the likelihood of more rapid depletion would increase as additional toll free codes are made available because it is likely that a growing percentage of numbers in each code would be taken by subscribers exercising their right of first refusal. A subscriber interested in protecting a number in one toll free code would likely be interested in protecting that number in every toll free code. In addition, as more codes open, the chances increase that some subscriber

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<sup>40</sup> See United States Telephone Association ("USTA") Comments at 3; 1-800-Flowers Comments at 12; LDDS Worldcom Comments at 15.

<sup>41</sup> See Direct Marketing Association ("DMA") Supplemental Comments at 4; Sprint Comments at 4; U S West Communication, Inc. ("U S West") Further Comments at 5.

<sup>42</sup> The NANP is the basic numbering scheme for the telecommunications networks located in Anguilla, Antigua, Bahamas, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Dominica, Dominican Republic, Grenada, Jamaica, Montserrat, St. Kitts & Nevis, St. Lucia, St. Vincent, Turks & Caicos Islands, and Trinidad & Tobago.

will have found a vanity number use for a new set of numbers. Thus, a higher percentage of numbers in each new code could be subject to at least one subscriber's right of first refusal.

**18.** Many commenters offer creative variations on a right of first refusal that might curb the ratio of numbers in new codes that will be reserved by existing subscribers. We find, however, that these proposals fail to maximize the efficient allocation and use of toll free numbers. Regardless of the limitations imposed on incumbent subscribers, any system involving a right of first refusal inherently means that certain numbers will be unavailable to other toll free subscribers.

**19.** Furthermore, a right of first refusal is a less orderly method for assignment of vanity numbers than a first-come, first-served method. As multiple codes open, there could be multiple subscribers with a right of first refusal for each number in different codes.<sup>43</sup> It would be an administrative burden to devise a method for determining which subscriber should be given priority to seek the corresponding number. In addition, any such method inevitably would lead to disputes between subscribers. This system of number allocation also would involve additional administrative costs since, prior to the opening of each new code, it would be necessary to conduct a poll of existing toll free customers to identify the vanity numbers in that code.

**20.** Moreover, granting a right of first refusal conflicts with the well-established principle that telephone numbers are a public resource that subscribers do not own.<sup>44</sup> Telephone numbers are essential to routing calls over the public switched network. The 1996 Act empowers the Commission to ensure that the public has equitable access to telephone numbers.<sup>45</sup> We again affirm our prior holding that carriers and subscribers do not own numbers<sup>46</sup> and we find that number portability does not imply ownership of numbers. Maintaining the right to use a particular existing number when changing carriers is different than having an ownership interest in a number. Upon discontinuing service, a subscriber has no right to retain its number. Rather, the number is returned to the pool of available numbers.

**21.** We recognize that the problems associated with the use of a right of first refusal process arise primarily in the use of this method to assign toll free numbers on an ongoing basis as

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<sup>43</sup> For example, with 822, there could be seven subscribers with a right of priority refusal if none of the subscribers to equivalent numbers in earlier codes had exercised his refusal rights. The codes that would have opened earlier are 800, 888, 877, 866, 855, 844, and 833. Some method would have to have been established to determine the order in which these subscribers could exercise the right of refusal.

<sup>44</sup> See *supra* note 14.

<sup>45</sup> 47 U.S.C. § 251(e)(1) ("[t]he Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis").

<sup>46</sup> Second Report and Order at para. 32. Cf. National Association of Telecommunications End-Users ("NATE") Further Comments and Reply at 1 (Further Comments and Reply filed late).

future codes are opened to subscribers. We find that these efficiency problems would not arise if a right of first refusal method were used to assign toll free vanity numbers in the 888 code. Only 374,199 numbers were originally set aside out of approximately 8 million numbers available in the 888 code. If the option were limited to 888, the right would go to the holder of the 800 number that requested that the 888 number be set aside. Therefore, there would be no disputes among 800 subscribers concerning their rights to reserve these particular 888 numbers. Consequently, a right of first refusal limited to the 888 vanity numbers would not raise the concern regarding more rapid exhaustion of numbers or how to address competing requests among holders of the same numbers in different toll free codes. We conclude, therefore, that the use of a right of first refusal to assign vanity numbers in the 888 toll free code would produce an efficient and orderly allocation of those numbers.

**22. First-Come, First-Served Assignment.** A first-come, first-served reservation process will ensure an orderly allocation of toll free vanity numbers. Since only one subscriber would be eligible to reserve a particular number, this system would avoid the need to resolve competing claims among subscribers to assignment of particular numbers. Although we recognize commenters' concerns regarding trademark infringement and unfair competition, we find that those issues properly should be addressed by the courts under the trademark protection and unfair competition laws,<sup>47</sup> rather than by the Commission.

**23.** We find that a first-come, first-served process, with one exception discussed below, is the most efficient and least expensive way of assigning toll free numbers among the alternatives addressed in the record.<sup>48</sup> Indeed, it is noteworthy that the industry has used a first-come, first-served process for reserving non-vanity toll free numbers and experience to date has shown that, in general, a first-come, first-served policy is efficient.<sup>49</sup> Use of a first-come, first-served assignment avoids the problems of accelerated number depletion and subscriber disputes about reservation priority as discussed above with respect to the use of a right of first refusal method. We recognize that, under a first-come, first-served reservation process, some subscribers may instruct their RespOrgs to reserve equivalent numbers as soon as a new code opens. Even if this were to occur, however, a first-come, first-served reservation process does not provide any inherent advantage to incumbent subscribers, as the right of first refusal does. Moreover, a subscriber whose RespOrg is unsuccessful in reserving the equivalent number in a new code would not have an incentive to reserve another number in the new toll free code in its place if the subscriber sought to reserve the equivalent number solely for the purpose of preventing competitors from obtaining it. Thus, the rate of number depletion is likely to be slower if there is no automatic right of first refusal. In addition, we believe that the incentives of subscribers to

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<sup>47</sup> See 15 U.S.C. §§ 1051 *et. seq.* (the Lanham Act).

<sup>48</sup> First Report and Order at para. 22.

<sup>49</sup> See First Report and Order at para. 22; *cf. Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1469-70 (D.C. Cir. 1984) (The Commission authorized the leasing of transponders on a first-come, first-served basis).

engage in this strategy of attempting to reserve equivalent numbers in new toll free codes as they are opened will diminish over time. As users of toll free numbers recognize that each toll free number in a code is distinct from similar numbers in other codes, there will be less of a need to obtain the corresponding numbers in subsequent toll free codes. In other words, concerns over consumer confusion, misdialing, and dilution of investments should decrease because consumers will not assume that toll free subscribers have the same number in other codes.

### C. Fairness

**24.** Having determined that a first-come, first-served assignment method and a right of first refusal (in limited circumstances) meet the threshold requirements of order and efficiency, we must determine whether one system is fairer.

**25.** First-Come, First-Served Assignment. A first-come, first-served assignment method, as applied to vanity numbers in general, best serves our goal to assign toll free numbers fairly because it does not discriminate against new subscribers. All subscribers would be given an equal opportunity to reserve desirable toll free numbers as new codes are opened. This method is especially appropriate given that one telephone number could have a variety of vanity applications.

**26.** Right of First Refusal. A right of first refusal assignment method for toll free vanity numbers would discriminate against new subscribers by denying them the opportunity to obtain certain desirable numbers to promote their businesses. A toll free number may have commercial value because, for example, it is easy to remember, or because it corresponds to many different words related to different lines of business. A right of first refusal would prevent prospective toll free subscribers from using certain numbers even when that use might not affect subscribers that use equivalent numbers in other codes. For example, the new subscriber might use the last seven digits to spell words that are different from the words subscribers in other codes associate with those digits.<sup>50</sup>

**27.** 800 Users Coalition ("Coalition") relies on *Holiday Inns v. 800 Reservation*<sup>51</sup> to argue that declining to adopt a right of first refusal would be unfair to incumbent toll free subscribers. We find Coalition's reliance on *Holiday Inns* misplaced. The issue in *Holiday Inns* was whether the holder of a trademarked vanity number may claim trademark rights in complementary,<sup>52</sup> not corresponding, numbers.<sup>53</sup> The *Holiday Inns* Court simply noted, in *dicta*,

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<sup>50</sup> For example, a company selling SCUBA equipment might advertise its toll free number 800-123-3337 as 800-123-DEEP and the Federal Bureau of Investigation might advertise its toll free number 888-123-3337 as 888-123-FEDS.

<sup>51</sup> *Holiday Inns, Inc. v. 800 Reservation, Inc.*, 86 F.3d 619 (6th Cir. 1996) ("*Holiday Inns*").

<sup>52</sup> Complementary numbers are those numbers that are frequently misdialed when a customer dials a vanity number. For example, 1-800-H[0]L[1]DAY is a complementary number to "1-800-HOLIDAY" because customers

that, if Holiday Inns was concerned about unfair competition, it should have taken the simple precaution of reserving its complementary number.<sup>54</sup> Coalition argues that the only practical way to engage in this type of self help is through a right of first refusal.<sup>55</sup> Contrary to Coalition's argument that the *Holiday Inns* holding requires the Commission to create a right of first refusal, a more reasonable reading of *Holiday Inns* is that, if the Commission did create such a right, a trademark holder would be required to exercise that right as a reasonable self-help measure. Furthermore, we are not precluding subscribers from reserving numbers of their choice; rather, we permit all subscribers to engage in that process on a first-come, first-served basis. We recognize that many commenters may have invested in their numbers by, for example, advertising and developing name recognition, and that a right of first refusal would arguably protect that investment. We disagree, however, that a right of first refusal is the only way subscribers can protect these investments. Some toll free subscribers may have recourse to the trademark protection laws. Public education campaigns, too, can minimize confusion and thus protect subscribers' investments. Although, as Coalition notes, misdialing may occur, we are confident that as new toll free codes are opened, consumers will become more accustomed to an environment with multiple toll free codes, and will recognize that the same seven digits in different toll free codes in all likelihood are used by different toll free subscribers.<sup>56</sup>

**28.** Many commenters raised proposals limiting a right of first refusal.<sup>57</sup> These proposals fail to overcome other problems associated with a right of first refusal, such as the discriminatory impact a right of first refusal would have on new subscribers. While imposing limitations on a right of first refusal might lead to greater availability of toll free numbers for new subscribers, those subscribers would still be second in line to the incumbent subscribers.

**29.** 888 Set-Aside Vanity Numbers. We find that a right of first refusal is more equitable than a first-come, first-served method in one limited circumstance: assigning the 888 set-aside vanity numbers. The 888 toll free code was the first successor to the 800 code, which was

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frequently substitute the number zero for the letter "O" and the number one for the letter "I."

<sup>53</sup> *Holiday Inns*, 86 F.3d at 625.

<sup>54</sup> *Id.*

<sup>55</sup> Coalition Supplemental Comments at 13.

<sup>56</sup> This will be true as well for those public service numbers over which General Services Administration ("GSA") expresses concern. GSA Comments at 2-3.

