

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

In the Matter of	)	
	)	
Special Access for Price Cap Local Exchange Carriers;	)	WC Docket No. 05-25
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593
	)	

**REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING**

**Adopted: December 11, 2012**

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By the Commission: Chairman Genachowski and Commissioners Clyburn and Rosenworcel issuing separate statements; Commissioners McDowell and Pai approving in part, dissenting in part, and issuing separate statements.

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## I. INTRODUCTION

1. In this Report and Order and Further Notice of Proposed Rulemaking, we continue the process of reviewing our special access rules to ensure that they reflect the state of competition today and promote competition, investment, and access to dedicated communications services businesses across the country rely on every day to deliver their products and services to American consumers. Specifically, we initiate a comprehensive data collection and seek comment on a proposal to use the data to evaluate competition in the market for special access services.<sup>1</sup>

## II. BACKGROUND

### A. Price Cap Regulation

2. In 1991, the Commission implemented a system of price cap regulation by which the largest incumbent LECs (often referred to today as price cap LECs) establish their interstate access charges.<sup>2</sup> Price cap regulation is a form of incentive regulation that seeks to “harness the profit-making

<sup>1</sup> Special access services encompass all services that do not use local switches; these include services that employ dedicated facilities that run directly between the end user and an interexchange carrier’s (IXC) point of presence, where an IXC connects its network with the local exchange carrier’s (LEC) network, or between two discrete end user locations. *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 1997, para. 7 (2005) (*Special Access NPRM*); see also *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5677, para. 28 (2007) (*AT&T/BellSouth Order*) (“[S]pecial access is a dedicated transmission link between two locations, most often provisioned via high-capacity circuits.”). Special access is offered both at retail and at wholesale.

<sup>2</sup> The Commission required price cap regulation for the BOCs and GTE, and permitted other LECs to elect price cap regulation voluntarily, provided that all their affiliates also convert to price cap regulation and that they withdraw (continued....)

incentives common to all businesses to produce a set of outcomes that advance the public interest goals of just, reasonable, and nondiscriminatory rates, as well as a communications system that offers innovative, high quality services.”<sup>3</sup> In contrast to rate-of-return regulation, which preceded price cap regulation and focuses on an incumbent LEC’s costs and fixes the profits an incumbent LEC may earn based on those costs, price cap regulation focuses primarily on the prices that an incumbent LEC may charge. The access charges of price cap LECs originally were set at levels based on the rates that existed at the time the LECs entered the price cap regime. Increases in their rates have, however, been limited over the course of price cap regulation by the Price Cap Index (PCI) that is adjusted annually pursuant to formulae set forth in Part 61 of our rules.<sup>4</sup>

3. The PCI is designed to limit the prices LECs charge for service.<sup>5</sup> The PCI has three basic components: (1) a measure of inflation, *i.e.*, the Gross Domestic Product (chain weighted) Price Index (GDP-PI),<sup>6</sup> (2) a productivity factor or “X-Factor,” which represents the amount by which LECs can be expected to outperform economy-wide productivity gains,<sup>7</sup> and (3) adjustments to account for “exogenous” cost changes that are outside the LEC’s control and not otherwise reflected in the PCI.<sup>8</sup> The Commission’s price cap formula permitted special access PCIs to increase by a measure of inflation, minus a productivity offset (the X-factor). The X-factor represented the amount by which LECs were expected to outperform economy-wide productivity gains.<sup>9</sup>

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 from the pools administered by the National Exchange Carrier Association (NECA). *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6818, paras. 257-59 (1990) (*LEC Price Cap Order*), *aff’d*, *Nat’l Rural Telecom Ass’n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993). Most small LECs elected to remain subject to rate-of-return regulation.

<sup>3</sup> *LEC Price Cap Order*, 5 FCC Rcd at 6787, para. 2.

<sup>4</sup> See 47 C.F.R. § 61.45. *But see infra* para. 5 (describing how certain levels of pricing flexibility relief eliminate this ceiling on rate levels).

<sup>5</sup> *LEC Price Cap Order*, 5 FCC Rcd at 6792, para. 47. A price cap basket is a broad grouping of services, such as special access services. Prices for services within a basket are limited by the PCI for the basket, which limits the LEC’s pricing flexibility and its incentives to shift costs. See *id.* at 6810-11, paras. 198-203. To ascertain compliance with the PCI, LEC rate levels within each basket are measured through the use of an Annual Price Index (API). The API is the weighted sum of the percentage change in LEC prices. The API weights the rate for each rate element in the basket based on the quantity of each element sold in a historical base year. The historical base year is the calendar year that immediately precedes the annual tariff filing on July 1. A price cap LEC’s rates are in compliance with the cap for a basket if the API is less than or equal to the PCI. See 47 C.F.R. § 61.46.

<sup>6</sup> See *Access Charge Reform*, CC Docket No. 96-262; *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1; *Low-Volume Long-Distance Users*, CC Docket No. 99-249; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 13038-39, paras. 183-84 (2000) (*CALLS Order*), *aff’d in part, rev’d in part, and remanded in part*, *Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied*, *Nat’l Ass’n of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002), *on remand*, *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, Order on Remand, 18 FCC Rcd 14976 (2003).

<sup>7</sup> *LEC Price Cap Order*, 5 FCC Rcd at 6795-801, paras. 74-119.

<sup>8</sup> *Id.* at 6792, 6807-10, paras. 48, 166-90. Exogenous costs are incurred due to administrative, legislative, or judicial action beyond the LEC’s control. See *id.* at 6807, para. 166.

<sup>9</sup> *CALLS Order*, 15 FCC Rcd at 13018, para. 135.

## B. Pricing Flexibility

4. Pursuant to the pro-competitive, deregulatory mandates of the 1996 Act, the Commission adopted the *Pricing Flexibility Order* in 1999 to ensure that the Commission's regulations did not unduly interfere with the operation of interstate access markets as competition developed.<sup>10</sup> In that Order, the Commission developed competitive showing rules (also referred to as "triggers") intended to measure whether market conditions in a given Metropolitan Statistical Area would warrant various levels of regulatory relief.<sup>11</sup> To make a competitive showing, the Commission held that price cap LECs would need to demonstrate

either that (1) competitors unaffiliated with the incumbent LEC have established operational collocation arrangements in a certain percentage of the incumbent LEC's wire centers in an MSA, or (2) unaffiliated competitors have established operational collocation arrangements in wire centers accounting for a certain percentage of the incumbent LEC's revenues from the services in question in that MSA. In both cases, the incumbent also must show, with respect to each wire center, that at least one collocater is relying on transport facilities provided by a transport provider other than the incumbent LEC.<sup>12</sup>

5. Under the rules, the Commission granted relief in two phases. Phase I relief, which required lower levels of collocation, gave price cap LECs the ability to lower their rates through contract tariffs and volume and term discounts, but required that they maintain their generally available price cap-constrained tariff rates to "protect[ ] those customers that lack competitive alternatives."<sup>13</sup> Phase II relief, which required higher levels of collocation, permitted price cap LECs to raise or lower their rates throughout an area, unconstrained by price cap regulations included in the Commission's part 61 and part 69 rules.<sup>14</sup>

## C. The CALLS Order

6. In 2000, the Commission adopted the CALLS plan, a five-year interim, industry-proposed regime designed to move towards a more market-based approach to rate setting.<sup>15</sup> The CALLS plan separated special access services into their own basket and applied a separate X-factor to that basket.<sup>16</sup>

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<sup>10</sup> *Access Charge Reform*, CC Docket No. 96-262; *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1; *Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers*, CCB/CPD File No. 98-63; *Petition of U.S. West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14224, para. 1 (1999) (*Pricing Flexibility Order*).

<sup>11</sup> *Id.* at 14261-67, paras. 77-83.

<sup>12</sup> *Id.* at 14261-62, 14296, para. 77 (footnote omitted); *see also id.* at 14296, para. 141.

<sup>13</sup> *Id.* at 14258, para. 69.

<sup>14</sup> *Id.* at 14301, para. 153. Price cap LECs granted Phase II relief must continue to maintain generally available tariffs, but may file such tariffs on one day's notice. *See id.*

<sup>15</sup> *See CALLS Order*, 15 FCC Rcd at 12965, 12977-79, paras. 4, 36-42.

<sup>16</sup> *Id.* at 12974-75, 13033-34, paras. 30, 172. The CALLS plan also retained the low-end adjustment for price cap LECs. *Id.* at 13038, para. 182. The low-end adjustment mechanism permits incumbent LECs earning rates of return less than 10.25 percent in a given year to increase their PCIs to a level that would allow them to earn 10.25 percent. *Id.* at 13018, para. 136 n.282. The Commission subsequently eliminated the low-end adjustment mechanism for price cap LECs that qualified for and elected to exercise Phase I or Phase II pricing flexibility. *Id.* (citing *Pricing Flexibility Order*, 14 FCC Rcd at 14304, para. 162).

The X-factor under the CALLS plan, unlike under prior price cap regimes, is not a productivity factor but “a transitional mechanism . . . to lower rates for a specified time period for special access.”<sup>17</sup> The CALLS X-factor for special access was 3.0 percent in 2000, and increased to 6.5 percent for 2001, 2002, and 2003. For the final year of the CALLS plan (July 1, 2004 – June 30, 2005), the special access X-factor was set equal to inflation.<sup>18</sup> As the Commission has yet to replace the interim CALLS plan X-factor, price cap LECs’ special access rates have remained frozen at 2003 levels<sup>19</sup> (excluding any necessary exogenous cost adjustments).<sup>20</sup>

#### D. AT&T’s Petition for Rulemaking and 2005 Special Access NPRM

7. On October 15, 2002, AT&T Corp. filed a petition for rulemaking requesting that the Commission revoke the pricing flexibility rules and revisit the CALLS plan as it applies to special access services.<sup>21</sup> AT&T contended both that the predictive judgment at the core of the *Pricing Flexibility Order* had not been confirmed by marketplace developments, and that BOC special access rates exceeded competitive levels and hence were unjust and unreasonable in violation of section 201 of the Communications Act.<sup>22</sup> Because the predictive judgment had proven wrong, AT&T asserted, the Commission was compelled to revisit its pricing flexibility rules in a rulemaking proceeding.<sup>23</sup> Price cap LECs countered that, among other things, their special access rates were reasonable and therefore lawful, that there was robust competition for special access services, that the collocation-based competitive showings were an accurate metric for competition, and that data relied upon by AT&T were unreliable in the context used by AT&T.<sup>24</sup>

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<sup>17</sup> *CALLS Order*, 15 FCC Rcd at 13028, para. 160.

<sup>18</sup> *Id.* at 13025, para. 149. Because rates are both reduced by and increased by the inflation rate, they are effectively frozen. *See supra* para. 2.

<sup>19</sup> Because the special access rates were reduced by a universally applied productivity factor, all LECs achieved the 2003 special access rate target at the same time.

<sup>20</sup> 47 C.F.R. § 61.45(b)(1)(iv) (“Starting in the 2004 annual filing, X shall be equal to GDP-PI for the special access basket.”). The Commission hoped that, by the end of the five-year CALLS plan, competition would exist to such a degree that deregulation of access charges (switched and special) for price cap LECs would be the next logical step. *CALLS Order*, 15 FCC Rcd at 12977, para. 35.