<sup>57</sup> See, e.g., Invesco Funds Group, Inc. ("IFG") Comments at 1-2 (recommending requiring a subscriber to establish a need for the second number before exercising its right of first refusal); Network Telephone Service, Inc. ("NTS") Comments at 2 (supporting a right of first refusal provided that each RespOrg is granted the same percentage of their current base in conjunction with a circuit breaker built into the database system, which would prevent the RespOrg from reserving a vanity number once it reaches its cap).

in use for almost 30 years before numbers in that code were exhausted.<sup>58</sup> As a result, we believe that the arguments advanced by the proponents of the right-of-first-refusal assignment system are most compelling as applied to the allocation of 888 vanity numbers. Although 888 numbers are now in widespread use (and, indeed, approaching exhaustion), we are concerned that consumers are still adjusting to this environment of having more than one toll free code in use. We agree with commenters who contend that the problems of customer confusion, misdialing, and new toll free subscribers benefiting from the marketing efforts of 800 subscribers with the same seven-digit numbers are likely to be most serious in the case of the first toll free number opened after the 800 code.<sup>59</sup> As subsequent toll free codes are introduced, customers will become more cognizant that there are numerous toll free codes thus, reducing instances of confusion and misdialing. In addition, providing a right of first refusal solely with respect to numbers that have been set aside in the 888 code does not entail the inefficiencies or administrative burdens that would result if we were to do likewise for all subsequently established toll free codes. Although it would be reasonable for us to require the use of a first-come, first-served method for all new toll free numbers, on balance we believe that it would be preferable to permit the 800 subscribers that have designated particular 888 numbers to be set aside to have a right of first refusal to use those numbers. This procedure for assignment of the 888 set-aside vanity numbers would be performed pursuant to our obligation under section 251(e)(1) of the 1996 Act,<sup>60</sup> to allocate numbers on an equitable basis, and does not imply that these subscribers possess ownership interest in these 888 numbers.

**30.** For the foregoing reasons, we create a limited exception to the first-come, first-served policy and permit a right of first refusal for the 888 set-aside numbers only. As multiple toll free codes open, subscribers must invest in and advertise their numbers with the knowledge that there are existing toll free codes and, therefore, that they will not be given a right of first refusal for codes beyond 888. Furthermore, we emphasize that our rules prohibit hoarding and warehousing.<sup>61</sup> Under these rules, an 800 subscriber that reserved an 888 number for the sole purpose of preventing a competitor from obtaining that number and did not activate that number for use would be considered to be hoarding in violation of the Commission's rules. Therefore, an 800 subscriber that exercises the right of first refusal for an 888 set-aside number must use that number by activating service through a toll free service provider within the time periods provided by the Commission's rules.<sup>62</sup>

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<sup>58</sup> The 800 toll free code was introduced in 1967.

<sup>59</sup> Bell Atlantic Telephone Companies ("Bell Atlantic") Comments at 8.

<sup>60</sup> 47 U.S.C. 251(e)(1).

<sup>61</sup> 47 C.F.R. §§ 52.105 and 52.107.

<sup>62</sup> See 47 C.F.R. § 52.103.

**31. Fee-Based Right of First Refusal.** We decline to adopt a fee-based right of first refusal for any toll free number. A fee-based right of first refusal would require a subscriber to pay a fee for the right to obtain a corresponding number in a subsequent toll free code. After considering arguments made by commenters in support of this option, we conclude that a fee-based right of first refusal would not overcome any disadvantages associated with a right of first refusal. First, with respect to the 888 set aside numbers, a fee-based right of first refusal would be impractical and administratively difficult to justify. The cost and administrative effort required to implement and administer a one-time fee plan for this finite set of numbers would outweigh any benefits a fee may provide. Second, a fee-based right of first refusal could unfairly prejudice small businesses, unable to compete against the greater resources of large businesses. Finally, if the fee is proposed for the purpose of deterring subscribers from hoarding numbers, our anti-hoarding rules already in place will serve that purpose.

**32.** We conclude that current 800 subscribers holding 800 vanity numbers that correspond to previously set-aside 888 vanity numbers shall have a right of first refusal to the corresponding 888 number. If the 800 subscriber refrains from exercising its option to reserve the corresponding 888 number, the set-aside 888 vanity number shall be released into the available pool of toll free numbers, and distributed on a first-come, first-served basis. Right of first refusal procedures must take place within 90 days of 877 deployment. The 888 set-aside numbers will then be available for assignment 90 days after the 877 code is deployed. We find a right of first refusal appropriate only for the 888 set-aside vanity numbers and not for vanity numbers in subsequent toll free codes.

**33.** In order to ensure an orderly and efficient implementation of the right of first refusal for the 888 set-aside vanity numbers and implementation of 877, we delegate to the Chief, Common Carrier Bureau, authority to resolve the implementation details for assignment and deployment of these numbers. We also delegate to the Bureau Chief authority to implement conservation plans on any or all toll free codes in use if needed to prevent exhaust of toll free numbers.

#### **IV. MEMORANDUM OPINION AND ORDER**

**34.** On February 13, 1997, American Telegram Corporation ("ATC") filed an application for review and reversal of the Common Carrier Bureau's decision to deny ATC's request to require MCI Telecommunications Corporation ("MCI") to return two specific 888 numbers to unavailable status pending the Commission's determination of whether 800 subscribers wishing to obtain the corresponding numbers in the 888 code will be afforded any special protection or right to do so. On December 9, 1997, ATC filed a supplement to its original application for review.<sup>63</sup>

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<sup>63</sup> Letter from Roger J. Meyers, ATC, to William F. Caton, FCC (February 13, 1997).

**35.** The 888 code was opened March 1, 1996. Several weeks prior to that, on January 25, 1996, the Bureau directed DSMI to place in unavailable status those numbers in the 888 code that subscribers to the corresponding numbers in the 800 code stated they wished to set aside for their use.<sup>64</sup> The Bureau deferred to the RespOrgs to identify what 888 numbers, designated through their polling processes, were to be set aside.<sup>65</sup> The identified numbers were to remain in unavailable status until the Commission decided whether such numbers should be afforded permanent special protection.<sup>66</sup> Subsequently, some subscribers notified the Bureau that DSMI or their RespOrgs had omitted from the list of protected numbers certain 888 numbers that subscribers wished to place in unavailable status. On February 29, 1996, the Bureau directed DSMI to reclassify as unavailable those 888 numbers identified by 800 subscribers that were erroneously omitted from the list of unavailable numbers, provided that those numbers were not already in "working" status.<sup>67</sup> These requests had to be submitted in writing by either the 800 subscriber, or the subscriber's RespOrg, and had to be received by DSMI by 11:59 p.m. March 15, 1996. It subsequently came to the Bureau's attention that certain 888 numbers that were in "working" status were placed erroneously in "unavailable" status. On March 29, 1996, the Bureau's Network Services Division ("Division") instructed DSMI to reinstate to the original RespOrg any 888 number that was listed in working status prior to 3:00 a.m. March 1, 1996.

**36.** ATC asserts that, on August 7, 1995, it directed its carrier, LDDS Worldcom, to pre-reserve 39 888 numbers.<sup>68</sup> Only two of those 39 numbers are at issue here. ATC subsequently switched to Sprint Corporation ("Sprint") for toll free service, and also directed Sprint to request that these two 888 numbers be placed in unavailable status. According to ATC, it discovered in late February 1996, that the two 888 numbers had not been placed in unavailable status. At ATC's request, on February 29, 1996, Sprint requested DSMI to place these two numbers in unavailable status. Because these numbers were in working status, however, DSMI was unable to place them in unavailable status. On February 29, 1996 and June 6, 1996, ATC

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<sup>64</sup> See First Report and Order at para. 2.

<sup>65</sup> *Id.* at para. 13.

<sup>66</sup> *Id.* at para. 2.

<sup>67</sup> A number being classified as in "working" status means that necessary steps have been taken to activate the number and that the number has been identified by descriptive markers in the database. Classifying a number in "working" status does not mean that the number is accepting calls being delivered through the telephone network. Numbers can be listed in the database in "working" status without actually being operational. For the number to be activated on March 1, 1996, information pertinent to that number had to be downloaded to the service control points (the regional local exchange carrier databases used in the processing of toll free calls) before March 1, 1996, and the number had to be listed in "working" status in the toll free database.

<sup>68</sup> See Letter from Glenn S. Richards, ATC to William F. Caton, FCC (February 29, 1996) (attaching letter from Roger J. Meyers, ATC to Sonja Coburn, LDDS Worldcom requesting pre-reservation of 39 888 numbers (August 7, 1995)).

filed requests with the Commission<sup>69</sup> and the Division<sup>70</sup> respectively, requesting that the two numbers in question be placed in the unavailable pool. On April 23, 1996, ATC learned that the numbers had been transferred to MCI, pursuant to the Division's March 29 letter directing DSMI to reinstate to the original RespOrg, in this case MCI, any number that was listed as in "working status" before 3:00 a.m. on March 1, 1996. MCI subsequently activated those numbers.

**37.** On October 22, 1996, Geraldine A. Matise, Chief, Network Services Division, Common Carrier Bureau, denied ATC's request because the Division determined that DSMI had acted properly in returning the numbers to MCI.<sup>71</sup> On November 21, 1996, ATC filed a letter requesting that the Bureau reconsider and reverse that decision, and order that the two 888 numbers be reassigned to ATC's RespOrg.<sup>72</sup> On January 14, 1997, Regina M. Keeney, Chief, Common Carrier Bureau, denied ATC's request finding that taking the 888 numbers back from the current subscribers would be unfair because those subscribers were not responsible for the alleged failure of ATC's RespOrg to place the selected numbers in unavailable status at the proper time.<sup>73</sup> On February 13, 1997, ATC filed with the Commission an application for review and reversal of the Bureau's decision.<sup>74</sup> On December 8, 1997, ATC filed a supplement to its application for review and reversal of the Bureau's decision.<sup>75</sup>

**38.** We deny ATC's application for review. First, we note that, in the First Report and Order, it was not the Bureau's intent to resolve claims that a subscriber's set-aside request was not honored, which is why the Bureau deferred to the RespOrg's polling processes to identify what 888 numbers were to be set aside.<sup>76</sup> ATC's RespOrg apparently did not request that those numbers be set aside. Second, the grounds advanced by ATC in support of its application restate the arguments presented to the Bureau. We reviewed the arguments presented and agree with the Bureau's decision that it would be unfair to the current 888 subscribers to take the 888 numbers away from them because of ATC's RespOrg's alleged failure to act on ATC's behalf.

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<sup>69</sup> Letter from Roger J. Meyers, ATC to William F. Caton, FCC (February 29, 1996).

<sup>70</sup> Letter from Roger J. Meyers, ATC to Geraldine A. Matise, FCC (June 6, 1996).

<sup>71</sup> Letter from Geraldine A. Matise, FCC, to Roger J. Meyers, ATC (October 22, 1996).

<sup>72</sup> Letter from Roger J. Meyers, ATC to Regina M. Keeney, FCC (November 21, 1996).

<sup>73</sup> Letter from Regina M. Keeney, FCC, to Roger J. Meyers, ATC (January 14, 1997).

<sup>74</sup> Letter from Roger J. Meyers, ATC to William F. Caton, FCC (February 13, 1997). On March 3, 1997, Network Services Division informed ATC that the Commission would address its request in the context of this rulemaking proceeding. Letter from Geraldine A. Matise, FCC, to Roger J. Meyers, ATC (March 3, 1997).

<sup>75</sup> Letter from Roger J. Meyers, ATC, to William F. Caton, FCC (December 5, 1997).

<sup>76</sup> First Report and Order at para. 13.

## V. CONCLUSION

**39.** We conclude that vanity numbers in the 877 toll free code, and in toll free codes beyond 877, shall be released and made available on a first-come, first-served basis as each toll free code is deployed. We further conclude that a right of first refusal shall be offered to current 800 subscribers holding 800 vanity numbers that correspond to the 888 vanity numbers that were initially set aside. If the 800 subscriber refrains from exercising its option to reserve the corresponding 888 vanity number, that number shall be released and made available on a first-come, first-served basis. The 888 set-aside numbers will be available for assignment 90 days after the 877 code is deployed.

**40.** This Fourth Report and Order will become effective upon publication in the Federal Register. We find good cause exists to have the rules adopted in this Fourth Report and Order take effect upon publication in the Federal Register pursuant to section 553(d)(3) of the Administrative Procedure Act, 5 U.S.C. Section 553(d)(3). The rules adopted herein are critical to ensuring the smooth transition to the new 877 toll free code. We are nearing exhaustion of toll free numbers based on industry projection.<sup>77</sup> As a result, there has been a massive industry effort to make the next code ready before complete exhaustion of existing toll free numbers. The 877 toll free code is scheduled for deployment on April 5, 1998. In the interest of a smooth transition to 877, it is prudent to avoid exhaustion of existing codes before the new code is opened. Because the industry must have the guidance of these rules before the next code can be deployed, the rules adopted herein must be in effect prior to April 5, 1998.<sup>78</sup> Thus, we find that good cause exists to make the rules adopted herein effective upon their publication in the Federal Register.

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<sup>77</sup> See Letter from Don Werner, ATIS, to Kathie Levitz, FCC, dated September 10, 1997.

<sup>78</sup> ResponseTrak® Call Centers, a division of New England 800 Company ("Responsetrak"), filed a written Ex Parte presentation on February 24, 1998. Responsetrak proposed that toll free subscribers be divided into two categories of users: Enterprise and Communicator. An Enterprise user would use its codes for commercial, business, or philanthropic uses, provided it meets certain conditions, including that its number be published in "all available" public directory listings. A Communicator user would use its codes for personal, residential, pager, or business uses that don't meet the conditions set for an enterprise use. In addition, Responsetrak and ICB filed a joint written Ex Parte letter on March 13, 1998 requesting that deployment of 877 be delayed until the Commission has resolved the issue of vanity-number treatment. The Office of Advocacy, U.S. Small Business Administration ("SBA") filed a written Ex Parte Presentation on March 17, 1998 requesting a delay in the opening of the 877 toll free code until the Commission has resolved the issue of vanity-number treatment and has analyzed alternatives that can ease the burden on small entities. USBA raised concerns over conflicts of interests involving RespOrgs.

Responsetrak's proposal to partition toll free service was rejected in the Second Report and Order in this docket and no party sought reconsideration of that decision. See Second Report and Order at paras. 64-67. As vanity number assignment is addressed in this Fourth Report and Order, the request for delaying opening 877 is moot. In addition, this Fourth Report and Order considers the effects on small businesses. Furthermore, delaying 877 deployment would have adverse consequences on new small RespOrgs planning their businesses around the April 5, 1998 date. The issue of whether it is a conflict of interest for toll free service providers to operate as RespOrgs is outside the scope of this proceeding, and will be addressed in part in response to petitions for reconsideration to the Second Report and Order in this docket.

**VI. PROCEDURAL MATTERS**

- 41.** The Final Regulatory Flexibility Analysis is contained in Appendix B.

**VII. ORDERING CLAUSES**

**42.** Accordingly, pursuant to sections 1, 4(i), 201-205, 218, and 251 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201-205, 218, and 251, IT IS ORDERED that the Fourth Report and Order IS HEREBY ADOPTED.

**43.** IT IS FURTHER ORDERED that this Fourth Report and Order SHALL BECOME EFFECTIVE upon publication in the Federal Register. For the reasons discussed above, pursuant to section 553(d)(3) of Administrative Procedure Act, 5 U.S.C. § 553(d)(3), we find that good cause exists to have the rule adopted in this Fourth Report and Order take effect immediately upon publication in the Federal Register.

**44.** IT IS ORDERED, pursuant to Section 5(c)(1) of the Communications Act, as amended, 47 U.S.C. § 155(c)(1), and Section 0.201(d) of the Commission's rules, 47 C.F.R. § 0.201(d), THAT AUTHORITY IS DELEGATED to the Chief, Common Carrier Bureau to resolve those issues necessary for the assignment of the 888 set-aside vanity numbers and implementation of 877, including conservation plans, if needed on any or all toll free codes in use to prevent exhaust of toll free numbers before deployment of the next toll free code.

**45.** IT IS FURTHER ORDERED that, pursuant to section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review filed by American Telegram Corporation IS DENIED.

**46.** IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this FOURTH REPORT AND ORDER, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

**Appendix A**

**Final Rules**

**PART 52 - NUMBERING**

**§ 52.111 Toll Free Number Assignment**

Toll free numbers shall be made available on a first-come, first-served basis unless otherwise directed by the Commission.

## Appendix B

### FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act ("RFA"),<sup>1</sup> an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Toll Free Service Access Codes*, Notice of Proposed Rulemaking ("Notice").<sup>2</sup> The Commission sought written public comment on the proposals in the Notice, including comments on the IRFA.<sup>3</sup> This present Final Regulatory Flexibility Analysis ("FRFA") in this Fourth Report and Order ("Order") conforms to the RFA.<sup>4</sup>

2. To the extent that any statement contained in this FRFA is perceived as creating ambiguity with respect to our statements made in preceding sections of this Fourth Report and Order, the statements set forth in those preceding sections shall be controlling.

#### **Need for, and Objectives of, the Order:**

3. The Commission, pursuant Sections 1, 4(i), 201-205, 218, and 251 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201-205, 218, and 251, adopts this Fourth Report and Order to ensure the efficient, fair, and orderly allocation of toll free numbers.

#### **Summary of Significant Issues Raised by the Public Comments in Response to the IRFA:**

4. In the Notice, the Commission included an IRFA of the possible impact on small entities of the proposals suggested in the Notice.<sup>5</sup> The Commission noted that the proposals set forth in the Notice may have a significant economic impact on a substantial number of small entities, because toll free numbers are essential to many businesses both in terms of marketing and advertising products. Further, the Commission noted that toll free numbers may also have an intrinsic value to many businesses. The Commission sought written public comments on the IRFA.<sup>6</sup> Although no comments were submitted in direct response to the IRFA, the Commission

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

<sup>2</sup> Toll Free Service Access Codes, *Notice of Proposed Rulemaking*, 10 FCC Rcd 13692, 13707 (1995) ("Notice").

<sup>3</sup> Notice at para. 61.

<sup>4</sup> *See* 5 U.S.C. § 604.

<sup>5</sup> Notice, Appendix A.

<sup>6</sup> Notice at para. 61.

has addressed the issues raised in the general comments that pertain to small entities,<sup>7</sup> and has considered the possible economic impact on small entities.

### **Description and Estimate of the Number of Small Entities to which the Rules Will Apply:**

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>8</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>9</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>10</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").<sup>11</sup> A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."<sup>12</sup> Nationwide, as of 1992, there were approximately 275,801 small organizations.<sup>13</sup> "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."<sup>14</sup> As of 1992, there were approximately 85,006 such jurisdictions in the United States.<sup>15</sup> This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.<sup>16</sup> The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91

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<sup>7</sup> See, e.g., MFS Communications Co., Inc. ("MFS") Comments at 4-5.

<sup>8</sup> 5 U.S.C. § 603(b)(3).

<sup>9</sup> *Id.* § 601(6).

<sup>10</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

<sup>11</sup> Small Business Act, 15 U.S.C. § 632 (1996).

<sup>12</sup> 5 U.S.C. § 601(4).

<sup>13</sup> 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

<sup>14</sup> 5 U.S.C. § 601(5).

<sup>15</sup> U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

<sup>16</sup> *Id.*

percent) are small entities. Below, we further describe and estimate the number of small entity licensees and regulates that may be affected by the proposed rules, if adopted.

6. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service ("TRS").<sup>17</sup> According to data in the most recent report, there are 3,459 interstate carriers.<sup>18</sup> These carriers include, inter alia, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone toll service, providers of telephone exchange service, and resellers.

7. The SBA has defined establishments engaged in providing "Radiotelephone Communications" and "Telephone Communications, Except Radiotelephone" to be small businesses when they have no more than 1,500 employees.<sup>19</sup> Below, we discuss the total estimated number of telephone companies falling within the two categories and the number of small businesses in each, and we then attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

8. Although some affected incumbent local exchange carriers ("ILECs") may have 1,500 or fewer employees, we do not believe that such entities should be considered small entities within the meaning of the RFA because they are either dominant in their field of operations or are not independently owned and operated, and therefore by definition not "small entities" or "small business concerns" under the RFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small ILECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately consider small ILECs within this analysis and use the term "small ILECs" to refer to any ILECs that arguably might be defined by the SBA as "small business concerns."<sup>20</sup>

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<sup>17</sup> FCC, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997) (*Telecommunications Industry Revenue*).

<sup>18</sup> *Id.*

<sup>19</sup> 13 CFR § 121.201, Standard Industrial Classification (SIC) codes 4812 and 4813. *See also* Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual* (1987).

<sup>20</sup> *See* 13 CFR § 121.201, SIC code 4813. Since the time of the Commission's 1996 decision, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, 16144-45 (1996), the Commission has consistently addressed in its regulatory flexibility analyses the impact of its rules on such ILECs.

## 1. Responsible Organizations

9. This Order applies to all Responsible Organizations ("RespOrgs"), which may be small business entities. Any entity that meets certain eligibility criteria may serve as a RespOrg. Neither the Commission nor the SBA has developed a definition of small entities that would apply specifically to RespOrgs. The most reliable source of information regarding the number of RespOrgs appears to be data collected by Database Service Management, Inc. ("DSMI"), the organization that administers the toll free allotment database. According to a May 8, 1996, report obtained from DSMI, 168 companies reported that they were RespOrgs.<sup>21</sup> Although it seems certain that some of these RespOrgs are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of RespOrgs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 168 small entity RespOrgs that may be affected by the decisions adopted in this Fourth Report and Order.

## 2. Toll Free Subscribers

10. This Order also applies to all toll free subscribers, which also may be small business entities. "As noted and discussed *supra*, the RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." We note here that toll free subscribers may include entities from all three of these categories of small entities." Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to toll free subscribers. The most reliable source of information regarding the number of 800 subscribers of which we are aware appears to be the data we collect on the 800 numbers in use.<sup>22</sup> According to our most recent data, at the end of 1995, the number of 800 numbers in use was 6,987,063. Similarly, the most reliable source of information regarding the number of 888 subscribers appears to be the data we collect on the 888 numbers in use.<sup>23</sup> According to our most recent data, as of March 23, 1998, a total of 6,115,550 888 numbers were in use.<sup>24</sup> Although it seems certain that some of these subscribers either are not independently owned and operated businesses, or do not have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 6,987,063 small entity 800 subscribers and fewer than 6,115,550 888 subscribers that may be affected by the decisions adopted in this Fourth Report and Order.

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<sup>21</sup> DSMI, *SMS/800 Overview, SMS/800 Statistics* (May 8, 1996).

<sup>22</sup> Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, *FCC Releases, Study on Telephone Trends*, Tbl. 20 (May 16, 1996).

<sup>23</sup> Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, *Long Distance Carrier Code Assignments*, p. 80, Tbl. 10B (Oct. 18, 1996).

<sup>24</sup> SMS/800 Management Team, Number Administration Summary Report (March 23, 1998).