<sup>21</sup> AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593 at 1, 6, 39-40 (filed Oct. 15, 2002) (2002 Special Access Rulemaking Petition). Competitive LECs and telecommunications users generally supported the 2002 Special Access Rulemaking Petition. *See, e.g.*, Ad Hoc 2002 Special Access Rulemaking Petition Comments at 1-7 (filed Dec. 2, 2002); API 2002 Special Access Rulemaking Petition at 1-5 (filed Dec. 2, 2002); AT&T 2002 Special Access Rulemaking Petition Comments at 1-7 (filed Dec. 2, 2002); PAETEC 2002 Special Access Rulemaking Petition Comments at 1-6 (filed Dec. 2, 2002); WorldCom 2002 Special Access Rulemaking Petition Comments at 1-14 (filed Dec. 2, 2002). The 2002 Special Access Rulemaking Petition was filed prior to AT&T’s merger with SBC. *See SBC Communications, Inc. and AT&T Corp. Application for Approval of Transfer of Control*, WC Docket No. 06-65, Memorandum Opinion and Order, 20 FCC Rcd 18290 (2005) (*SBC/AT&T Merger Order*).

<sup>22</sup> 2002 Special Access Rulemaking Petition at 1-6, 20, 34-35.

<sup>23</sup> *Id.* at 6-7, 35-36.

<sup>24</sup> *See, e.g.*, SBC 2002 Special Access Rulemaking Petition Opposition at 10-13, 19, 22-24 (filed Dec. 2, 2002); Verizon 2002 Special Access Rulemaking Petition Opposition at 9-10, 13-14, 17, 21 (filed Dec. 2, 2002). SBC noted that AT&T only provided (and could only provide) data from a single year (2001) that post-dated the initial implementation of Phase II pricing flexibility in 2001. SBC 2002 Special Access Rulemaking Petition Opposition at (continued....)

8. On January 31, 2005, the Commission released the *Special Access NPRM*, which initiated a broad examination of what regulatory framework to apply to price cap LECs' interstate special access services following the expiration of the CALLS plan, including whether to maintain or modify the Commission's pricing flexibility rules.<sup>25</sup> Moreover, the NPRM sought to examine whether the available marketplace data supported maintaining, modifying, or repealing these rules.<sup>26</sup> It also responded to AT&T's request for interim relief.<sup>27</sup>

## E. Recent Actions in the Proceeding

### 1. Competitive and Regulatory Developments

9. Numerous regulatory and competitive developments affected the special access market in the years following the release of the *Special Access NPRM*. In July 2007, the Commission sought comment in the record in light of subsequent industry consolidation, a Government Accountability Office (GAO) report on special access competition, and other competitive developments.<sup>28</sup> Moreover, as a result of a series of forbearance proceedings, the scope of services affected by the *Special Access NPRM* narrowed considerably.<sup>29</sup>

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16. SBC and Verizon claimed that ARMIS data were not designed to evaluate the reasonableness of rates. *Id.* at 22; Verizon 2002 Special Access Rulemaking Petition Opposition at 21.

<sup>25</sup> *Special Access NPRM*, 20 FCC Rcd at 1995, para. 1.

<sup>26</sup> *Id.* at 1996-97, para. 5. The Commission noted its commitment to re-examine periodically rules that were adopted on the basis of predictive judgments to evaluate whether those judgments are, in fact, corroborated by marketplace developments. Accordingly, the Commission sought data and comments on whether actual marketplace developments supported the predictive judgments used to support the special access pricing flexibility rules. *Id.*

<sup>27</sup> AT&T asked, in addition to initiating a rulemaking, that the Commission reinitialize Phase II pricing flexibility special access rates at an 11.25 percent rate of return, and impose a temporary moratorium on further pricing flexibility applications. These requests were denied; however, the Commission sought comment on whether to adopt any interim requirements in the event that the Commission was unable to conclude the NPRM in time for any adopted rule changes to be implemented in the 2005 annual tariff filings. *Id.* at 1997, para. 6.

<sup>28</sup> *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, RM-10593, Public Notice, 22 FCC Rcd 13352, 13352-53 (2007) (*Refresh the Record Public Notice*).

<sup>29</sup> A petition for forbearance from dominant carrier regulation of enterprise broadband special access services (*i.e.*, packet-based switched, high-speed telecommunications services for businesses) filed by Verizon was deemed granted in 2006. *See* Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law, WC Docket No. 04-440, News Release (rel. Mar. 20, 2006) (*March 20 News Release*); *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440, Order, 20 FCC Rcd 20037 (2004). In orders issued in October 2007 and August 2008, the agency granted petitions filed by AT&T, Embarq, Frontier and Qwest under 47 U.S.C. § 160 seeking similar forbearance relief, and, in August 2008, the Commission granted Qwest's petition for similar relief from regulation of enterprise broadband special access. *Petition of the Embarq Local Operating Companies for Forbearance under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common Carriage Requirements, Petition of the Frontier and Citizens ILECs for Forbearance under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, FCC 07-184, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007); *Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services, Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, FCC 07-180, WC 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and (continued....)

## 2. Analytical Framework

10. In November 2009, the Commission's Wireline Competition Bureau (Bureau) sought comment on the appropriate analytical framework for examining the issues that the *Special Access NPRM* raised.<sup>30</sup> In July 2010, the Bureau held a staff workshop on the economics of special access to gather further input on the analytical framework issue.<sup>31</sup>

## 3. Voluntary Data Requests

11. In October 2010, the Bureau issued a public notice inviting the public to submit data on the presence of competitive special access facilities to assist the Commission in evaluating the issues that the *Special Access NPRM* raised.<sup>32</sup> In September 2011, the Bureau issued a second public notice requesting the submission of competition and pricing data.<sup>33</sup>

## 4. Pricing Flexibility Suspension Order

12. On August 22, 2012, the Commission adopted an order that concluded that the special access pricing flexibility rules discussed above were not working as predicted and suspended the 90-day deadline for granting a petition for pricing flexibility based on those flawed rules.<sup>34</sup>

## III. REPORT AND ORDER

13. In this Report and Order, we require providers and purchasers of special access service and certain other services to submit data, information and documents to allow the Commission to conduct a comprehensive evaluation of competition in the special access market.<sup>35</sup>

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Order, 23 FCC Rcd 12260 (2008). We note that a similar petition filed by CenturyLink is pending before the Commission. See *Petition of CenturyLink for Forbearance Pursuant to 47 U.S.C § 160(c) from Dominant Carrier and Certain Computer Inquiry Requirements on Enterprise Broadband Services*, WC Docket No. 12-60 (filed Feb. 23, 2012), amended by Letter from Craig J. Brown, Associate General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 12-60 (filed Mar. 21, 2012).

<sup>30</sup> *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 24 FCC Rcd 13638 (2009) (*Analytical Framework Public Notice*). Among other things, the *Analytical Framework Public Notice* also sought comment on additional data not in the record that the Commission should collect. *Id.* at 13640.

<sup>31</sup> *Wireline Competition Bureau Announces July 19, 2010 Staff Workshop to Discuss the Analytical Framework for Assessing the Effectiveness of the Existing Special Access Rules*, WC Docket No. 05-25, Public Notice, 25 FCC Rcd 8458 (2010) (*Staff Workshop Public Notice*).

<sup>32</sup> *Data Requested in Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 25 FCC Rcd 15146 (2010) (*Special Access Facilities Data Public Notice*); see also *Clarification of Data Requested in Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 25 FCC Rcd 17693 (2010) (*Special Access Facilities Data Request Clarification*).

<sup>33</sup> *Competition Data Requested in Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 26 FCC Rcd 14000 (2011) (*Special Access Competition Data Public Notice*). In the *Special Access Competition Data Public Notice*, at footnote 8 (citing 5 C.F.R. § 1320.3(h)(4)), the Bureau explained that the data solicited from the public were not subject to the Paperwork Reduction Act. See *id.* at 14001 n.8.

<sup>34</sup> *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order, 27 FCC Rcd 10557 (2012) (*Special Access Pricing Flexibility Suspension Order*). We note that the decision in the *Special Access Pricing Flexibility Suspension Order* was based on information available at that time. The data collection adopted in this Report and Order will provide more comprehensive information to the Commission than was previously available.

## A. Scope

14. In this section, we identify the scope of the data collection, the entities that must respond to the data collection, and the geographic areas and time periods for which they must respond.

15. A preliminary note on terminology: For purposes of this Report and Order and consistent with Commission precedent, we do not include mass market Internet access services (*e.g.*, DSL or cable modem service) in our definition of special access.<sup>36</sup> We use the term “location” to mean a building, other man-made structure, a cell site on a building, a free-standing cell site, or a cell site on some other man-made structure where the end user is connected, but is not a “node.” We use the term “node” to mean an aggregation point, a branch point, or a point of interconnection on a provider’s network, including a point of interconnection to other provider networks. “End user” means a business, institutional, or government entity that purchases dedicated service for its own purposes and does not resell such service.<sup>37</sup> We use the term “connection” to mean a wired “line” or wireless “channel” that provides a dedicated communication path between an end user’s location and the first node on a provider’s network.<sup>38</sup> Examples include LEC central offices, remote terminal locations, splice points

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<sup>35</sup> See *supra* note 1. The terms “provider(s)” and “purchaser(s),” for purposes of this Order, are defined below in para. 20.

<sup>36</sup> See, *e.g.*, *SBC Commc'ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18335, para. 82 n.243 (2005) (“The Commission has defined mass market customers as residential and small business customers that purchase standardized offerings of communications services.”); *Applications of NYNEX Corp. Transferor, and Bell Atlantic Corp., Transferee*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20016, para. 53 (1997) (“Residential and small business customers are served primarily through mass marketing techniques including regional advertising and telemarketing.”); *AT&T and BellSouth Corp.*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5709-10, para. 85 (2007) (“[E]nterprise customers tend to be sophisticated and knowledgeable (often with the assistance of consultants), . . . contracts are typically the result of RFPs and are individually-negotiated (and frequently subject to non-disclosure clauses), . . . contracts are generally for customized service packages, and that the contracts usually remain in effect for a number of years.”); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8649, para. 51 (2010) (“Retail mass market services generally are purchased by residential customers and some very small business customers.”) (*Qwest Phoenix Forbearance Order*), *aff'd*, *Qwest Corp. v. FCC*, 689 F.3d 1214 (10<sup>th</sup> Cir. 2012); *Petitions of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11738 n.54 (2008) (noting that Commission precedent exists for dividing the analysis of switched access services into the mass market (residential and small business customers) and the enterprise market (mid-sized and large business customers)). We define the term “special access” above. See *supra* note 1. We note that we require responses from providers, as that term is defined *infra* para. 20, that either provide special access services or provide connections that are *capable* of providing special access services. As a result, there may be instances in which an entity that provides mass market Internet services via connections that are capable of providing special access services is required to respond to certain questions in this data collection.

<sup>37</sup> A mobile wireless service provider is considered an end user when it purchases dedicated service to make connections within its own network, *e.g.*, backhaul to a cell site.

<sup>38</sup> A connection may be an unbundled network element (UNE), including an unbundled copper loop. A connection must have the capability of being used to provide one or more “dedicated services.” For these purposes, a “dedicated service” transports data between two or more designated points (*e.g.*, between an end user’s premises and a point-of-presence, between the central office of a local exchange carrier (LEC) and a point-of-presence, or between two end user premises) at a rate of at least 1.5 megabytes per second (Mbps) with prescribed performance requirements that include bandwidth-, latency-, or error-rate guarantees or other parameters that define delivery under a tariff or in a service-level agreement. A communication path that is currently being used to provide a non-dedicated service to an end user, but has the capability to provide a dedicated service is considered a connection for (continued....)

(including, for example, at manholes), controlled environmental vaults, cable system headends, cable modem termination system (CMTS) locations, and facility hubs. We use the terms “bandwidth” and “capacity” interchangeably.