### 3. Telephone and Wireless Entities

**11. Total Number of Telephone Companies Affected.** The provisions adopted herein may have a significant effect on a substantial number of the small telephone companies identified by SBA. The United States Bureau of the Census ("the Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.<sup>25</sup> This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small ILECs because they are not "independently owned and operated."<sup>26</sup> For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small ILECs that may be affected by the decisions adopted in this Fourth Report and Order.

**12. Wireline Carriers and Service Providers.** SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.<sup>27</sup> According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.<sup>28</sup> All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small ILECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions adopted in this Fourth Report and Order.

**13. Local Exchange Carriers.** Neither the Commission nor the SBA has developed a definition for small providers of local exchange services ("LECs"). The closest applicable definition under the SBA rules is for telephone communications companies other than

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<sup>25</sup> United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

<sup>26</sup> 15 U.S.C. § 632(a)(1).

<sup>27</sup> *1992 Census, supra*, at Firm Size 1-123.

<sup>28</sup> 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

radiotelephone (wireless) companies.<sup>29</sup> According to the most recent *Telecommunications Industry Revenue* data, 1,371 carriers reported that they were engaged in the provision of local exchange services.<sup>30</sup> We do not have data specifying the number of these carriers that are either dominant in their field of operations, 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 LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,371 providers of local exchange service are small entities or small ILECs that may be affected by the proposed rules, if adopted.

**14. Interexchange Carriers.** Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services ("IXCs"). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.<sup>31</sup> According to the most recent *Telecommunications Industry Revenue* data, 143 carriers reported that they were engaged in the provision of interexchange services.<sup>32</sup> We do not have data specifying the number of these carriers 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 IXCs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 143 small entity IXCs that may be affected by the proposed rules, if adopted..

**15. Competitive Access Providers.** Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access services providers ("CAPs"). The closest applicable definition under the SBA rules is for telephone communications companies other than except radiotelephone (wireless) companies.<sup>33</sup> According to the most recent *Telecommunications Industry Revenue* data, 109 carriers reported that they were engaged in the provision of competitive access services.<sup>34</sup> We do not have data specifying the number of these carriers 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 CAPs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 109 small entity CAPs that may be affected by the proposed rules, if adopted..

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<sup>29</sup> *Id.*, SIC Code 4813.

<sup>30</sup> *Telecommunications Industry Revenue*, Figure 2.

<sup>31</sup> 13 CFR § 121.201, SIC code 4813.

<sup>32</sup> *Telecommunications Industry Revenue*, Figure 2.

<sup>33</sup> 13 CFR § 121.201, SIC code 4813.

<sup>34</sup> *Telecommunications Industry Revenue*, Figure 2.

**16. Operator Service Providers.** Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.<sup>35</sup> According to the most recent *Telecommunications Industry Revenue* data, 27 carriers reported that they were engaged in the provision of operator services.<sup>36</sup> We do not have data specifying the number of these carriers 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 operator service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 27 small entity operator service providers that may be affected by the proposed rules, if adopted.

**17. Pay Telephone Operators.** Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.<sup>37</sup> According to the most recent *Telecommunications Industry Revenue* data, 441 carriers reported that they were engaged in the provision of pay telephone services.<sup>38</sup> We do not have data specifying the number of these carriers 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 pay telephone operators that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 441 small entity pay telephone operators that may be affected by the proposed rules, if adopted.

**18. Resellers (including debit card providers).** Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable SBA definition for a reseller is a telephone communications company other than radiotelephone (wireless) companies.<sup>39</sup> According to the most recent *Telecommunications Industry Revenue* data, 339 reported that they were engaged in the resale of telephone service.<sup>40</sup> We do not have data specifying the number of these carriers 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 resellers that would qualify as small business concerns under the

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<sup>35</sup> 13 CFR § 121.201, SIC code 4813.

<sup>36</sup> *Telecommunications Industry Revenue*, Figure 2.

<sup>37</sup> 13 CFR § 121.201, SIC code 4813.

<sup>38</sup> *Telecommunications Industry Revenue*, Figure 2.

<sup>39</sup> 13 CFR § 121.201, SIC code 4813.

<sup>40</sup> *Telecommunications Industry Revenue*, Figure 2.

SBA's definition. Consequently, we estimate that there are fewer than 339 small entity resellers that may be affected by the proposed rules, if adopted.

**19. Wireless (Radiotelephone) Carriers.** SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.<sup>41</sup> According to SBA's definition, a small business radiotelephone company is one employing fewer than 1,500 persons.<sup>42</sup> The Census Bureau also reported that 1,164 of those radiotelephone companies had no more than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the decisions adopted in this Fourth Report and Order.

**20. Cellular Licensees.** Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons.<sup>43</sup> According to the Bureau of the Census, only twelve radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.<sup>44</sup> Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. In addition, we note that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. In addition, according to the most recent *Telecommunications Industry Revenue* data, 804 carriers reported that they were engaged in the provision of either cellular service or Personal Communications Service ("PCS") services, which are placed together in the data.<sup>45</sup> We do not have data specifying the number of these carriers 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 cellular service carriers that would qualify as small business concerns under the SBA's definition.

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<sup>41</sup> United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

<sup>42</sup> 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

<sup>43</sup> 13 C.F.R. § 121.201, SIC code 4812.

<sup>44</sup> *1992 Census*, Series UC92-S-1, at Table 5, SIC code 4812.

<sup>45</sup> *Telecommunications Industry Revenue*, Figure 2.

Consequently, we estimate that there are fewer than 804 small cellular service carriers that may be affected by the proposed rules, if adopted.

**21. Private and Common Carrier Paging.** The Commission has proposed a two-tier definition of small businesses in the context of auctioning licenses in the Common Carrier Paging and exclusive Private Carrier Paging services. Under the proposal, a small business will be defined as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million, or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than \$15 million. Because the SBA has not yet approved this definition for paging services, we will utilize the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.<sup>46</sup> At present, there are approximately 24,000 Private Paging licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Telecommunications Industry Revenue* data, 172 carriers reported that they were engaged in the provision of either paging or "other mobile" services, which are placed together in the data.<sup>47</sup> We do not have data specifying the number of these carriers 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 paging carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 172 small paging carriers that may be affected by the proposed rules, if adopted. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

**22. Mobile Service Carriers.** Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. As noted above in the section concerning paging service carriers, the closest applicable definition under the SBA rules is that for radiotelephone (wireless) companies,<sup>48</sup> and the most recent *Telecommunications Industry Revenue* data shows that 172 carriers reported that they were engaged in the provision of either paging or "other mobile" services.<sup>49</sup> Consequently, we estimate that there are fewer than 172 small mobile service carriers that may be affected by the proposed rules, if adopted.

**23. Broadband Personal Communications Service (PCS).** The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar

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<sup>46</sup> 13 C.F.R. § 121.201, SIC code 4812.

<sup>47</sup> *Telecommunications Industry Revenue*, Figure 2.

<sup>48</sup> 13 C.F.R. § 121.201, SIC code 4812.

<sup>49</sup> *Telecommunications Industry Revenue*, Figure 2.

years.<sup>50</sup> For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>51</sup> These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.<sup>52</sup> No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F.<sup>53</sup> However, licenses for blocks C through F have not been awarded fully, therefore there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small entity PCS providers as defined by the SBA and the Commission's auction rules.

**24. SMR Licensees.** Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than \$15 million in the three previous calendar years. This definition of a "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.<sup>54</sup> The decisions adopted in this Fourth Report and Order may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues no more than \$15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities, which may be affected by the decisions adopted in this Fourth Report and Order.

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<sup>50</sup> See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, FCC 96-278, WT Docket No. 96-59, paras. 57- 60 (released June 24, 1996), 61 F 33859 (July 1, 1996); see also 47 C.F.R. § 24.720(b).

<sup>51</sup> See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, FCC 96-278, WT Docket No. 96-59, para. 60 (1996), 61 F 33859 (July 1, 1996).

<sup>52</sup> See, e.g., Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rad 5532, 5581-84 (1994).

<sup>53</sup> FCC News, Broadband PCS, D, E and F Block Auction Closes, No. 71744 (released January 14, 1997).

<sup>54</sup> See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2693-702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order*, *Eighth Report and Order*, and *Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463 (1995).

25. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the decisions adopted in this Fourth Report and Order includes these 60 small entities. In the recently concluded 800 MHz SMR auction there were 524 licenses awarded to winning bidders, of which 38 were won by small or very small entities. We assume that all 38 may be affected by the decisions adopted in this Fourth Report and Order.

#### 4. Cable System Operators (SIC 4841)

26. SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than \$11 million in revenue annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were 1,788 total cable and other pay television services and 1,423 had less than \$11 million in revenue.<sup>55</sup>

27. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.<sup>56</sup> Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.<sup>57</sup> Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the decisions adopted in this Fourth Report and Order.

28. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one 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."<sup>58</sup> The Commission has determined that there are 66,000,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 660,000 subscribers shall be deemed a

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<sup>55</sup> 1992 *Economic Census Industry and Enterprise Receipts Size Report*, Table 2D, SIC code 4841 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

<sup>56</sup> 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. Implementation of Sections of the 1992 Cable Act: Rate Regulation, *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995).

<sup>57</sup> Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>58</sup> 47 U.S.C. § 543(m)(2).

small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.<sup>59</sup> Based on available data, we find that the number of cable operators serving 660,000 subscribers or less totals 1,450.<sup>60</sup> We do not request nor do we collect information concerning whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000,<sup>61</sup> and thus are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

### **Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:**

**29.** In this Fourth Report and Order, we adopt a requirement that DSMI release vanity numbers in the 877 toll free code and in toll free codes beyond 877 at the same time as each code is deployed, to be made available on a first-come, first-served basis. In addition, we adopt a requirement that RespOrgs assign the 888 vanity numbers that were initially set aside, to their 800 customers holding the corresponding 800 vanity number, provided these 800 subscribers exercise an option to reserve the 888 set-aside number. Finally, we adopt a requirement that DSMI release the 888 set-aside vanity numbers, to be made available on a first-come, first-served basis if the 800 subscriber chooses to refrain from exercising its option to reserve the number. We conclude that these requirements are consistent with our obligation under section 251(e) of the Act to ensure that numbers are made available on an equitable basis. We believe that these requirements will not unduly burden DSMI because the act of releasing numbers is part of DSMI's responsibility as administrator of the toll free database and will not require any additional recordkeeping. Furthermore, these requirements will reduce DSMI's burden by no longer requiring DSMI to ensure that these numbers remain unavailable. We also believe that these requirements will not unduly burden RespOrgs, including small business entities, because the act of assigning numbers to subscribers and releasing numbers to the spare pool is part of RespOrgs' responsibilities as managers of toll free subscribers' database records. We further believe that these requirements will not unduly burden subscribers, including small business entities, because the subscribers may decline to exercise the option. If however, the subscriber chooses to exercise the option, the necessary steps involved in reserving these numbers do not exceed the necessary steps involved in reserving any other toll free numbers. We anticipate that no new skills are necessary to comply with this requirement, and that no additional staff or other resources should be necessary to comply with this requirement. Furthermore, we adopt no new reporting or recordkeeping requirements for toll free subscribers, including small business entities.

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<sup>59</sup> *Id.* § 76.1403(b).

<sup>60</sup> Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>61</sup> We do receive such information on a case-by-case basis only if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.1403(b) of the Commission's rules. *See* 47 CFR § 76.1403(d).

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**Significant Alternatives and Steps Taken by Agency to Minimize Significant Economic Impact on a Substantial Number of Small Entities Consistent with Stated Objectives:**

**30.** As stated, we conclude that releasing vanity numbers in the 877 code and codes beyond 877 as each code is deployed to be made available on a first-come, first-served basis, is consistent with our obligation under section 251(e) of the Act to ensure that numbers are made available on an equitable basis. This conclusion is in the public interest, and will not have an adverse impact on toll free subscribers, including small business entities, because it will open the toll free market to all toll free subscribers on an equal basis. Small toll free subscribers will be affected in the same manner as non-small business entities. We also conclude that allowing current 800 subscribers a right of first refusal to the corresponding 888 vanity numbers initially set aside is consistent with our obligation under Section 251(e) of the Act to ensure that numbers are made available on an equitable basis. This conclusion is also in the public interest, and will not have an adverse impact on toll free subscribers, including small business entities, because all toll free subscribers, including small business entities, with an 800 number corresponding to an 888 set-aside number will have a right of first refusal.

**31.** We considered providing a right of first refusal to subscribers that expressed interest in replicating their toll free numbers beyond the 888 toll free code.<sup>62</sup> We declined to accept various proposals associated with a right of first refusal for future codes.<sup>63</sup> We concluded that such a requirement would have conflicted with our goal to allocate toll free numbers efficiently, fairly, and on an orderly basis. We found that a right of first refusal for future codes would have been discriminatory against new subscribers because it would have precluded them from obtaining certain desirable numbers. If incumbent subscribers were allowed to exercise a right of first refusal in future codes, they would have a decided advantage over entities by precluding them from obtaining these numbers to represent their businesses. The entities that would be placed at a disadvantage by such an approach would probably have included small business entities. New business entities are often small, and the new entities would have been the entities precluded from obtaining those desirable vanity numbers. By allowing a right of first refusal for the 888 set-aside only, new subscribers, including small business entities, will have the opportunity to reserve desirable numbers in 877 and codes beyond 877.

**32.** We also considered providing a right of first refusal with a fee. We declined to accept various proposals associated with a fee-based right of first refusal. We concluded that such a requirement would not solve the problems associated with discriminatory access to toll free numbers. In addition, such a requirement could place an undue financial burden on small business entities that may not have the financial resources to comply with such a fee requirement.

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<sup>62</sup> Notice paras. 41-43.

<sup>63</sup> See, e.g., Telecommunications Resellers Association ("TRA") Comments at 17-18; Qwest Communications Corporation ("Qwest") Comments at 7-8; Communications Venture Services, Inc. ("CVS") Comments at 1-2; Network Telephone Services ("NTS") Comments at 2; LDDS Worldcom Comments 14.

**33.** We also considered imposing a Standard Industrial Classification ("SIC") code requirement.<sup>64</sup> Under this option, an incumbent toll free subscriber with commercial concerns related to assignment of the corresponding vanity number in a subsequent toll free code would have reported its code to its toll free service provider or RespOrg, that in turn would have reported the code to DSMI. DSMI would have incorporated this SIC code into the subscriber's record and queried the database when applicants requested a corresponding number in another code to determine if their SIC code is the same as the current holder of the corresponding number in the previous toll free code. If the two parties shared the same SIC code and were, therefore, considered competitors, the applicant for the new number would have been prohibited from obtaining that number. We concluded that this option is inconsistent with our goal to allocate toll free numbers on an efficient, fair, and orderly basis. We determined that such a requirement would be administratively burdensome, difficult to apply because of a rapidly changing market, and subject to manipulation. Moreover, as with a right of first refusal, this option would have provided incumbent subscribers with a decided advantage over entities in the same line of business by precluding them from obtaining certain desirable numbers. The entities that would have been placed at a disadvantage by such an approach would have probably included small business entities. New business entities are often small, and the new entities would have been the entities precluded from obtaining those 888 numbers.

**34.** The Office of Advocacy, U.S. Small Business Administration ("SBA"), filed a Written Ex Parte Presentation on March 17, 1998 requesting a delay in the opening of the 877 toll free code until the Commission has resolved the issue of vanity-number treatment and has analyzed alternatives that can ease the burden on small entities.<sup>65</sup>

This Fourth Report and Order addresses the issue of vanity-number assignment and in doing so considers the effects on small businesses. Furthermore, delaying 877 deployment would have adverse consequences on new RespOrgs planning their businesses around the April 5, 1998 date. New business entities are often small, and these entities would have been placed at a disadvantage by delaying 877 deployment.

#### **Report to Congress:**

**35.** The Commission will send a copy of the *Toll Free Service Access Codes*, Fourth Report and Order, including this Final Regulatory Flexibility Analysis, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Toll Free Service Access Codes*, Fourth Report and Order, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Toll Free Service Access Codes*, Fourth Report

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<sup>64</sup> Notice paras. 44-45.

<sup>65</sup> USBA Written Ex Parte Presentation (March 17, 1998).

and Order and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

**Appendix C**  
**List of Commenters**

1.800.BALLOON  
1-800-Flowers  
800 Users Coalition ("Coalition")  
Aeronautical Radio, Inc. ("ARINC")  
AirTouch Paging ("AirTouch")  
Allnet Communication Services, Inc. ("Allnet")  
Ameritech  
American Car Rental Association ("ACRA")  
American Petroleum Institute ("API")  
American Telegram Corporation ("ATC")  
Americas Carrier Telecommunications Association ("ACTA")  
AT&T Corporation ("AT&T")  
Avis Rent A Car System, Inc. ("Avis")  
Bass Pro Shops ("Bass Pro")  
Bass Tickets, Inc. ("Bass Tickets")  
Bell Atlantic Telephone Companies ("Bell Atlantic")  
BellSouth Telecommunications, Inc. ("BellSouth")  
Cable & Wireless, Inc. ("CWI")  
Charter Medical Corporation ("Charter Medical")  
Communications Managers Association ("CMA")  
Communications Venture Services, Inc. ("CVS")  
Competitive Telecommunications Association ("CompTel")  
Crestar Bank ("Crestar")  
DeFabio, Joel ("Joel DeFabio")  
Del Webb Corporation ("Del Webb")  
Direct Marketing Association ("DMA")  
Enterprise Rent-A-Car, Inc. ("Enterprise")  
General Services Administration ("GSA")  
GTE Service Corporation ("GTE")  
INVESCO Funds Group, Inc. ("IFG")  
LCI, International ("LCI")  
LDDS WorldCom  
MCI Telecommunications Corporation ("MCI")  
MFS Communications Company, Inc. ("MFS")  
National Telephone Cooperative Association ("NTCA")  
NEXTLINK, Inc. ("NEXTLINK")  
Network Telephone Services, Inc. ("NTS")  
NIMA, International ("NIMA")  
Nissan Rosenthal ("Nissan")  
NYNEX Telephone Companies ("NYNEX")

Office of Management and Budget ("OMB")  
Olson, Mark D. ("Mark Olson")  
Organization for the Protection and Advancement of Small Telephone Companies  
("OPASTCO")  
Pacific Bell and Nevada Bell ("Pacific")  
Page, Joseph Edward ("Joseph Page")  
Paging Network, Inc. ("PageNet")  
Personal Communications Industry Association ("PCIA")  
Promoline, Inc. ("Promoline")  
Puerto Rico Telephone Company ("PRTC")  
Qwest Communications Corporation ("Qwest")  
Scherers Communications Group, Inc. ("Scherers")  
Service Management System/800 Number Administration Committee of the Ordering and  
Billing Forum ("SNAC")  
Service Merchandise Company, Inc. ("Service Merchandise")  
Southern New England Telephone Company ("SNET")  
Southwestern Bell Telephone Company ("SWBT")  
Sprint Corporation ("Sprint")  
Telco Planning, Inc. ("Telco Planning")  
Telecommunications Resellers Association ("TRA")  
Telecompute Corporation ("Telecompute")  
Telemation International, Inc. ("Telemation")  
Telephone Express  
Telco Planning, Inc. ("Telco Planning")  
Time Warner Communications Holdings, Inc. ("TWC")  
TLDP Communications, Inc. ("TLDP")  
United States Telephone Association ("USTA")  
Unitel Communications, Inc. ("UniTel")  
U S West Communications, Inc. ("U S West")  
Vanity International  
World Savings and Loan Association ("World Savings")  
Weather Channel, Inc. ("Weather Channel")  
Wise Telecommunications ("Wise")

**List of Reply Commenters**

1-800-Flowers  
American Automobile Association ("AAA")  
AirTouch Paging and Arch Communications Group ("AirTouch")  
Ameritech  
AT&T Corporation ("AT&T")  
Austin, John ("John Austin")  
Bass Pro Shops ("Bass Pro")  
BellSouth Telecommunications, Inc. ("BellSouth")  
British Airways Plc ("British Airways")  
Cable & Wireless, Inc. ("CWI")  
Communications Venture Services, Inc. ("CVS")  
Competitive Telecommunications Association ("CompTel")  
Dial 800, L.P. ("Dial 800")  
Eastern Tel Long Distance Service, Inc. ("Eastern Tel")  
Enterprise Rent-A-Car, Inc. ("Enterprise")  
General Communication, Inc. ("GCI")  
General Services Administration ("GSA")  
GTE Service Corporation ("GTE")  
Interactive CallBrand ("CallBrand")  
LDDS WorldCom  
MCI Telecommunications Corporation ("MCI")  
MFS Communications Company ("MFS")  
National Telephone Cooperative Association (NTCA")  
New York Clearing House Association ("NYCHA")  
NYNEX Telephone Companies ("NYNEX")  
Pacific Bell and Nevada Bell ("Pacific")  
Paging Network, Inc. ("PageNet")  
Personal Communications Industry Association ("PCIA")  
Promoline, Inc. ("Promoline")  
Qwest Communications Corporation ("Qwest")  
Scherers Communications Group, Inc. ("Scherers")  
Southwestern Bell Telephone Company ("SWBT")  
Sprint Corporation ("Sprint")  
Telecommunications Resellers Association ("TRA")  
TLDP Communications, Inc. ("TLDP")  
United States Telephone Association ("USTA")  
U S West Communications, Inc. ("US West")  
Vanity International  
Weather Channel, Inc. ("Weather Channel")

**List of Further Commenters**

800 Users Coalition ("Coalition")  
ArtSnob Inc. ("ArtSnob")  
Car Rental Association ("CRA")  
Dame Olcott, Linda ("Linda Dame Olcott")  
Communications Venture Services, Inc. ("CVS")  
Direct Marketing Association ("DMA")  
Enterprise Rent-A-Car, Inc. ("Enterprise")  
ICB, Inc. ("ICB")  
Lerman, Joshua ("Joshua Lerman")  
MCI Telecommunications Corporation ("MCI")  
National Association of Telecommunication End-Users ("NATE")  
New England 800 Company ("New England")  
National Electronics Warranty Corporation ("NEW")  
Palnik, Paul ("Paul Palnik")  
RCN Telecom Services, Inc. ("RCN")  
Sprint Corporation ("Sprint")  
U S West Communications, Inc. ("U S West")  
Vanity International

**List of Further Reply Commenters**

Direct Marketing Association ("DMA")  
ICB, Inc. ("ICB")  
MCI Telecommunications Corporation ("MCI")  
National Association of Telecommunications End-Users ("NATE")  
Sprint Corporation ("Sprint")  
TLDP Communications, Inc. ("TLDP")  
Vanity International

## Appendix D Comments Summary

1. First-Come, First-Served Assignment. Most commenters assert that a first-come, first-served reservation policy is the most equitable way to allocate toll free numbers. For example, Scherers supports a first-come, first-served reservation policy because it is consistent with the method by which non-vanity toll free numbers are allocated.<sup>1</sup> National Electronics Warranty Corporation ("NEW") urges the Commission to employ a first-come, first-served process to allow small and new businesses to enter the market.<sup>2</sup>

2. With respect to the 888 vanity numbers originally set aside, many commenters support releasing these "unavailable" 888 vanity numbers at the end of the 888 assignment pool.<sup>3</sup> Although they agree that an aging process for 888 vanity numbers is necessary to allow 800 subscribers a greater opportunity to engage in public-education efforts, most of these commenters differ on the appropriate time and method for release.<sup>4</sup> Bell Atlantic Telephone Companies ("Bell Atlantic"), however, opposes any delay in assigning 888 numbers because, it argues, that approach will only defer misuse, not prevent it.<sup>5</sup>

3. Right of First Refusal. Most commenters oppose a right of first refusal for toll free vanity numbers. Many of these commenters assert that telephone numbers are a finite numbering

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<sup>1</sup> Scherers Communications Group, Inc. ("Scherers") Comments at 15; *see also* BellSouth Telecommunications, Inc. ("BellSouth") Comments at 17-18; ArtSnob, Inc. ("ArtSnob") Comments at 2-4 (Comments filed late).