16. *Services Covered.* Traditionally, federal antitrust agencies have begun competitive analyses in a variety of contexts by defining relevant product and geographic markets. As noted in the Further Notice, however, these agencies have more recently noted that “analysis need not start with market definition... although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.”<sup>39</sup> In particular, “[e]vidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects.”<sup>40</sup>

17. Taking these considerations into account, we collect information on the full array of traditional special access services, including DS1s and DS3s, and packet-based dedicated services such as Ethernet. Further, although there is little disagreement in the record as to the definition of special access services, and that as traditionally defined they do not include mass market Internet access services,<sup>41</sup> there is some question as to whether the relevant product market should encompass not only special access services but other high-capacity data services targeted at enterprise customers. Some commenters have argued that best efforts broadband Internet access services—even when marketed to small- to medium-sized business customers—are not part of the relevant product market.<sup>42</sup> These commenters note, among other things, that prices for best efforts services differ substantially from special access services for comparable bandwidth.<sup>43</sup> Others have argued that best efforts services are often marketed with express comparisons to special access services, and therefore the Commission should collect data on both.<sup>44</sup>

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the purpose of this data collection. We note that this definition does not depend on the medium used (*e.g.*, whether it is fiber, copper, or coaxial cable), but instead on the capability of the facility. *See* Letter from Glenn T. Reynolds, USTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 1 (filed Dec. 3, 2012) (explaining that “special access and similar services can be provided over hybrid fiber coaxial (“HFC”) lines”).

<sup>39</sup> U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 4 (2010) (*2010 DOJ/FTC Horizontal Merger Guidelines*), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

<sup>40</sup> *Id.*

<sup>41</sup> *See supra* para. 15.

<sup>42</sup> *See, e.g.*, Verizon 2009 PN Reply Comments at 11-14; AT&T 2009 PN Reply Comments, Appendix A at 6-7; Letter from Ross J. Lieberman, Vice President of Government Affairs, American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, RM-10593 (filed Nov. 16, 2012).

<sup>43</sup> *See, e.g.*, Letter from Thomas Jones and Nirali Patel, Counsel for Cbeyond, Inc., Earthlink, Inc. and Integra Telecom, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 at 2 (filed Nov. 21, 2012) (citing “record evidence demonstrating that ‘best efforts’ broadband services are not a substitute for the dedicated broadband services at issue in the special access rulemaking proceeding . . .”); Petition of Ad Hoc Telecommunications Users Committee, BT Americas, Cbeyond, Computer & Communications Industry Association, EarthLink, MegaPath, Sprint Nextel, and tw telecom to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs’ Non-TDM-Based Special Access Services, WC Docket No. 05-25, at 39-40 & nn.125-126 (filed Nov. 2, 2012).

<sup>44</sup> *See, e.g.*, Letter from Glenn T. Reynolds, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Nov. 29, 2012); Letter from Frank S. Simone, Assistant Vice President, Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 at 4, Attach. (filed Sept. 28, 2012) (citing best efforts Internet access services for “home, home office, or small business.”).

18. We need not resolve the market-definition issue here—for purposes of this data collection, we conclude it is best to simply take a broad approach. To ensure that we collect data on services that enterprise customers may view as substitutable, we define the scope of our data collection to include best efforts business broadband Internet access services, which we define as best efforts Internet access data services with a capacity equal to or greater than a DS1 connection that are marketed to enterprise customers (including small, medium, and large businesses, as well as existing special access customers).<sup>45</sup> As described below, we structure the collection somewhat differently for best efforts and special access services to minimize the burden on submitters consistent with our data requirements and taking into consideration data that the Commission already has available to it.

19. We also note that we intend to collect data on intrastate special access services and special access services offered via a state-level tariff or state-approved contract.<sup>46</sup> Doing so is necessary to ensure that we have a clear picture of all competition in the marketplace.

20. *Providers and purchasers that must respond.* In order to conduct a comprehensive analysis of the special access market, we will collect data from all providers and purchasers of special access services as well as some entities that provide best efforts business broadband Internet access services. By “providers,” we mean any entity subject to the Commission’s jurisdiction under the Communications Act, as amended, that provides special access services or provides a connection that is capable of providing special access services.<sup>47</sup> By “purchasers,” we mean any entity subject to the Commission’s jurisdiction under the Communications Act, as amended, that purchases special access services.<sup>48</sup>

21. To clarify our terminology, we note that some providers are “competitive providers,” by which we mean a competitive local exchange carrier (CLEC), interexchange carrier, cable operator, wireless provider or any other provider that is not an incumbent LEC operating within its incumbent service territory. We also note that a rate-of-return carrier, which is not subject to our pricing flexibility rules, shall not be considered a “provider” to the extent it provides special access within its rate-of-return service area. This exemption does not apply to services not regulated on a rate-of-return basis or provided outside a rate-of-return carrier’s service area by itself or an affiliate.

22. We note concerns regarding the burden that this data collection will impose on small companies,<sup>49</sup> and are mindful of the importance of seeking to reduce information collection burdens for small business concerns, and in particular those “with fewer than 25 employees.”<sup>50</sup> Any effort to lessen

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<sup>45</sup> For purposes of this Report and Order, best efforts business broadband Internet access services do not include mobile wireless services, as that term is used in the *15th Annual Mobile Wireless Competition Report*. See *15th Annual Mobile Wireless Competition Report*, 26 FCC Rcd at 9687-88, paras. 3-5.

<sup>46</sup> Because special access lines usually carry both interstate and intrastate traffic, the Commission has drawn a bright-line rule for jurisdictional purposes: Special access lines carrying both intrastate and interstate traffic are classified as interstate for rate regulation and other purposes “if the interstate traffic on the line involved constitutes more than ten percent of the total traffic on the line.” 47 C.F.R. § 36.154(a). Interstate traffic that “amounts to ten percent or less of the total traffic on a special access line” is deemed *de minimis*, and that line is classified as intrastate for jurisdictional purposes. *MTS and WATS Market Structure Amendment of Part 36 of the Commission’s Rules and Establishment of a Joint Board*, 4 FCC Rcd 5660, 5660, para. 2 (1989).

<sup>47</sup> Section 1 of the Communications Act of 1934, as amended, confers on the Commission jurisdiction over “interstate and foreign commerce in communication by wire and radio.” See 47 U.S.C. § 151.

<sup>48</sup> See *id.*

<sup>49</sup> See, e.g., Letter from Tamar E. Finn, Counsel for TDS Metrocom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Aug. 27, 2012).

<sup>50</sup> Small Business Paperwork Relief Act of 2002 § 2(c)(3), Pub. L. No. 107-198; see 44 U.S.C. § 3506(c)(4).

the burdens of this information collection on small companies must be balanced against our goal of obtaining the most accurate and useful data possible. Competition in the provision of special access appears to occur at a very granular level—perhaps as low as the building/tower. A provider that owns 50 of its own channel terminations to end users may not be competitively significant within an area as large as an MSA, but could be a significant competitor within smaller areas, such as zip code areas. Therefore, we believe it necessary to obtain data from special access providers and purchasers of all sizes,<sup>51</sup> but we shall not require entities with fewer than 15,000 customers and fewer than 1,500 business broadband customers to provide data regarding their best efforts business broadband Internet access services.<sup>52</sup> As some commenters have urged us to do, this approach will incorporate data and information from nascent technologies, such as WISPs.<sup>53</sup>

23. *Geographic scope.* With some exceptions,<sup>54</sup> we will collect data on a nationwide basis to ensure the most comprehensive and accurate assessment of competition in markets for special access services subject to our pricing flexibility rules. Because the focus of this proceeding is on the regulation of special access services in price-cap territories, we will not require data from any provider with regard to its operations in any geographic area in which a rate-of-return carrier is the incumbent, as such carriers are not subject to the pricing flexibility rules. Moreover, we will not require a purchaser to produce data based on purchases it makes in those areas in which a rate-of-return carrier is the incumbent. If, however, a provider or purchaser prefers to provide data for all areas without distinguishing between areas served by price cap LECs and rate-of-return LECs, it may do so.

24. We considered whether we could reduce the burden of this data collection by collecting all of our data from a sample of locations (*e.g.*, business locations and wireless towers) and/or larger

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<sup>51</sup> See, *e.g.*, Letter from Frank S. Simone, Assistant Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Sept. 7, 2012); see also Letter from Letter from Frank Simone, Assistant Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Sept. 28, 2012); Frank S. Simone, Assistant Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Sept. 25, 2012); Letter from Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket 05-25 (filed Sept. 18, 2012).

<sup>52</sup> As described by the American Cable Association (ACA), the burden of participating in the State Broadband Initiative broadband mapping effort has been greatest for its members with fewer than 15,000 video subscribers. See Letter from Thomas Cohen, Counsel to American Cable Association, to Michael Steffen, Legal Advisor to Chairman Genachowski, Federal Communications Commission, WC Docket No. 05-25 (filed Nov. 27, 2012). Thus requiring entities with at least 15,000 customers to participate should help mitigate the burden of this collection. Also, ACA reports that operators with that level of video subscribership generally have about 1,500 business broadband customers. *Id.* To ensure that entities that provide best efforts services with a focus on business customers also submit information, we require entities with at least 1,500 business broadband customers to participate as well. For purposes of this exemption, the number of customers and business broadband customers shall be determined as of the date of release of this Report and Order.

<sup>53</sup> See, *e.g.*, Letter from Melissa E. Newman, Vice President – Federal Relations, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, Attach. at 16 (filed June 23, 2010) (arguing for a particular analytic framework that would assess data from “all potential alternatives to DS1s and DS3s (*e.g.*, cable, Ethernet, fixed wireless, mobile wireless, satellite, alternative fiber), including those that do not collocate”); USTA 2009 PN Reply; Letter from Frank S. Simone, Executive Director – Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, Attach. at 4 (filed Sept. 10, 2007).

<sup>54</sup> See, *e.g.*, *infra* paras. 26, 34.

geographic areas.<sup>55</sup> However, we decline to adopt a sampling approach because we believe that the process of identifying and collecting a representative sample would be unlikely to substantially reduce provider burdens, and could significantly lengthen the data collection process. With respect to a sample of geographic regions, it is very difficult to design a representative sample without coming close to covering the entire country—a fact that minimizes the likelihood that a geographic sample would actually reduce the burden on respondents. Further, respondents likely would be required to search multiple databases and compare the results of those searches to determine which of their customer locations were in the selected geographies, resulting in substantial setup costs. Finally, even where a respondent need only consult a single database, it typically would have to engage in essentially the same, or greater (to account for the geographic sample), amount of coding to “pull” a sample of records as it would if it pulled all records.

25. A methodology based on sampling specific locations suffers from the same database and coding issues as geographic sampling, and further would likely lengthen the data collection process by a significant margin.<sup>56</sup> Although the most recent data we have are several years old, they suggest that competitive providers may serve a relatively small proportion of all locations that have special access.<sup>57</sup> As a result, a random sample from all locations would need to be very large—perhaps approaching a census—to obtain sufficient data on competitive providers. Alternatively, we could require all respondents to identify all the relevant locations so that a smaller sample could be drawn from that census in a scientific way. That approach likely would lengthen the data collection process because it would require two collections to be conducted sequentially: first a census of served locations from which a sample could be drawn, and then a subsequent issuing of questions about locations in the sample. It would also fail to significantly reduce the overall burden for several reasons. First, the burden of producing the census would be similar to, though perhaps lower than, the burden of producing the information identified above. Second, because of the need to tie sampled locations to the relevant

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<sup>55</sup> See, e.g., Letter from Paul Margie, Counsel, Sprint, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 9-10 (filed Aug. 14, 2012) (“A building-by-building analysis of a smaller sample of areas . . . would provide useful data about competition and would not be onerous.”); CenturyLink Response to *Special Access Facilities Data Public Notice*, Question III.E (filed Dec. 5, 2011) (stating that the Commission must collect data from a statistically significant cross-section of MSAs, to the extent it wishes to apply its results to other markets); Qwest 2009 PN Reply at 21-22 (stating that “rather than conducting a market-power analysis for *every* market in the United States, or even every Phase II market, the Commission should select a statistically valid, stratified cross-section of Phase I and Phase II markets and collect the relevant data from various stakeholders in the markets in that sample”). For example, cleaning (*i.e.*, identifying and correcting errors) a smaller data set should be easier than cleaning a large one, and a smaller data set has lower storage requirements.