<sup>2</sup> NEW Comments at 1; *see also* Letter from Joshua Lerman to Bill Caton, Secretary, Federal Communications Commission at 3 (August 13, 1997) ("Lerman Ex Parte Letter") (arguing that all companies deserve the opportunity to obtain the 888 version of an 800 vanity number, otherwise the Commission would not be fulfilling its role of promoting growth, encouraging competition, serving the public interest and protecting consumers).

<sup>3</sup> *See, e.g.*, SouthWestern Bell Telephone Company ("SWBT") Comments at 17-18 (supporting a set-aside procedure); Service Management System/800 Number Administration Committee of the Ordering and Billing Forum ("SNAC") Comments at 13-14; MCI Telecommunications Corporation ("MCI") Comments at 15.

<sup>4</sup> An aging process sets a period of time during which the numbers would remain unavailable in order to minimize misdialing and confusion among the public. *See, e.g.*, Sprint Corporation ("Sprint") Comments at 18-19; NYNEX Telephone Companies ("NYNEX") Comments at 8; BellSouth Comments at 15-16; U S West Communications, Inc. ("U S West") Comments at 20; Telephone Express Comments at 2; The 800 Users Coalition ("Coalition") Comments at 19-20 (supporting holding 888 vanity numbers until the end of the assignment pool in conjunction with a right of first refusal at that time); 1-800-Flowers Comments at 11-12 (maintaining that holding numbers until the end of the 888 assignment pool is not a sufficient substitute for a right of first refusal and should only apply to those numbers that vanity-number holders declined to replicate); Enterprise Rent-A-Car, Inc. ("Enterprise") Supplemental Comments at 3.

<sup>5</sup> Bell Atlantic Comments at 9; *see also* Telecommunications Resellers Association ("TRA") Comments at 19; Bass Pro Shops ("Bass Pro") Comments at 6; Weather Channel, Inc. ("Weather Channel") Comments at 6-7; Service Merchandise Company, Inc. ("Service Merchandise") Comments at 6; Promoline, Inc. ("Promoline") Reply Comments at 6-7; Time Warner Communications Holdings, Inc. ("TWC") Reply Comments at 3.

resource and that a right of first refusal would lead to an accelerated exhaust of toll free numbers.<sup>6</sup> Sprint argues that a right of first refusal would lead to "underutilization" of a scarce resource because some 800 subscribers may want to replicate numbers simply to prevent others from obtaining that number, and not because it will generate more business.<sup>7</sup> Similarly, Paging Network, Inc. ("PageNet") notes that 800 users cannot claim they require additional numbers to expand their business because additional circuits and trunks can be installed to meet increased demand.<sup>8</sup> Furthermore, several commenters contend that a right of first refusal discriminates against new subscribers to toll free services by reducing the chances that they can obtain those corresponding numbers.<sup>9</sup>

4. Some commenters state that a right of first refusal is inconsistent with the concept that holders of telephone numbers do not acquire property rights in those numbers.<sup>10</sup> Scherers argues that a right of first refusal would create a "faulty perception of ownership."<sup>11</sup> USTA maintains that a right of first refusal would encourage the public to ignore essential differences between numbers and urges the Commission to recognize the uniqueness of numbers.<sup>12</sup> NYNEX argues that the Commission's failure to treat each 10-digit number as distinct and separate from every other 10-digit number would increase consumer confusion.<sup>13</sup> Similarly, U S West asserts that a right of first refusal is likely to cause greater consumer confusion and increased misdials because to the extent that vanity-number holders exercise their option to obtain the corresponding

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<sup>6</sup> See, e.g., United States Telephone Association ("USTA") Comments at 7; Pacific Bell and Nevada Bell ("Pacific") Comments at 12; Southern New England Telephone Company ("SNET") Comments at 12; U S West Comments at 18-24; UniTel Communications, Inc. ("UniTel") Comments at 3-4; LCI International ("LCI") Comments at 8-9; AirTouch Paging ("AirTouch Paging") Comments at 14; Cable & Wireless, Inc. ("CWI") Comments at 6-7; TRA Comments at 17-18; Qwest Communications Corporation ("Qwest") Comments at 7; Paging Network, Inc. ("PageNet") Comments at 13; and Competitive Telecommunications Association ("CompTel") Reply Comments at 7-9; TLDP Communications, Inc. ("TLDP") Comments at 1-2 (asserting that denying a right of first refusal will not result in number conservation because subscribers will instruct their RespOrgs to reserve equivalent 888 numbers as soon as they become available).

<sup>7</sup> Sprint Comments at 20; see also BellSouth Comments at 15; SNET Comments at 12; and Bell Atlantic Comments at 7-8.

<sup>8</sup> PageNet Comments at 13; see also LCI Comments at 8-9.

<sup>9</sup> Pacific Comments at 10-13; GTE Service Corporation ("GTE") Comments at 9; Joseph Page Comments at 2-6 (extending monopoly of current 800 holders); SWBT Comments at 17 (numbers may be used to spell a different word); Scherers Comments at 15; Telephone Express Comments at 2.

<sup>10</sup> USTA Comments at 4-6; Bell Atlantic Comments at 7-8; LCI Comments at 8-9; Scherers Comments at 15; CompTel Comments at 12-14. *But see* Vanity International Further Ex Parte Comments at 3 and National Association of Telecommunication End-Users ("NATE") Further Comments and Reply at 1 (Comments filed late).

<sup>11</sup> Scherers Comments at 15.

<sup>12</sup> USTA Comments at 4-6, 8. See, e.g., NYNEX Comments at 7-8.

<sup>13</sup> NYNEX Comments at 7-8; see also U S West Further Comments at 3.

number in subsequent toll free codes, consumers may treat all 800 and 888 numbers as interchangeable.<sup>14</sup> BellSouth also opposes a right of first refusal and argues that consumer confusion caused by the existence of multiple toll free codes should be minimized through public education and advertising campaigns.<sup>15</sup>

5. Several commenters support a right of first refusal.<sup>16</sup> Certain commenters assert that a right of first refusal would minimize confusion and avoid misdialing by the public.<sup>17</sup> Another group of commenters argues that a right of first refusal would allow current 800 holders to protect their investment in their 800 numbers.<sup>18</sup> ICB, Inc. ("ICB") and New England claim that, because subscribers have a property interest in numbers, they should be permitted to exercise a right of first refusal.<sup>19</sup> MCI argues that 800 subscribers should have a right of first refusal in all toll free codes to be able to protect its investment.<sup>20</sup> 1-800-Flowers asserts that businesses must

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<sup>14</sup> U S West Comments at 18-24; *see also* Telephone Express Comments at 2.

<sup>15</sup> BellSouth Comments at 15; *See also* Bell Atlantic Comments at 8 (arguing that customer confusion will subside as additional toll free codes open).

<sup>16</sup> *See, e.g.*, Telco Planning, Inc. ("Telco Planning") Comments at 5; Coalition Comments at 14-15; Bass Pro Comments at 3 n.4; Enterprise Comments at 1; Weather Channel Comments at 3 n.3; British Airways Plc ("British Airways") Reply Comments at 2; New York Clearing House Association ("NYCHA") Reply Comments at 5; New England 800 Company ("New England") Comments at 2; Paul Palnik Comments at 1; Cable & Wireless, Inc. ("CWI") Reply Comments at 2.

<sup>17</sup> AT&T Corporation ("AT&T") Comments at 24-26; Avis Rent A Car System, Inc. ("Avis") Comments at 7; Americas Carrier Telecommunications Association ("ACTA") Comments at 18; Weather Channel Comments at 2-3; INVESCO Funds Group, Inc. ("IFG") Comments at 1-2; American Petroleum Institute ("API") Comments at 3-5. Crestar Bank ("Crestar") Comments at 1-2; Promoline Comments at 6-8; Bass Pro Comments at 2-3; Coalition Comments at 18-19; TLDP Reply Comments at 7; American Car Rental Association ("ACRA") Supplemental Comments at 3; and Coalition Supplemental Comments at 4-10 (arguing that despite extensive public education efforts over the past year, misdialing continues).

<sup>18</sup> Coalition Comments at 6; MCI Comments at 15; Direct Marketing Association ("DMA") Comments at 10-11; Nissan Rosenthal ("Nissan") Comments at 1; American Telegram Corporation ("ATC") Comments at 3 (supporting a 90-day window to exercise the option and recommending that the Commission establish separate guidelines for vanity numbers); Vanity International Reply Comments at 1; ICB Further Comments at 6 (supporting replication as an interim measure and claiming that the Commission must correct its conclusions regarding property rights in telephone numbers).

<sup>19</sup> ICB Further Comments at 2 (arguing that number portability implies private interest in numbers because it recognizes that toll free subscribers have a legally protected right to maintain their toll free numbers); New England Comments at 2 (asking the Commission to recognize that telephone numbers are private property of subscribers and not in the public domain).

<sup>20</sup> MCI Comments at 15 and Reply Comments at 1-2.

be able to protect themselves against unfair competition.<sup>21</sup> It maintains that a right of first refusal is the least regulatory, litigious, and burdensome way for businesses to protect themselves.<sup>22</sup>

6. Weather Channel states that denying a right of first refusal would allow competitors to benefit from the reputation and goodwill of the 800 holder.<sup>23</sup> Similarly, Coalition asserts that a right of first refusal would enable subscribers to protect themselves from infringement and unfair business practices.<sup>24</sup> General Services Administration ("GSA") supports a right of first refusal because some 800 numbers procured by GSA effectively perform a public service by virtue of their ease of recognition and should be made available pursuant to a right of first refusal.<sup>25</sup> Although Sprint and U S West generally oppose a right of first refusal, they state they could support it only for 888 numbers because, given the length of time 888 vanity numbers have been unavailable, subscribers may believe that they have acquired some right to replicate their number in the 888 code.<sup>26</sup>

7. Some commenters offer variations on a limited right of first refusal.<sup>27</sup> TWC and IFG recommend requiring a subscriber to establish a need for the second number before exercising its right of first refusal.<sup>28</sup> 1-800-Flowers asserts that the subscriber should be required to use the number that it obtains by exercising a right of first refusal.<sup>29</sup> Direct Marketing

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<sup>21</sup> 1-800-Flowers Comments at 1-11; *see also* TLDP Comments at 1-2.

<sup>22</sup> 1-800-Flowers Comments at 1-11.

<sup>23</sup> Weather Channel Comments at 2-3; *see also* Crestar Comments at 1-2; Bass Pro Comments at 2-3; DMA Supplemental Comments at 2.

<sup>24</sup> Coalition Supplemental Comments at 12-13 (*citing Holiday Inns, Inc. v. 800 Reservation, Inc.*, 86 F.3d 619, 625 (6th Cir. 1996) ("*Holiday Inns*"). In *Holiday Inns*, the Court of Appeals held that, despite ownership of trademark rights in a vanity number, the trademark holder cannot claim rights in complementary numbers. The Court, in dicta, noted that "*Holiday Inns* neglected to take the simple precaution of reserving its complementary number-- a practice which many of its competitors have chosen to take." Complementary numbers are those numbers that are frequently misdialed when a customer dials a vanity number. For example, "1-800-H[0]L[1]DAY" is a complementary number to "1-800-HOLIDAY" because customers frequently substitute the number zero for the letter "O" and the number one for the letter "I."

<sup>25</sup> GSA Comments at 2-3; *see also* Charter Medical Corporation ("*Charter*") Comments at 1-2.

<sup>26</sup> Sprint Comments at 2; U S West Further Comments at 4; *see also* LDDS WorldCom Comments at 14-15.

<sup>27</sup> *See, e.g.*, TRA Comments at 17-18; MCI Further Comments at 7 (endorsing a rule that provides right of first refusal only to current holders of 800 numbers, not the subscribers holding numbers at the time the numbers were set aside); RCN Telecom Service, Inc. ("*RCN*") Further Comments at 3 (the right of first refusal should belong to the current holder of the 800 vanity numbers rather than the holder at the time the number was set aside).

<sup>28</sup> TWC Comments at 7-8; IFG Comments at 1-2.

<sup>29</sup> 1-800-Flowers Comments at 10-11; *see also* Aeronautical Radio, Inc. ("*ARINC*") Comments at 4-5; Service Merchandise Comments at 1-3 (supporting right of first refusal to 800 holders who meet a certain threshold of use

Association ("DMA") supports a two-part approach: (1) all 800 vanity-number holders should be given the right to reserve the equivalent 888 number; and (2) these holders should be allowed to release the 888 number on the condition that an associated acronym not be used.<sup>30</sup> Qwest opposes an unrestricted right of first refusal but supports the following three-part approach: (1) customers that trademarked their numbers could automatically receive the corresponding 888 number; (2) current 800 holders could elect, at their option, to install a transitional gateway intercept; and (3) for a limited period of time, the remaining 800 vanity-number holders could exercise a right of first refusal for a fee.<sup>31</sup> Although CompTel opposes a right of first refusal, it suggests that, if the Commission adopts this policy, it should expire after a brief interval (e.g., 45 days).<sup>32</sup> Ameritech proposes allowing RespOrgs to reserve up to 10 percent of their toll free numbers as vanity numbers with a right of first refusal.<sup>33</sup> Similarly, Network Telephone Service, Inc. ("NTS") supports a right of first refusal provided that each RespOrg is granted the same percentage of their current base in conjunction with a circuit breaker built into the database system, which would prevent the RespOrg from reserving a vanity number once it reaches its cap.<sup>34</sup>

**8. Fees for Exercising a Right of First Refusal.** Most commenters support imposing a fee for exercising a right of first refusal for vanity numbers.<sup>35</sup> DMA suggests a fee-based use-or-lose rule under which, by failing to exercise its right of first refusal, the 800 subscriber would waive its right with respect to numbers in any codes subsequently opened.<sup>36</sup> LDDS Worldcom supports a one-time fee of \$1,000 and a recurring fee of at least \$200 per month for every 888

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to qualify as "significant users"); American Petroleum Institute ("API") Comments at 3-5.

<sup>30</sup> DMA Comments at 12-17; *see also* NIMA, International ("NIMA") Comments at 7-9.

<sup>31</sup> Qwest Comments at 7-8; *see also* John Austin Reply Comments at 1-3; Communications Venture Services, Inc. ("CVS") Comments at 1-2 (opposing a right of first refusal but supporting replication rights only for trade names protectible by trademark laws).

<sup>32</sup> CompTel Comments at 12-14.

<sup>33</sup> Ameritech Reply Comments at 5-8.

<sup>34</sup> NTS Comments at 2 (circuit breaker would act as a trigger to prevent number reservation when the percentage of toll-free numbers unassigned fell to a certain level); *see also* Vanity International Reply Comments at 4 (suggesting creation of a distinctive domain for pagers, personal, and other major uses); ICB Further Comments at 9-10 and Reply Comments (Reply Comment filed late) at 5 (suggesting that the Commission look to the Internet domain assignment system as a model for a toll free number allocation system, categorize toll free number uses, consider using PIN numbers, and use grandfathering).

<sup>35</sup> *See, e.g.*, Dial 800, L.P. ("Dial 800") Reply Comments at 4; Bass Pro Reply Comments at 7; LDDS Worldcom Reply Comments at 8; NATE Informal Objection and Complaint at 2 (Complaint and Objection was filed late); 1-800-Flowers Comments at 10-11.

<sup>36</sup> DMA Supplemental Comments at 1-4.

vanity number for which an 800 number holder exercised its right of first refusal.<sup>37</sup> Americas Carrier Telecommunications Association ("ACTA") supports a non-recurring charge based on a sliding scale corresponding to the assets and income of the end user, with a minimum charge of \$1,000 per number.<sup>38</sup> 1-800-Flowers supports a one-time fee based on usage, under which the fee would be reduced as the call volume increased.<sup>39</sup> Nissan supports a small one-time fee and a nominal monthly fee to maintain service under replicated codes.<sup>40</sup> Several commenters, while opposing a right of first refusal, assert that a fee should be imposed if a right of first approval is adopted.<sup>41</sup> GSA supports a monthly recurring rate and a nominal fee for 800 subscribers that merely wish to block another's use.<sup>42</sup>

**9.** Several commenters oppose a fee-based right of first refusal.<sup>43</sup> AT&T argues that a fee would simply reward the party willing to pay most for the number.<sup>44</sup> Avis asserts that it would be inequitable to require payment for the logical extension of an 800 holder's investment.<sup>45</sup>

**10.** In response to the Commission's questions regarding the disposition of the money resulting from a fee-based right of first refusal, commenters provide a variety of suggestions. LDDS Worldcom suggests that the money be given to a neutral administrator and used for ongoing consumer education campaigns or SMS database service enhancements.<sup>46</sup> Similarly,

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<sup>37</sup> LDDS Worldcom Comments at 14; *see also* Promoline Comments at 7-8 (supporting a one-time fee of \$5,000); Bass Pro Comments at 3; Weather Channel Comments at 3 (supporting a one-time fee of \$10,000).

<sup>38</sup> ACTA Comments at 18.

<sup>39</sup> 1-800-Flowers Comments at 10-11; *see also* Enterprise Comments at 4-5 (supporting an annual fee to maintain reservation of an equivalent number only when subscriber failed to meet a minimum use requirement); ACRA Comments at 6-7; Coalition Comments at 20-21 (generally opposing a fee but supporting a use-based fee if the Commission adopts a fee-based right of first refusal).

<sup>40</sup> Nissan Comments at 1.

<sup>41</sup> GTE Comments at 10 (supporting a significant fee for exercising the right); Scherers Comments at 15-16; CompTel Comments at 13-14; TRA Comments at 18 (supporting fee imposed every time a potential subscriber is blocked from reserving the preempted number in order to reflect the true value of the number for the potential subscribers).

<sup>42</sup> GSA Comments at 3.

<sup>43</sup> *See, e.g.*, NYCHA Reply Comments at 1-3; TLDP Reply Comments at 8; Vanity International Reply Comments at 3.

<sup>44</sup> AT&T Comments at 27.

<sup>45</sup> Avis Comments at 7-8.

<sup>46</sup> LDDS Worldcom Comments at 14; *see also* Promoline Comments at 8 n.17; Bass Pro Comments at 3 n.5; Weather Channel Comments at 3 n.4; Enterprise Comments at 5 (fees should go into an escrow account from which fees can be refunded to exempt subscribers); ACRA Comments at 7 (suggesting using money to fund

TRA suggests that the money be used to defray the cost of administering the SMS.<sup>47</sup> Scherers supports using the money for early implementation of new toll free codes.<sup>48</sup>

**11. International Law.** With regard to whether a right of first refusal would be consistent with international law, DMA argues that it is unnecessary to consider the impact of a right of first refusal on foreign laws because the overwhelming majority of 800 calls are made within the United States to entities within the United States.<sup>49</sup> SWBT questions "how vanity numbers arising from NXX codes used in the Caribbean countries would be protected in 888."<sup>50</sup>

**12. Trademark Law.** Most commenters assert that trademark and unfair competition laws will adequately protect the investment current holders of 800 numbers have made in their 800 numbers.<sup>51</sup> GTE argues that a subscriber harmed by the holder of the corresponding number in a different code can seek relief from the courts.<sup>52</sup> Similarly, Allnet Communications Service, Inc. ("Allnet") maintains that existing unfair trade and intellectual property laws provide the necessary protections and that, therefore, the "Commission does not need to delve into this arena."<sup>53</sup>

**13.** Other commenters disagree, stating that trademarks or service marks do not adequately protect the investment current 800 holders have made in their 800 numbers.<sup>54</sup> AT&T maintains that not all vanity-number customers are eligible for trademark or service-mark

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NANPA).

<sup>47</sup> TRA Comments at 18; *see also* Enterprise Comments at 5 (suggesting that fees be used to fund the administration of the SMS database).

<sup>48</sup> Scherers Comments at 1.

<sup>49</sup> DMA Comments at 12 n.3.

<sup>50</sup> SWBT Comments at 17.

<sup>51</sup> *See, e.g.*, Sprint Comments at 21-22 n.11; BellSouth Comments at 16-17; SNET Comments at 6; Bell Atlantic Comments at 7; AirTouch Paging ("AirTouch") Comments at 14-15; PageNet Comments at 14-15; CompTel Comments at 13; LCI Comments at 8; USTA Reply Comments at 4.

<sup>52</sup> GTE Comments at 9-10 n.15.

<sup>53</sup> Allnet Comments at 9; Joseph DeFabio Comments at 1 (asserting that the Commission should not attempt to preempt trademark law).