<sup>56</sup> A sample of locations would consist of a sample taken from the universe of “building[s], other free-standing site[s], cell site[s] on a building, or free-standing cell site[s]” in price cap areas. See *supra* para. 15.

<sup>57</sup> See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et. al.*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17155, para. 298 n.856 (2003) (“Both competitive LECs and incumbent LECs report that approximately 30,000, *i.e.*, between 3% to 5%, of the nation’s commercial office buildings are served by competitor-owned fiber loops.”) (subsequent history omitted); see also Letter from Anna Gomez, VP-Government Affairs, Sprint, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, Attach. at 2 n.4 (filed Mar. 27, 2007) (asserting that, out of three million large office buildings and campuses nationwide that purchased special access, only 22,000 purchased those services from a competitive provider); tw telecom 2005 NPRM Reply at 4-5 (noting Verizon’s observation that between 1996 and 2005, competitors increased deployment from 24,000 buildings to 31,467 buildings, which tw telecom states is in contrast to the millions of buildings served by incumbents); WilTel 2005 NPRM Reply at 6 (estimating that competitors deployed special access facilities to 25,000 buildings as of 2005). We expect that our data collection will provide more recent data about the number of locations nationwide served by competitive providers.

databases, the effort to respond to questions about a sample of locations would, for many respondents, raise, or at least not reduce, their burden. Third, while the costs in burden saved through sampling are likely to be relatively small, the statistical error of any conclusions based on a sample could be significantly higher than conclusions based on a census.

26. We do choose to sample for the narrower purpose of seeking to understand the evolution of competitive provider buildout of a connection to a specific end user's location.<sup>58</sup> Such an analysis requires facilities deployment data over a long period of time, which would be burdensome for many providers to produce for their entire networks. By collecting this data in a representative sample of geographic areas, it is possible to minimize the burden on providers while providing accurate and useful data on this narrow aspect of providers' behavior. The decision to sample for this narrow purpose does not suffer from the same issues discussed above.<sup>59</sup> First, the sample can be significantly smaller than would be necessary for a more general analysis. Second, the sample will be drawn from the universe of locations identified in the course of the larger data collection; this sequential collection is unlikely to materially impact our ability to undertake the proposed analysis. Finally, the information to be produced from the sample is limited to facilities deployment data.

27. *Temporal scope.* We will collect the majority of the data for calendar years 2010 and 2012.<sup>60</sup> We find that collecting data on these issues for two calendar years appropriately balances the need for time series data with the burden of producing data for multiple years. We choose calendar year 2012 because it is the most recent calendar year for which data will be available once Paperwork Reduction Act approval is obtained for the information collection adopted in this order. And by collecting 2012 data, the Commission will obtain the most up-to-date data available while still providing respondents a reasonable time to gather and submit their data.<sup>61</sup> We choose calendar year 2010 because, while we recognize that it likely is more burdensome to produce 2010 data than 2011 data, a two year period between observations is more likely to include changes in the relevant variables than a one year period. We also recognize that our second voluntary data request sought data for 2010, which will mean those providers who responded to that request will be able to rely on their past efforts in responding to some elements of this collection.

28. We will collect two years' worth of data for market structure, price, and demand (*i.e.*, observed sales and purchases). This allows for an analysis that controls for factors that may vary widely across geographic areas, but not within a given geographic area (*e.g.*, entry factors such as building codes or soil quality). For example, if we observe differences in deployment between different geographies, these may be due to differences in factors such as building codes, climate, or soil quality. Controlling for these can be challenging. However, these kinds of variables do not typically change significantly over a few years. In contrast, observing differences in deployment that emerge over a few years within the same

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<sup>58</sup> See *infra* para. 34.

<sup>59</sup> See *supra* paras. 24-25.

<sup>60</sup> We will collect 2010 and 2012 pricing data on a monthly basis. We note that there are some questions for which we ask for additional historical data, such as questions about non-price factors. Questions related to terms and conditions, competition, and pricing decisions span a variety of timeframes specific to the issue addressed.

<sup>61</sup> Incumbent LECs argue that data collected for a specific timeframe will be stale by the time we analyze it. Letter from Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 3 (filed Apr. 26, 2012); Qwest Response to *Special Access Facilities Data Request*, Question III.F at 7 (filed Jan. 27, 2011); Letter from Glenn Reynolds, Vice President for Policy, USTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 3 (filed Dec. 1, 2010). However, these parties have not proposed a method of instantaneous data submission, and proper analysis naturally takes some time to perform.

geographic region permits an analysis that controls for such factors. Conversely, if we have only one year's worth of data, we will be less able to associate particular factors with levels of deployment.<sup>62</sup>

29. Most importantly, collecting a time series of data will help us assess potential competition. One way to assess potential competition is by obtaining structural, pricing, and demand data over a two-year period to observe and better understand how and why competition has evolved over time and, therefore, where potential competition exists.<sup>63</sup> Our proposal to collect historical data, which could be used to predict potential competition, is consistent with Commission precedent, as well as that of the U.S. antitrust agencies.<sup>64</sup>

#### **B. Nature of Data to be Collected**

30. The data, information, and documents required to conduct a robust analysis of special access competition fall into five general categories: market structure, pricing, demand (*i.e.*, observed sales and purchases), terms and conditions, and competition and pricing decisions.<sup>65</sup> In this section, we describe the nature of the data to be collected. Further, we include in Appendix C an initial version of the data collection that incorporates the data, information, and documents we describe below.<sup>66</sup> We direct the

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<sup>62</sup> In addition, the need to include large numbers of controls unnecessarily reduces regression efficiency relative to a regression that relies on data from more than one time period.

<sup>63</sup> See, e.g., *AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc*, IB Docket No. 98-212, SES-ASG-19981110-01654 (30), SES-ASG-19981110-01655 (2), Memorandum Opinion and Order, 14 FCC Rcd 19140, 19149-50, paras. 17-19 (1999) (stating that, when analyzing a merger, the Commission “seeks to determine if market entry is unconstrained so that an attempted exercise of market power can be prevented, *i.e.*, if rivals and new entrants have the capabilities and incentives to expand output in response to any anticompetitive practices by the merging entities”); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 10-133, Fifteenth Report, 26 FCC Rcd 9664, 9713, para. 55 (2011) (“Entry and exit conditions are important in helping to understand the degree to which incumbent firms may or may not possess market power, *i.e.* the ability to set prices above marginal cost without attracting entry. Entry and exit occurs in the context of underlying . . . market conditions that directly influence the total number of firms that can compete successfully in a market. Such conditions are relevant for determining *if* actual entry or exit will occur, and *when* actual entry or exit will occur—both of which are important for ensuring competition in the marketplace.”).

<sup>64</sup> See, e.g., *Applications of Comcast Corp., General Elec. Co., & NBC Universal, Inc.; For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4382, App. B (2011); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses et al.*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, App. D (2006); *Gen. Motors Corp. & Hughes Elecs. Corp., Transferors, and The News Corp. Ltd., Transferee, for Authority to Transfer Control*, MB Docket 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 565-69, paras. 201-11 (2004); see also *2010 DOJ/FTC Horizontal Merger Guidelines* at § 2.1.2 (2010) (“The Agencies look for historical events, or ‘natural experiments,’ that are informative regarding the competitive effects of the merger. For example, the Agencies may examine the impact of recent mergers, entry, expansion, or exit in the relevant market. Effects of analogous events in similar markets may also be informative.”).

<sup>65</sup> We note that the specific data, information, and documents solicited in this data collection may fall into more than one category and/or be used to evaluate more than one issue. For example, some of the pricing questions may help us evaluate terms and conditions issues.

<sup>66</sup> See *infra* Appendix C.

Bureau to review and modify this collection, consistent with the authority delegated in section III.D below, to implement the requirements of this Report and Order.<sup>67</sup>

31. *Market structure data.* We intend to assess the market structure for special access market(s). By this, we mean that we intend to examine comprehensive data on the situs and type of facilities capable of providing special access, by sold and potential capacity and ownership, and the proximity of such facilities to sources of demand. Specifically, we require each provider to submit data and information for connections that are owned by the provider, leased under an indefeasible right of use (IRU), or, for competitive providers, obtained from an incumbent LEC as an unbundled network element (UNE) to provide a dedicated service,<sup>68</sup> including, but not limited to:

- Locations to which the provider has sold a connection to an end user or a provider;
- information on the nature of the location and the nature of the connection serving that location, including:<sup>69</sup>
  - the situs of the location and whether the location is a building, other free-standing site, cell site on a building, or free-standing cell site;
  - whether the connection is fiber, wireless (and if wireless, the provisioned bandwidth of the channel), or some other medium; and
  - the provisioned bandwidth of each type of connection.

32. We require incumbent LEC providers to submit data concerning the number, nature, and situs of UNEs sold.<sup>70</sup>

33. We require competitive providers to submit detailed information related to non-price factors that may impact where special access providers build facilities or expand their network via UNEs. For example, providers may choose to expand their facilities in areas where they have already made significant facilities investments, like near their headquarters or a point of interconnection, to take advantage of cost efficiencies. We therefore require respondents to provide detailed information about such non-price factors. In addition, we require competitive providers to provide us with any business rules they use to determine whether to build a connection to a location.<sup>71</sup>

34. In addition, we require competitive providers to submit the history of their facilities deployment in a sample of locations served by a competitive provider. Each competitive provider will report the date on which it provided a connection to each of its locations within the sample and locations proximate to the locations in the sample, including when and where it relied upon UNEs to establish a

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<sup>67</sup> For example, the Bureau may release the data collection, in whole or in part, as part of a Bureau-level order or Public Notice requiring the production of data, information, and documents. *See infra* paras. 52-53 (Role of the Wireline Competition Bureau).

<sup>68</sup> Several types of unbundled network elements are available to competitive carriers, as set forth and defined in our unbundling rules. *See* 47 C.F.R. § 51.319(a).

<sup>69</sup> The terms “connection” and “location,” as used throughout this Order, are defined above. *See supra* para. 15.

<sup>70</sup> Incumbent LECs are best situated to identify *where* UNEs are sold to competitive providers. Competitive providers, in turn, are best situated to identify what services are provided over those UNEs, and in particular whether a given UNE connection is used to provide a dedicated access service to a location. Incumbent LECs are encouraged to exclude from their response, to the extent possible, UNEs that serve residential locations.

<sup>71</sup> Unlike our question geared exclusively to how non-price factors influence decisions to build, our question about business rules may incorporate price factors.

connection. The locations selected will include areas in which no pricing flexibility has been granted, as well as Phase I and/or Phase II pricing flexibility areas.<sup>72</sup> These detailed data on the evolution of competitive provider networks will help us understand how competitive facilities are deployed over time and whether the presence of competitive facilities in fact provides a threat of competitive entry in nearby or adjacent areas.