<sup>54</sup> U S West Comments at 21-22; 1-800-Flowers Comments at 14-15; Coalition Comments at 21-22; AT&T Comments at 26; Enterprise Reply Comments at 1; NYCHA Reply Comments at 11; Promoline Reply Comments at 7; TWC Reply Comments at 1-3; British Airways Reply Comments at 3-5; Bass Pro Reply Comments at 2; Paul Palnik Comments at 2.

registration.<sup>55</sup> DMA asserts that the Commission must consider trademark protections, but must also harmonize number allocation rules with principles of trademark and unfair competition.<sup>56</sup> Others argue that, regardless of whether trademark law adequately protects 800 subscribers, the Commission does not have the authority to draft new trademark law or inject itself into the field of trademark law.<sup>57</sup>

**14. SIC Codes.** Most commenters generally oppose the use of SIC codes to protect incumbent toll free subscribers' financial interests in their toll free vanity numbers. They argue that implementing such a system would be administratively burdensome.<sup>58</sup> Additionally, commenters cite the difficulties involved with identifying the proper classifications for conglomerates.<sup>59</sup> SWBT states that implementation of the SIC code proposal would be "an administrative and legal nightmare" for the database administrator.<sup>60</sup> U S West asserts that the addition of a company's SIC code to the SMS record is inappropriate because such information has been considered proprietary.<sup>61</sup> AT&T maintains that such a system would be difficult to monitor and subject to abuse by current vanity-number holders possessing an incentive to claim multiple classifications in order to preempt anyone else from obtaining an 888 number they want to protect.<sup>62</sup> Similarly, MCI asserts that self-assignment invites misrepresentation.<sup>63</sup> Bell Atlantic, citing the Department of Commerce, opposes the proposal because not all businesses have SIC Codes, especially service businesses.<sup>64</sup> The Office of Management and Budget ("OMB") notes that use of SIC codes may result in legal action if questions arise as to the applicability of the SIC code to a particular firm and questions who would adjudicate complaints about a company's

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<sup>55</sup> AT&T Comments at 26; Service Merchandise Comments at 6; 1-800-Flowers Comments at 14-15; Bass Pro Comments at 8 n.15 & n.16; Weather Channel Comments at 8-9; Coalition Comments at 21-22.

<sup>56</sup> DMA Comments at 11-14.

<sup>57</sup> See generally Lisa Dame Olcott, *Confusingly Dissimilar Applications of Trademark Law to Vanity Telephone Numbers*, Catholic University of America Law Review, at 143 (This article was filed by the author as Informal Comments). But see New England Comments at 2 (suggesting that the Commission act as the courts with respect to trademark law).

<sup>58</sup> See, e.g., Sprint Comments at 21; LDDS Worldcom Comments at 15; TWC Comments at 8; Enterprise Supplemental Comments at 3.

<sup>59</sup> See, e.g., MCI Comments at 15; CWI Comments at 3; Ameritech Comments at 32; GTE Comments at n.17; Service Merchandise Comments at 6; CompTel Comments at 13 n.17; ACRA Comments at 8.

<sup>60</sup> SWBT Comments at 18; see also API Comments at 5; NYNEX Comments at 8.

<sup>61</sup> U S West Comments at 24-25.

<sup>62</sup> AT&T Comments at 27 n. 54; see also MFS Communications Company, Inc. ("MFS") Comments at 10; Telecompute Comments at 3; DMA Comments at 14 n.5.

<sup>63</sup> MCI Further Comments at 6.

<sup>64</sup> Bell Atlantic Comments at 8-9 (citing Department of Commerce, 1994 U.S. Industrial Outlook, at 1).

"classification."<sup>65</sup> OMB suggests that the Commission consider the use of a dispute resolution service to resolve issues related to "800" and "888" number overlap.<sup>66</sup>

**15.** Others argue that SIC codes are not designed to identify competitors and would not provide the protection the proposal is intended to give.<sup>67</sup> Coalition notes that problems associated with the assignment of SIC codes are magnified by a dynamic economy because the codes cannot keep pace with the market.<sup>68</sup> Coalition illustrates the unreliability of SIC codes for identifying competitors by noting that UPS is defined as a trucking company while Federal Express is defined as an airline.<sup>69</sup> Pacific notes that the proposal places RespOrgs in the position of prohibiting one customer from obtaining a number used by another customer and ultimately hurts their business relationship with their customers.<sup>70</sup> U S West maintains that modifying the database to perform this function would require significant programming.<sup>71</sup> Other commenters note that using SIC codes to limit assignments would not reduce misdialing and would lead to subscriber confusion and frustration.<sup>72</sup>

**16.** Avis supports the SIC code proposal because it provides some measure of protection against competitors trafficking in toll free numbers.<sup>73</sup> Avis notes that, if the proposal is adopted, it may be necessary to ensure that a company's subsidiaries are assigned the main company's SIC code.<sup>74</sup> Enterprise also supports the proposal, provided that an 800 number holder is able to report multiple codes and to update its SIC codes.<sup>75</sup> CVS asks the Commission to define what the "same code" means for SIC numbers and suggests that the first two digits of

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<sup>65</sup> OMB Comments at 4.

<sup>66</sup> *Id.*

<sup>67</sup> *See, e.g.*, NIMA Comments at 8-9.

<sup>68</sup> Coalition Comments at 23.

<sup>69</sup> Coalition Comments at 22-23; *see also* Bass Pro Comments at 5 and Weather Channel Comments at 5-6 (giving examples of potential competitors who do not have the same SIC code).

<sup>70</sup> Pacific Comments at 13.

<sup>71</sup> U S West Further Comments at 4.

<sup>72</sup> *See, e.g.*, 1-800-Flowers Reply Comments at 7; British Airways Reply Comments at 5.

<sup>73</sup> Avis Comments at 5-6.

<sup>74</sup> *Id.*

<sup>75</sup> Enterprise Comments at 6.

the SIC code should be sufficient.<sup>76</sup> TRA notes that limited use of SIC codes could provide a useful method of determining whether a subscriber and a would-be subscriber are competitors.<sup>77</sup>

**17. Lotteries.** Most commenters agree that a lottery-based assignment method is not preferable to a first-come, first-served option.<sup>78</sup> Many commenters assert that a lottery would undermine our anti-brokering rules because it would invite brokering practices.<sup>79</sup> DMA questions the Commission's authority to assign numbers through a lottery.<sup>80</sup>

**18. Auctions.** None of the commenters supports a competitive bidding process for vanity numbers.<sup>81</sup> MCI argues that auctions should not be used where numbers are plentiful.<sup>82</sup> Vanity International argues that, if telephone numbers cannot be owned, they cannot be auctioned.<sup>83</sup> AT&T argues that an auction would simply reward the party willing and able to pay most for the number, and would not minimize consumer confusion, or avoid brokering.<sup>84</sup> Additionally, DMA argues that auction of 888 numbers would likely lead to anti-competitive business practices, fraud, and confusion.<sup>85</sup>

**19. Partitioning.** ResponseTrak® Call Centers, a division of New England 800 Company ("Responsetrak"), first raised partitioning of toll free service in its comments<sup>86</sup> refreshing the record filed on July 21, 1997 and then filed a written ex parte presentation on

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<sup>76</sup> CVS Comments at 5.

<sup>77</sup> TRA Comments at 19.

<sup>78</sup> Paul Palnik Comments at 1; Coalition Supplemental Comments at 14-16; ICB Further Comments at 3-6.

<sup>79</sup> DMA Supplemental Comments at 4 (maintaining that an auction or lottery would imply that toll free numbers are a tradeable commodity); Sprint Comments at 4; U S West Further Comments at 5.

<sup>80</sup> DMA Supplemental Comments at 2.

<sup>81</sup> *See, e.g.*, Promoline Comments at 8-9 (finding incumbent subscribers with little capital unfairly prejudiced); Coalition at 21; Bass Pro Comments at 4; Weather Channel Comments at 4-5; ACRA Comments at 5-6; 1-800-Flowers Comments at 10; DMA Supplemental Comments at 4-5; Paul Palnik Comments at 1; Vanity International Further Ex Parte Comments at 2; Sprint Reply Comments at 4.

<sup>82</sup> MCI Further Comments at 4.

<sup>83</sup> Vanity International Further Ex Parte Comments at 2.

<sup>84</sup> AT&T Comments at 26-27; *see also* Promoline Comments at 8-9; Bass Pro Comments at 4; Weather Channel Comments at 4-5; ACRA Comments at 5-6.

<sup>85</sup> *See* DMA Supplemental Comments at 4-5.

<sup>86</sup> New England 800 Company ("New England") Comments at 2-3.

February 24, 1998.<sup>87</sup> Responsetrak proposed that toll free subscribers be divided into two categories of users: Enterprise and Communicator. An Enterprise user would use its codes for commercial, business, or philanthropic uses, provided it meets certain conditions, including that its number be published in "all available" public directory listings. A Communicator user would use its codes for personal, residential, pager, or business uses that don't meet the conditions set for an enterprise use.<sup>88</sup> In addition, Responsetrak and ICB filed a joint written ex parte letter on March 13, 1998 requesting that deployment of 877 be delayed until the Commission has resolved the issue of vanity-number treatment.<sup>89</sup>

**20.** The Office of Advocacy, U.S. Small Business Administration ("SBA"), filed a written ex parte presentation on March 17, 1998 requesting a delay in the opening of the 877 toll free code until the Commission has resolved the issue of vanity-number treatment and has analyzed alternatives that can ease the burden on small entities. SBA raised concerns over conflicts of interests involving RespOrgs.<sup>90</sup>

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<sup>87</sup> Responsetrak Written Ex Parte Presentation and Motion to Defer 877 Implementation (February 24, 1998).

<sup>88</sup> The Commission has already considered and rejected the option of assigning specific toll free area codes to subscribers of particular types of services, otherwise known as partitioning. Reconsideration of this issue was not sought by any parties.

<sup>89</sup> Letter from Robert J. Keller, Counsel, ICB and Responsetrak, to A. Richard Metzger, Chief, Common Carrier Bureau (March 13, 1998) (Responsetrak Ex Parte Letter).

<sup>90</sup> USBA Written Ex Parte Presentation (March 17, 1998).

**DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH**

*Re: Toll Free Service Access Codes, CC Docket No. 95-155.*

While I agree with many aspects of the majority's decision regarding the assignment of toll free vanity numbers, I dissent from the Commission's conclusion that vanity numbers in the 877 toll free code and all future toll free codes should be assigned on a first-come, first served basis as each code is open for calling. Because vanity numbers are easily recognizable by consumers, many subscribers to 800 toll free numbers have invested substantial resources in advertising to develop an association with particular products or services. When the deployment of the 888 toll-free code approached, holders of 800 vanity numbers expressed concern about consumer confusion, misdials, and erosion of their trademarks, and wanted to obtain the corresponding number in the 888 toll-free code. As a result, the Common Carrier Bureau ordered those numbers in the 888 toll-free code in which 800 subscribers expressed an interest be set-aside in an "unavailable pool" of numbers.

While today's decision continues to hold as unavailable those numbers previously set-aside, the majority also decides to forgo any future set-asides. I am concerned that this decision does not provide an adequate protection for those entities that have already invested heavily in the marketing of their toll free vanity numbers, and may discourage others from investing similarly in the future. In addition, these adverse impacts on the market are only compounded by the Commission's anti-brokering rules which currently prohibit the buying and selling of numbers. Thus, the Commission's own regulations prohibit the free market from resolving these concerns.

As opposed to the first-come, first-served approach adopted today, I would have preferred any one of several options. The Commission could have extended a right of first refusal -- possibly accompanied by a substantial industry-based fee -- to holders of vanity numbers. To respond to any additional concerns about number exhaust, a variety of creative solutions were proposed to limit the number of incumbent subscribers. For example, the Commission could have limited the ability to reserve vanity numbers to those holders that have already set-aside their 800 vanity numbers in the 888 code. Only 375,000 of the possible 8 million numbers were set-aside in the 888 code, and most of the 800 subscribers that had invested heavily in the marketing of a particular vanity number were able to reserve those numbers in the 888 code. In contrast, holders of new vanity numbers in the 877 and subsequent codes would then be on notice that their marketing investments would not be protected in the same manner. In addition, while the New England 800 partitioning proposal would require the Commission to revisit its numbering scheme in general, I believe that this proposal has some merit.

In conclusion, I believe that the Commission should have acted to further protect those entities that have an established commercial investment in toll free vanity numbers beyond the 888 toll code, and thus regretfully Dissent from that part of today's Order.