35. We require competitive providers to provide detailed collocation situs information. We also require competitive providers to submit maps of the routes followed by fiber that they own or lease subject to an IRU, of nodes that interconnect with third party networks, and of connections from their networks to locations. These maps will indicate where competitive providers can provide, or could potentially provide, special access services. Among other things, such maps will identify points of interconnection between competitive providers of special access services and incumbent LEC facilities.<sup>73</sup>

36. *Price data.* We require price data to characterize competition in the market for special access services. Such data will allow comparisons of different providers' prices, after controlling, where necessary, for differences in cost-causing factors, and can allow the consideration of the effect of market structure on price. Price data include, but are not limited to:

- the quantities sold and prices charged for special access services, by circuit element;
  - as reflected in billing data;
  - including, where applicable and necessary, but not limited to, identifiers for the nature of the service, such as:
    - Universal Service Order Code (USOC) or comparable code;
    - circuit and/or mileage end-points;
    - quantities relevant for billing (such as bandwidth and mileage);
    - term, volume, or revenue commitments relevant to billing; and
    - adjustments, rebates, or true-ups provided or received over time.

The Bureau collected similar data on a voluntary basis in the *Special Access Facilities Data Public Notice*.<sup>74</sup>

37. To understand this pricing information, we must also take into account the regulatory environment. For competitive providers, we already know the regulatory environment—they are unregulated with respect to price at the federal level. In contrast, the Commission regulates the prices incumbent LECs charge through a variety of methods: rate-of-return regulation, price-cap regulation, and Phases I and II of pricing flexibility.<sup>75</sup> We therefore require incumbent LECs to list the form of price regulation that applies to their interstate special access services on a wire-center-by-wire-center basis.

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<sup>72</sup> See 47 C.F.R. § 69.701 *et seq.*

<sup>73</sup> We note that we do not collect the same detailed information about connections to and from and between nodes as we do about locations. This decision is premised on the fact that nodes typically connect to several additional nodes, so there may be dozens of direct and indirect paths between two nodes. Running a regression analysis on that information would be algorithmically difficult, if not impossible.

<sup>74</sup> See *Special Access Competition Data Public Notice*, 26 FCC Rcd at 14000.

<sup>75</sup> Although today's data collection does not extend to rate-of-return incumbent LECs, we note that several incumbents have converted from rate-of-return regulation to price-cap regulation in the last two years.

38. *Demand data (i.e., observed sales and purchases).* Demand data are a key input into any statistical analysis of how price varies with competition. Competitors generally are attracted to areas of high demand density because such areas provide opportunities to enjoy economies of scale and scope. Consequently, an understanding of the relationship between prices for observed sales and purchases and competitive entry will facilitate an assessment of market power. In addition, the record indicates that competition in the provision of special access appears to occur at a very granular level—perhaps as low as the building/tower or a floor of a building. We therefore need to understand observed sales or purchases of special access at the most granular level possible, because, among other things, sold or purchased volumes and volume density are a key driver of special access costs and an important determinant of the likelihood of potential entry. We therefore will collect, including but not limited to, data that identify:

- the bandwidth of the special access services sold or purchased;
- the location(s) being served;
- the nature of the demand (*e.g.*, provider, end user, other);
- the locations of mobile wireless providers' cell sites and connections to those cell sites;
- total expenditures on special access services by purchasers; and
- revenues earned from the sales of special access.

39. *Terms and conditions data and information.* The record reflects questions about whether the terms and conditions associated with the sale of special access services may inhibit a buyer's ability to switch to other providers, which in turn may inhibit facilities-based entry into special access markets.<sup>76</sup> We therefore will collect, from providers and purchasers of special access services, data and information that includes but is not limited to:

- generally available plans for tariffed special access services that offer discounts, circuit portability, or other competitively relevant benefits;
- the business rationale for those plans;
- the extent of special access sales and purchases made that are and are not subject to discounts, circuit portability, or other benefits;
- how such plans work with each other, and in conjunction with contract-based tariffs and other forms of contracts that govern the sale and pricing of special access services;
- customer information associated with such plans and contract-based tariffs (*e.g.*, the number of customers subscribed to an individual plan or contract-based tariff);

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<sup>76</sup> See, *e.g.*, Letter from Michael J. Mooney, Senior Vice President and General Counsel, Level 3, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Aug. 23, 2012); Letter from Thomas Jones & Matthew Jones, Counsel, tw telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed June 5, 2012); Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Feb. 22, 2012); Letter from Sarah DeYoung, Director, CALTEL, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, Attach. (filed Feb. 9, 2012); Sprint Response to *Special Access Competition Data Public Notice*, Questions III.D.5-6, III.D.8-9 (filed Dec. 19, 2011); Letter from Karen Reidy, Vice President, Regulatory Affairs, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Aug. 31, 2010).

- how discounts, circuit portability, and other competitively relevant benefits for sales of special access services by competitive providers differ from those of the incumbent LEC providers;
- contract-based tariffs;
- provider policies and internal procedures governing deployment, disconnection, upgrades, and switching providers;
- the impact certain terms and conditions may have on a purchaser's ability to reduce purchases from its existing provider, switch providers, or purchase unregulated services;
- generally available tariffs, contract-based tariffs, and other forms of contracts that govern the sale and pricing of special access services and services that are sold (or priced) in connection with special access services; and
- a description of the customers targeted by providers (*e.g.*, size, geographic scope, type) and the promotional and advertising strategies for winning or retaining such customers.

40. *Competition and pricing decision data, information and documents.* We require providers of special access to submit data, information and/or documents related to competition and pricing decisions for special access services, including selected competitive provider responses to Requests for Proposals (RFPs).

41. Specifically, we require each competitive provider to identify the five most recent RFPs for which it was selected as the winning bidder to provide each of the following: (i) best effort business broadband Internet access services, (ii) special access services, and, to the extent different from (i) or (ii), and (iii) some other form of high-capacity data services to business customers.<sup>77</sup> We also require each competitive provider to identify the five largest (by number of connections) RFPs for which it submitted an unsuccessful competitive bid between 2010 and 2012 for each of (i) best effort business broadband Internet access services, (ii) special access services, and, to the extent different from (i) or (ii), and (iii) some other form of high-capacity data services to business customers.<sup>78</sup> For each RFP identified, the competitive provider shall provide a description of the RFP, the area covered, the price offered, as well as other competitively relevant information regarding RFPs specified by the Bureau.

42. Parties contend that advertising and marketing relating to special access, regardless of whether a competitive provider has actually built out facilities to a particular location, may impact pricing and deployment decisions. Accordingly, we require competitive providers of special access to submit data, maps, information, marketing materials, and/or documents identifying those geographic areas where they advertised or marketed special access services over existing facilities, via leased facilities, or by building out new facilities as of December 31, 2010 and December 31, 2012, or planned to advertise or market such services within twenty four months following those dates.

43. Another useful category of information may be documents showing the internal analyses undertaken by providers in 2010 or thereafter to evaluate, *inter alia*, competitive market shares, changes in competition, changes in the costs of supplying services, whether to respond to RFPs, and identified rate increases and decreases. We decline at this time to require all providers to submit that information given

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<sup>77</sup> To be clear, we expect competitive providers that have won RFPs in each service category to identify up to five RFPs in each category, not a total of five RFPs across the three categories.

<sup>78</sup> To be clear, we expect competitive providers that have submitted unsuccessful competitive bids for RFPs in each service category to identify up to five RFPs in each category, not a total of five RFPs across the three categories.

the burden of identifying and producing such documents.<sup>79</sup> Instead, we shall take a two-stage approach with these internal documents. Specifically, we delegate authority to the Bureau to require a provider to submit such documents if the Bureau finds in an order that (a) a provider's responses to the business-rules questions are incomplete or insufficient for analysis, (b) a competitive provider's responses to the history-of-deployment questions are incomplete or insufficient for analysis, or (c) the data collected for a particular geographic area are incomplete or insufficient for analysis.

44. *Best Efforts Business Broadband Internet Access Services.* As noted above, we define the scope of our data collection to include best efforts business broadband Internet access services. Because the record indicates that entities that provide best efforts business broadband Internet access services generally deliver those services throughout their footprint over the same network facilities they use to deliver mass market broadband Internet access,<sup>80</sup> we need not collect this data at the same level of granularity as location and facilities data for special access.<sup>81</sup> Data showing whether an entity is providing best efforts business broadband Internet access service at, for example, the census block level would not diminish the rigor of our analysis, but would significantly reduce the burden of producing the necessary data.<sup>82</sup> Indeed, many entities already submit data in connection with the State Broadband Initiative (SBI) Grant Program as to where they offer best efforts broadband Internet access services at the census block level.<sup>83</sup>

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<sup>79</sup> See Letter from Steven F. Morris, Vice President and Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, RM-10593, at 2 (filed Oct. 24, 2012); Letter from Mary McManus, Comcast, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 1-2 (filed Nov. 5, 2012); Letter from Mary McManus, Comcast, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 2 (filed Oct. 22, 2012).

<sup>80</sup> See, e.g., Letter from Glenn T. Reynolds, Vice President, Policy, US Telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, GN Docket No. 09-51, Attach. at 5-6 (filed Aug. 31, 2009) (stating that “[c]able companies are increasingly using their near-ubiquitous networks to provide business customers a range of services that compete with special access” and identifying cable providers, such as Cox and Comcast, who are targeting the small and enterprise market (SME) in their existing footprints); SBC 2005 NPRM Reply at 13 (“Using their existing facilities, cable providers have access to an estimated market of over 20 million [(small and medium sized)] business lines, and they are actively expanding their fiber-to-the-curb infrastructure to include business customers.” (citing SBC 2005 NPRM Comments at Casto Decl., para. 37)).

<sup>81</sup> See *supra* para. 31.

<sup>82</sup> See, e.g., Letter from Jennifer K. McKee, Vice President and Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, RM-10593 (filed Nov. 29, 2012).

<sup>83</sup> See Letter from Steven F. Morris, Vice President and Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Nov. 19, 2012); *but see* Letter from Thomas Jones and Nirali Patel, Counsel for Cbeyond, Inc., Earthlink, Inc. and Integra Telecom, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 at 2 (filed Nov. 21, 2012) (arguing “Compliance with a mandatory FCC request to provide the “best efforts” broadband coverage information requested in connection with the NBM project would be burdensome for many competitive LECs . . .”). Since July 2009, the National Telecommunications and Information Administration (NTIA), in coordination with the Commission, has been collecting data concerning where broadband is deployed across the nation as part of the State Broadband Initiative (SBI) Grant Program. See Department of Commerce, NTIA, State Broadband Data and Development Grant Program, Docket No. 0660-ZA29, Notice of Funds Availability, 74 Fed. Reg. 32545 (July 8, 2009) (*NTIA State Mapping NOFA*), available at [http://www.ntia.doc.gov/files/ntia/publications/fr\\_broadbandmappingnofa\\_090708.pdf](http://www.ntia.doc.gov/files/ntia/publications/fr_broadbandmappingnofa_090708.pdf); Department of Commerce, NTIA, State Broadband Data and Development Grant Program, Docket No. 0660-ZA29, Notice of Funds Availability; Clarification, 74 Fed. Reg. 40569 (Aug. 12, 2009); see also NTIA, State Broadband Initiative, <http://www2.ntia.doc.gov/SBDD> (last visited Dec. 12, 2012). The data collected as part of the SBI Grant Program (continued....)

45. Further, we already have information on enterprise subscriptions to broadband Internet access services through our Form 477 collection. In their biannual Form 477 filings, facilities-based providers of fixed-location Internet access connections (which include providers equipping UNEs, special access lines, or other leased facilities) submit information, by census tract (areas roughly the size of zip codes), on all Internet access connections (greater than 200 kbps) to end users, including businesses.<sup>84</sup> They also identify the percentage of connections within each census tract that is residential.<sup>85</sup>

46. We therefore require, subject to the exception set forth in paragraph 22 above, entities that submitted data in connection with the SBI Grant Program and offer best efforts business broadband Internet access services to identify, on a granular but not location-by-location basis (ideally, at the census block level), the geographic areas in which they offer those services.<sup>86</sup> The Bureau may accept such entities' certification that the data they have submitted in connection with the SBI Grant Program accurately and completely identify the areas in which they offer best efforts business broadband Internet access services and exclude those areas where they do not offer such services. We further require such entities to submit a price list for the best efforts business broadband Internet access services that they offered within their footprint. Such price list should identify the list prices for the best efforts business broadband Internet access services they offered, whether there was any price variation within their service footprint, and, if so, the nature of such variation. This information, taken together with the Form 477 data and the data we will collect on UNEs that could be used to provide these services, will allow us to analyze the availability of, demand for, and pricing of best efforts business broadband Internet access services.

47. *Additional Data Not Collected.* We recognize that the collection we adopt today does not include every type of data that is available. Commenters suggest we ask for a broad array of competition

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helped populate a national broadband inventory map that was first made public in February 2011 and most recently updated July 2012. National Broadband Map, <http://broadbandmap.gov/> (last visited Dec. 12, 2012); Press Release, Moira Vahey, NTIA Unveils National Broadband Map and New Broadband Adoption Survey Results (Feb. 17, 2011) (*NTIA National Broadband Plan Press Release*), available at <http://www.ntia.doc.gov/press-releases/2011/commerce%C3%A2%E2%82%AC%E2%84%A2s-ntia-unveils-national-broadband-map-and-new-broadband-adoption-survey>; Lynn Chadwick, *The National Broadband Map Is Updated*, National Broadband Map Blog (July 25, 2012), <http://www.broadbandmap.gov/blog/2803/the-national-broadband-map-is-updated/>.

<sup>84</sup> FCC Form 477, Instructions for Local Telephone Competition and Broadband Reporting at 2, 17 (2012) (regarding filings due Sep. 1, 2012), available at <http://www.fcc.gov/Forms/Form477/477inst.pdf> (*FCC Form 477 Instructions*). Form 477 excludes high-capacity lines between end users and interexchange carriers and point-to-point connections among end-user locations within a single customer entity. *Id.* at 6-7. Specifically, the Form 477 instructions direct reporting entities to exclude (among others) the following types of connections:

“Connections between two locations of the same business or other end user entity (such as point-to-point connections within private or semi-private data networks or corporate telephone systems).”

“High-capacity connections between network components within the public switched telephone network or the Internet (*note that* such connections do not terminate at an end user location.)”

“High-capacity dedicated connections (‘special access’ circuits) between end users and interexchange (telephone) carrier points of presence (‘toll bypass’).”

<sup>85</sup> *FCC Form 477 Instructions* at 9 (specifying that, for all technologies except terrestrial mobile wireless, connections should be considered residential “when they deliver Internet-access services that are *primarily* purchased by, designed for, and/or marketed to residential end users”).

<sup>86</sup> As discussed before, because the entities that we require to report have submitted data to the SBI program at the census block level, we expect the burden on such entities of reporting this information will be small. *See, e.g.*, Letter from Steven F. Morris, Vice President and Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Nov. 19, 2012).

data and information.<sup>87</sup> Others have recommended obtaining information about providers' past lateral construction projects, future upgrade or expansion plans and additional information on competitive bidding.<sup>88</sup> We agree that some such information may be qualitatively useful, and, for example, have required the production of data on competitive provider RFP responses and future plans to inform our analysis.<sup>89</sup> We must, however, balance the administrative burdens with the potential benefits of a broader collection, and believe that this Report and Order will allow us to collect data and information sufficient for our purposes while minimizing, to the extent possible, the burden we impose on industry.

48. Further, we agree with commenters who argue that to understand the impact of competition in special access, it is important to grasp the effects of potential, as well as actual, competition. To this end we are requiring the production of information that will illuminate those factors that affect providers' decisions to expand existing networks, *e.g.*, the non-price factors that may impact where special access providers build new facilities,<sup>90</sup> business rules for deployment,<sup>91</sup> a sample of historical deployment,<sup>92</sup> points of collocation,<sup>93</sup> fiber network maps,<sup>94</sup> availability and use of UNEs,<sup>95</sup> internal analysis of pricing decisions,<sup>96</sup> a selected set of responses to RFPs, and internal competitive analysis.<sup>97</sup>

### C. Statutory Authority

49. Several provisions of the Communications Act and the Telecommunications Act give the Commission authority to adopt this data collection. Under section 218 of the Communications Act, we may "obtain from [common] carriers and from persons directly or indirectly controlling or controlled by,

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<sup>87</sup> See, *e.g.*, Letter from Paul Margie & Marc Davis, Counsel, Sprint, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 10 (filed Aug. 14, 2012) ("At a minimum, some information about costs will be useful in order to ensure that prices are just and reasonable."); Letter from Erin Boone, Senior Corporate Counsel, Federal Regulatory Affairs, Level 3, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 2 (filed Mar. 7, 2011) ("In order to determine whether . . . contract tariffs and tariffs require buyers of a large percentage of special access circuits to purchase all or nearly all of their special access needs from the ILEC and thus result in anticompetitive market foreclosure, the Commission must know not only that potentially anticompetitive tariffs and contract tariffs exist, but also measure how they influence the marketplace."); COMPTTEL 2009 PN Comments at 8 (stating that the Commission should perform a price/cost ratio analysis to determine if special access rates are reasonable); Level 3 2009 PN Reply at 11 (stating that "the Commission should . . . consider the extent to which unjust and unreasonable terms and conditions have arisen due to a lack of competition or have precluded competitive entry in special access markets"); Letter from Edward J. Black *et al.*, President, CCIA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed June 3, 2009) (setting forth a data request proposal that would include requests for pricing data, cost data, and information about terms and conditions).

<sup>88</sup> See Qwest Response to *Special Access Facilities Data Request*, Question III.F (filed Jan. 27, 2011).

<sup>89</sup> See *supra* para. 40-42.

<sup>90</sup> See *supra* para. 33.

<sup>91</sup> See *supra* para. 33.

<sup>92</sup> See *supra* para. 34.

<sup>93</sup> See *supra* para. 35.

<sup>94</sup> See *supra* para. 35.

<sup>95</sup> See *supra* paras. 31-34.

<sup>96</sup> See *supra* para. 43.

<sup>97</sup> See *supra* para. 41.

or under direct or indirect common control with, such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created.”<sup>98</sup> As such, section 218 empowers us to collect data from incumbent LECs, competitive LECs, CMRS providers, and other common carriers whether they provide or purchase special access service or other relevant services.

50. Section 201 requires that interstate special access service rates, terms, and conditions be just and reasonable, section 202 prohibits unjust or unreasonable discrimination in the provision of interstate special access services, and section 706 of the Telecommunications Act requires that we “encourage the deployment of advanced telecommunications capability . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”<sup>99</sup> The Communications Act in turn provides us authority to carry out these duties—all of which will be aided by today’s data collection—in section 4(i), which empowers the Commission to “perform any and all acts . . . and issue such orders . . . as may be necessary in the execution of [our] functions,”<sup>100</sup> and section 201(b), which authorizes the Commission to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions” of the Communications Act.<sup>101</sup> These authorities, along with our subject matter jurisdiction over “interstate and foreign commerce in communication by wire and radio,”<sup>102</sup> allow us to extend the data collection beyond common carriers to include other market participants that provide interstate communication by wire or radio.<sup>103</sup> We note that there is widespread accord in the record on the Commission’s authority to require the collection of the data and information it needs to inform our future actions.<sup>104</sup>

51. We note that parties have had extensive notice and opportunity to comment on the need for and scope of this data collection. In the 2005 *Special Access NPRM*, the Commission sought comment regarding evidence of marketplace competitiveness and pricing for special access services, including the data and information to perform those analyses.<sup>105</sup> In a subsequent Public Notice, the Commission sought additional data and to otherwise refresh the record of the *Special Access NPRM* in light of subsequent developments, including the release of a GAO report that, among other things, contended that the

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<sup>98</sup> 47 U.S.C. § 218; *see also id.* § 220(c).

<sup>99</sup> 47 U.S.C. § 1302(a).

<sup>100</sup> *Id.* § 154(i); *see also id.* § 303(r) (authorizing the Commission to “[m]ake such rules . . . as may be necessary to carry out the provisions of this chapter”).

<sup>101</sup> 47 U.S.C. § 201(b); *see also id.* § 303(r) (authorizing the Commission to “[m]ake such rules . . . as may be necessary to carry out the provisions of this chapter”).

<sup>102</sup> *Id.* § 151.

<sup>103</sup> *Id.* § 154(i); *see also id.* § 303(r); *see also American Library Ass’n v. FCC*, 406 F.3d 689, 691-93 (D.C. Cir. 2005) (holding that the Commission may exercise ancillary authority when the general grant of subject matter jurisdiction in section 1 covers the regulated subject and the regulations are reasonably ancillary to the Commission’s effective performance of its statutory obligations) (*citing United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968)).

<sup>104</sup> *See, e.g.*, AT&T 2009 PN Comments at 28, 39; NoChokePoints 2009 PN Comments at 17-18; tw telecom 2009 PN Comments at 15; Level 3 2009 PN Reply at 14-15; Qwest 2009 PN Reply at 22-23, Exh. 39; AT&T 2007 PN Comments at 6, 25-26, 51-52; Embarq 2007 PN Reply at i, 2; BellSouth 2005 NPRM Reply at 21.

<sup>105</sup> *See generally Special Access NPRM*, 20 FCC Rcd at 2019-30, paras. 73-112.

Commission needed additional data to evaluate the special access marketplace.<sup>106</sup> In the resulting record of the proceeding, various parties advocated that the Commission undertake a data collection to obtain the data necessary to appropriately perform these analyses.<sup>107</sup> Citing such filings, the Bureau sought comment on an analytical framework necessary to resolve the issues raised in the *Special Access NPRM*, including whether the record contained sufficient information to perform such analyses and, if not, what additional data the Commission should collect, and from whom.<sup>108</sup> Most recently, in the *Special Access Pricing Flexibility Suspension Order*, the Commission stated that a data collection order would be forthcoming.<sup>109</sup> In short, we have provided notice regarding this comprehensive data collection that has given ample opportunity for public participation and met any requirements of the Administrative Procedure Act.<sup>110</sup>

#### D. Role of the Wireline Competition Bureau

52. The data collection we adopt today is set forth in Appendix A. Given the complexities associated with ensuring that the specific questions asked meet the Commission's needs as expressed in this Report and Order, navigating the Paperwork Reduction Act process, and actually collecting, cleaning, and analyzing the data, we delegate limited authority to the Bureau to: (a) draft instructions to the data collection and modify the data collection based on public feedback; (b) amend the data collection based on feedback received through the PRA process; (c) make corrections to the data collection to ensure it reflects the Commission's needs as expressed in this Report and Order; and (d) issue Bureau-level orders and Public Notices specifying the production of specific types of data, specifying a collection mechanism (including necessary forms or formats), and setting deadlines for response to ensure that data collections are complied with in a timely manner, and (e) take other such actions as are necessary to implement this Report and Order.<sup>111</sup> All such actions must be consistent with the terms of this Report and Order.<sup>112</sup>

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<sup>106</sup> See *Refresh the Record Public Notice*, 22 FCC Rcd at 13352.

<sup>107</sup> See, e.g., Letter from Glenn T. Reynolds, Vice President, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, Attach. at 14 (filed Aug. 31, 2009); Letter from Glenn T. Reynolds, Vice President, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 4-5 & Attach. A (filed Apr. 27, 2009); Letter from Donna Epps, Vice President, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 1-2 (filed May 22, 2009); Letter from Karen Reidy, COMPTel, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 6 (filed May 18, 2009).

<sup>108</sup> See *Analytical Framework Public Notice*, 24 FCC Rcd at 13638.

<sup>109</sup> See *Special Access Pricing Flexibility Suspension Order*, 27 FCC Rcd at 10561, para. 7.

<sup>110</sup> 5 U.S.C. § 553.

<sup>111</sup> The delegation includes the authority to require entities subject to the Commission's jurisdiction to certify whether or not they are special access providers, entities that provide best efforts business services, or purchasers for purposes of this data collection. In addition, although the Bureau may employ the existing waiver process under Commission rule 1.3 to waive some or all of the requirements of this Report and Order for individual respondents where good cause is shown, see 47 C.F.R. § 1.3, such waivers must be narrowly tailored to the applicable circumstances. To the extent the Bureau cannot obtain Office of Management and Budget approval for some portion of the data collection, we direct the Bureau to proceed with the remainder of the collection.

<sup>112</sup> For example, if the PRA process revealed that there were substantial special access facilities deployed to places that are not buildings or cell sites (such as walls or mines), it would be consistent with this Report and Order for the Bureau to amend the data collection to collect information about facilities deployed to such places as well as to "locations." In contrast, even if the PRA process suggested that it would be less burdensome to collect special access facilities deployment at the census block level, it would not be consistent with this Report and Order for the (continued....)

53. Our goal is to ensure a comprehensive and detailed data collection. Accordingly, we direct the Bureau to engage in outreach with the provider and purchaser communities to ensure that all providers and purchasers are aware of this comprehensive data collection and the penalties for non-response. We encourage the Bureau to reach out to trade associations that represent small providers to inform them of their obligations to participate in the data collection effort and to ensure that we have maximum participation. In addition, to reduce the burden of this data collection, we direct the Bureau to facilitate whenever possible the conversion of street addresses to geocoded coordinates for small providers and purchasers.

#### **E. Data Retention**

54. Respondents are required to retain any data, documents, documentation, or other information prepared for, or in connection with, their responses to these data reporting requirements for a period of three years or until the Commission issues a notice relieving respondents of this retention requirement upon the exhaustion of any appeals of a final order adopted in this proceeding.

#### **F. Penalties for False Statements and Non-Response**

55. Respondents are required to certify that all statements of fact, data and information submitted to the Commission are true and correct to the best of their knowledge.<sup>113</sup> False statements or misrepresentations to the Commission may be punishable by fine or imprisonment under Title 18 of the U.S. Code. Respondents are reminded that failure to comply with these data reporting requirements may subject them to monetary forfeitures of up to \$150,000 for each violation or each day of a continuing violation, up to a maximum of \$1,500,000 for any single act or failure to act that is a continuing violation.<sup>114</sup>

### **IV. FURTHER NOTICE OF PROPOSED RULEMAKING**

56. We now commence a process to more effectively determine where relief from special access regulation is appropriate and otherwise update our special access rules to ensure that they reflect the state of competition today and promote competition, investment, and access to services used by businesses across the country. In Section IV.A, below, we propose and seek comment on a market analysis that we intend to undertake in the coming months to assist the Commission in evaluating whether the pricing flexibility rules result in just and reasonable special access rates and what regulatory changes may be needed.<sup>115</sup> We anticipate that the analysis will be a one-time assessment of the competitive conditions in the special access market; however, we do not foreclose the possibility that further analyses may be needed in the future.

57. Our proposed market analysis is only one step in our process. Once the data are collected and analyzed, we may modify the existing pricing flexibility rules or adopt a new set of rules that will

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Bureau to amend the data collection to require census block information rather than location-by-location information required by paragraph 31 about such facilities.

<sup>113</sup> The Commission typically requires certifications from respondents to ensure the accuracy of reported information. See 47 C.F.R. § 1.7001(c); *Promoting Diversification of Ownership in the Broadcasting Services*, MM Docket 07-294, Report and Order, 24 FCC Rcd 5896, 5909-10, para. 25 (2009); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, 8 FCC Rcd 226, 227, App. (1992).

<sup>114</sup> 47 U.S.C. § 503(b)(2); 47 C.F.R. § 1.80(b); *Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 23 FCC Rcd 9845, 9847 (2008).

<sup>115</sup> See 47 U.S.C. § 201(b) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable . . .").

apply to requests for special access pricing flexibility. In section IV.B below, we seek comment on how the special access pricing flexibility rules might change after we conduct our market analysis. We also seek comment on what steps the Commission should take where relief has been provided under our existing rules and where the data and our analysis demonstrate that competition is not sufficient to discipline the marketplace. Finally, we seek in section IV.C data and information on the terms and conditions offered by incumbent LECs for special access services to facilitate our understanding of competition in the special access market and our ability to craft rules that properly address the state of the marketplace.

## A. Approach To Analyzing Special Access

### 1. Background

58. In the *Analytical Framework Public Notice*, the Bureau sought comment on a methodology that could be employed to evaluate the efficacy of the special access regulatory regime.<sup>116</sup> The Bureau requested that parties propose an analytic framework capable of assessing whether the Commission's price cap and pricing flexibility rules ensure just and reasonable rates, as well as just and reasonable terms and conditions in special access tariffs and contracts.<sup>117</sup> The Bureau noted that once the Commission adopted

an analytical approach enabling a systematic determination of whether or not the current regulation of special access services is ensuring rates, terms, and conditions that are just and reasonable as required by the Act, [the Commission] c[ould] determine what, if any, specific problems there are with the current regime and formulate specific solutions as necessary.<sup>118</sup>

59. The Bureau subsequently held a staff workshop to gather further input on the analytic framework proposals raised in the record and any associated data collection that would be required to implement such proposals.<sup>119</sup> In response to the *Analytical Framework Public Notice*, as well as through the staff workshop, commenters set forth several proposals for an analytic framework that the Commission could implement to evaluate the current special access rules.

### 2. Proposals in the Record

60. Several parties recommend that the Commission adopt a market power analytic framework in lieu of the *Pricing Flexibility Order's* competitive showing rules.<sup>120</sup> In the past, the Commission has defined market power as the power to control price.<sup>121</sup> The U.S. antitrust agencies have also expanded their definition of market power to include the ability to "reduce output, diminish innovation, or otherwise

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<sup>116</sup> *Analytical Framework Public Notice*, 24 FCC Rcd at 13638.

<sup>117</sup> *Id.* at 13639.

<sup>118</sup> *Id.*

<sup>119</sup> *Staff Workshop Public Notice*; July 2010 Special Access Workshop Transcript (July 19, 2010), available at [http://reboot.fcc.gov/c/document\\_library/get\\_file?uuid=f01ad781-6dd7-4ace-a7fc-bc296dc88315&groupId=19001](http://reboot.fcc.gov/c/document_library/get_file?uuid=f01ad781-6dd7-4ace-a7fc-bc296dc88315&groupId=19001) (2010 *Staff Workshop Transcript*).

<sup>120</sup> See, e.g., BT Americas 2009 PN Comments at 20-22; Qwest 2009 PN Comments at 25-26; Sprint 2009 PN Comments at 17; XO 2009 PN Comments at 3-5; MAG-Net 2009 PN Reply at 7-8; NJ Rate Counsel 2009 PN Reply at 9-11; RCA 2009 PN Reply at 7; tw telecom 2009 PN Reply at 6-8.

<sup>121</sup> *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1, 20, para. 54 (1980) (*Competitive Carrier First Report and Order*).

harm customers as a result of diminished competitive constraints or incentives.”<sup>122</sup> A market power analysis commonly evaluates separately “competition for distinct services, for example differentiating among the various retail services purchased by residential and small, medium, and large business customers, and the various wholesale services purchased by other carriers” in a distinct geographic area.<sup>123</sup> A market power analysis also typically involves the consideration of providers’ market shares, supply and demand elasticity, and carriers’ cost structures, size, and access to resources.<sup>124</sup>

61. Commenters voicing support for adoption of a market power framework state that it will ensure that, going forward, the Commission’s evaluation of competition for special access is a comprehensive, economically sound, and data-driven means of understanding where and what kinds of regulatory relief are justified.<sup>125</sup> Other commenters raise concerns about a market power framework, stating, for example, that the questions at the heart of a traditional market power analysis used in transaction review, such as how to define markets or analyze demand and supply responsiveness, have been made irrelevant by competition;<sup>126</sup> that such an approach is not an administratively workable way to address individual petitions for pricing flexibility;<sup>127</sup> that it is impractical to determine whether a firm has market power where baseline prices are regulated;<sup>128</sup> and that a market power framework is inconsistent with the Commission’s goals for the deregulation of telecommunications services.<sup>129</sup>

62. Another analytic framework proposed in the record involves comparing actual purchase prices for special access to specific benchmarks, such as rates for reasonably similar services (e.g., rates for UNEs, retail broadband services such as DSL or cable modem service, or rates in price cap areas as compared to pricing flexibility areas), the costs associated with providing special access services (e.g., forward-looking costs), or rate-of-return estimates (e.g., ARMIS rates-of-return).<sup>130</sup> Commenters assert

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<sup>122</sup> 2010 DOJ/FTC Horizontal Merger Guidelines at § 1 (“A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.”).

<sup>123</sup> *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8623, para. 1.

<sup>124</sup> A market power analysis is a fact-specific inquiry. See, e.g., *AT&T Corp. v. FCC*, 236 F.3d 729, 735-36 (D.C. Cir. 2001); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3293, para. 38 (1995) (*AT&T Non-Dominance Order*). See generally 2010 DOJ/FTC Horizontal Merger Guidelines.

<sup>125</sup> See, e.g., BT Americas 2009 PN Comments at 20-22; Sprint 2009 PN Comments at 7-8.

<sup>126</sup> See, e.g., Letter from Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, RM-10593, at 2 (Aug. 1, 2012); AT&T 2009 PN Comments at 21-22; AT&T 2009 PN Reply at 40-41; AT&T 2007 PN Comments at 44-45; Verizon 2009 PN Reply at 24-25; Verizon 2005 NPRM Reply at 37.

<sup>127</sup> See, e.g., AT&T 2009 PN Comments at 27; Qwest 2009 PN Comments at 27; BellSouth 2005 NPRM Comments at 55.

<sup>128</sup> See, e.g., Letter from Frank S. Simone, Assistant Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 3 (Oct. 1, 2012).

<sup>129</sup> CenturyLink 2009 PN Reply at 3-4; see also AT&T 2009 PN Reply at 17; Verizon 2009 PN Reply at 43-45. Verizon, for example, asserts that by requiring a more extensive showing prior to granting pricing flexibility, the Commission would impose costs on carriers, and ultimately on consumers, by encouraging regulatory inefficiencies in the special access market. Verizon 2005 NPRM Reply at 37-38 (noting that the Commission’s Part 69 rules impose costs on price cap LECs by limiting their ability to develop rate structures in response to market forces).

<sup>130</sup> See, e.g., Ad Hoc 2009 PN Comments at 7-9, 14-15; COMPTTEL 2009 PN Comments at 9-15; NoChokePoints 2009 PN Comments at 21-27, 35; PAETEC *et al.* 2009 PN Comments at 64-71; Sprint 2009 PN Comments at 25-30; tw telecom 2009 PN Comments at 5.

that where special access prices are higher than such benchmarks, the Commission should find that the competitive showings adopted in the *Pricing Flexibility Order* are insufficient to ensure just and reasonable rates.<sup>131</sup> Incumbent LECs, on the other hand, assert that the proposed benchmarks are neither necessary—because special access rates have already been “set” by the competitive marketplace—nor do they provide a reasonable proxy for special access rates.<sup>132</sup> Such carriers do, however, state that the Commission may be better positioned to develop its own cost benchmark after collecting data on special access prices and the presence of competition in specific geographic markets.<sup>133</sup>

63. Some commenters recommend that the Commission adopt a framework that would facilitate deregulating quickly in anticipation of future competition. For example, AT&T recommends that, rather than perform a more granular analysis of individual petitions for pricing flexibility, the Commission extend blanket Phase I relief to all special access services, fully de-regulate OCn and packet-based services, and extend Phase II relief to areas where the existing competitive showing requirements do not fully detect the extent of competitive entry.<sup>134</sup> Another analytic framework proposed by AT&T would examine whether the price cap rules are producing the marketplace benefits expected under incentive regulation.<sup>135</sup> In particular, where evidence suggests that “carriers are investing to become more efficient and innovative, that carriers are working to provide better services at the same or lower prices, that competitors are responding with increased entry, and that output is increasing,” the Commission should conclude that pricing flexibility is operating properly in its current form.<sup>136</sup> Competitive carriers, on the other hand, disagree that expectations of future competition warrant quick deregulation. They raise concerns that, particularly in Phase II markets, incumbent carriers have increased special access rates to supracompetitive levels.<sup>137</sup> They assert that the Commission must adopt a regulatory framework that curtails this practice.<sup>138</sup> Ad Hoc and Sprint, for example, propose a “hybrid approach,” in which carriers may obtain unlimited “downward pricing flexibility” in combination with price caps in all markets.<sup>139</sup>

64. Incumbent carriers also propose that the Commission adopt a framework for analyzing requests for pricing flexibility that takes into account both actual and potential competition, such as competition from non-collocating providers or those competitors who could quickly enter the market in

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<sup>131</sup> See, e.g., Ad Hoc 2009 PN Comments at 7-9; NoChokePoints 2009 PN Comments at 22-24; Sprint 2009 PN Comments at 25-26.

<sup>132</sup> See, e.g., Verizon 2009 PN Reply at 33-34; *2010 Staff Workshop Transcript* at 11 (Statement of William E. Taylor, Senior Vice President, NERA Economic Consulting), 20 (Statement of Dennis Carlton, Senior Managing Director, Compass Lexecon).

<sup>133</sup> Qwest, for example, contends that the Commission could analyze incumbent LEC rates in a sample of Phase II markets and, once it determines that a rate is competitive, the Commission could use it as a benchmark for assessing the reasonableness of special access rates in non-Phase II markets. Qwest 2009 PN Comments at 6-7; see also *2010 Staff Workshop Transcript* at 10-11 (Statement of William E. Taylor, Senior Vice President, NERA Economic Consulting).

<sup>134</sup> AT&T 2007 PN Reply at 42, 45-46; SBC 2005 NPRM Comments at 57-62.

<sup>135</sup> AT&T 2009 PN Comments at 10.

<sup>136</sup> *Id.*

<sup>137</sup> See, e.g., Sprint 2007 PN Comments at 17; T-Mobile 2007 PN Comments at 9.

<sup>138</sup> See, e.g., COMPTTEL 2009 PN Comments at 8-9; Sprint 2009 PN Reply at 10, 12, 15-16; XO 2009 PN Reply at 1-2.

<sup>139</sup> AdHoc 2007 Comments at 23; Ad Hoc 2005 Comments at 50-52; Sprint 2005 Comments at 11.

the near term.<sup>140</sup> For example, AT&T and Verizon propose that the Commission permit pricing flexibility in areas where the competitive showing requirements are not met but carriers can point to sources of actual or potential competition, such as the existence of alternative fiber in the area served by specific wire centers or facilities-based competitors providing service in wire centers where there is no collocation.<sup>141</sup> Verizon also argues that the Commission should modify the criteria for Phase II relief to allow price cap LECs to make a *prima facie* case that the competitive showings are satisfied by introducing evidence of competitive facilities in an MSA where insufficient competitive collocation exists to meet the competitive showing requirements.<sup>142</sup> Some commenters, however, such as Public Knowledge and Time Warner Telecom, raise questions about the extent to which potential competition is germane to an analysis of special access market conditions.<sup>143</sup>

65. Finally, several commenters, in particular incumbent LECs, recommend that, prior to implementing a new framework for special access pricing flexibility, the Commission collect additional data to assess whether the current competitive showing rules are a reasonably accurate proxy for the presence of competition.<sup>144</sup> For example, during the 2010 staff workshop, one economist suggested that the Commission

[l]ook at areas with different degrees of competition and across such areas compare prices and measures of competition and other terms and conditions controlling for relative factors such as density, access lines, customer characteristics, and then use statistical analysis to see what you can say about the relationship between prices and measures of competition controlling for other costs or demand-based factors.<sup>145</sup>

In his view, such findings could potentially be used to evaluate the existing pricing flexibility rules and craft new or modified rules if the data indicate that the existing rules are deficient.<sup>146</sup> Incumbent LECs

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<sup>140</sup> See, e.g., AT&T 2009 PN Comments at 38, 43-44; Verizon 2009 PN Reply at 9-10, 20; Qwest 2007 PN Reply at 32; Iowa Telecom / Valor 2005 NPRM Comments at 19; Verizon 2005 NPRM Comments at 45-46.

<sup>141</sup> Verizon 2005 NPRM Comments at 35 (“LECs should be able to . . . submit[] evidence of alternative fiber in the area served by specific wire centers – whether that evidence is obtained by competing carriers’ web sites, independent companies such as GeoTel, documented internal surveys, or other sources.”); see also AT&T 2007 Comments at 28 (“The Commission should modify its pricing flexibility rules to allow Phase I and Phase II flexibility even where the collocation triggers are not met, upon a showing that facilities-based competitors are providing service in enough wire centers where there is no collocation that the triggers would be met if those wire centers were counted.”); BellSouth 2005 Comments at 55 (“The better alternative is to assess the degree of competition in the context of this proceeding by considering data that indicates bypass competition . . .”).

<sup>142</sup> Verizon asserts that competitors objecting to the grant of a pricing flexibility petition should be required to provide full network maps for the geographic region, showing where the competitor does or does not have fiber, and, absent that evidence, the incumbent should be entitled to obtain Phase II relief. Verizon 2005 NPRM Comments at 35.

<sup>143</sup> Public Knowledge 2009 PN Reply at 9-10; tw telecom 2009 PN Comments at 15-16, 21.

<sup>144</sup> See AT&T 2009 PN Comments at 28; Qwest 2009 PN Comments at 25-26, 39; Verizon 2009 PN Comments at 42; Embarq 2007 PN Reply at 13-15.

<sup>145</sup> 2010 Staff Workshop Transcript at 9-10 (Statement of William E. Taylor, Senior Vice President, NERA Economic Consulting); see also *id.* at 86 (stating that “what we’re trying to do is ascertain whether the pricing flexibility rules as they sit in the FCC are doing what they’re supposed to do. . . . I would think that the kind of standard we’d like to apply is to look and see that across the different geographic and product markets that are affected by those rules, that the prices that come out of it are somehow close to a ‘competitive’ price.”).

<sup>146</sup> See *id.* at 9-10.

assert that further data collection is necessary because competitive carriers did not provide sufficient data in response to the two voluntary data requests issued by the Commission in 2010 and 2011.<sup>147</sup> Some competitive carriers, however, argue that it is not necessary for the Commission to collect additional data prior to adopting a new regulatory scheme for special access pricing flexibility.<sup>148</sup>

### 3. A One-Time, Multi-Faceted Market Analysis

66. Based on our review of the record, we propose to conduct as one step in our proceeding a one-time, multi-faceted market analysis to obtain a more accurate picture of competition for special access. In combination with the comprehensive data collection described in the above Report and Order,<sup>149</sup> we expect that the market analysis we propose will best assist the Commission in evaluating market conditions for special access services and determining what regulatory changes, if any, are warranted in light of that analysis.

67. We propose to perform a one-time, multi-faceted market analysis of the special access market designed to determine where and when special access prices are just and reasonable, and whether our current special access regulations help or hinder this desired outcome. We do not propose to conduct a simple market share or market concentration analysis. Rather, we will use the data we are collecting in this Report and Order to identify measures of actual and potential competition that are good predictors of competitive behavior, for example, by demonstrating that prices tend to decline with increases in the intensity of various competition measures, holding other things constant. In undertaking that analysis we will consider evidence as to what leads firms, including competitive providers, to undertake infrastructure investments. In so doing, we will consider whether our current regulatory regime may be hindering, for example, by keeping prices low, competitive investments that would reduce or obviate the need for regulation. The analysis will seek to control for factors that could reasonably be expected to affect prices and competitive investment, such as actual and potential competition from services that are substitutes for special access (regardless of technology), the nature of the services supplied, demand intensity, historical proximity and state and federal regulation. The one-time, multi-faceted market analysis will help the Commission determine whether any market participants have market power and, if so, where such market power exists. This will better allow us to determine the sources of such market power, the likely extent to which it is sustainable over time, and how to construct (where required) targeted regulatory remedies. In addition, the analysis should help the Commission determine what barriers inhibit investment and delay competition, including regulatory barriers, and any other barriers, and what steps the Commission could take to remove such barriers to promote a robust competitive market and permit the competitive determination of price levels.

68. As part of our one-time, multi-faceted market analysis we propose to conduct panel regressions designed to determine how the intensity of competition (or lack thereof), whether actual or potential, affects prices, controlling for all other factors that affect prices. Specifically, we propose to undertake econometric modeling to estimate the effect of competition from facilities-based providers, among other things, on the prices of special access services. The modeling would develop panel regressions of the prices for special access on characteristics such as: 1) the number of facilities-based competitors (both actual and potential); 2) the availability of, pricing of, and demand for best efforts business broadband Internet access services; 3) the characteristics of the purchased service; and 4) other

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<sup>147</sup> See, e.g., Verizon Special Access Facilities Data Public Notice Comments at 3-4 (filed Jan. 27, 2011); Qwest Response to Special Access Facilities Data Public Notice, Question III.F. (filed Jan. 27, 2011); CenturyLink Response to Special Access Competition Data Public Notice, Question III.E. (filed Dec. 5, 2011).

<sup>148</sup> See, e.g., Sprint 2009 PN Comments at 5-6; RCA 2009 PN Reply at 2.

<sup>149</sup> See *supra* Section III.

factors that influence the pricing decisions of special access providers, including cost determinants (e.g., density of sales) and factors that deliver economies of scale and scope (e.g., level of sales). The panel regressions (and our analysis more generally) would seek to control for the fact that firms set prices and make competitive investment decisions taking into account a variety of factors, including existing and expected prices, investments (including as informed by advertised offerings), and regulatory rules (e.g., whether the incumbent has received pricing flexibility and for what services). In particular, we expect to control for the fact that prices, which regulation impacts, likely play a role in entry decisions. The precise form of econometric modeling we conduct will be dependent, in large part, on the nature and the quality of the data produced in response to the Order. We expect that the output of such panel regressions will assist us in delineating both relevant product and geographic markets.<sup>150</sup> In conjunction with data on providers' business rules, it will also help us predict where and how potential competition will occur, as noted above.<sup>151</sup>

69. There are three key reasons for our proposal to undertake a one-time, multi-faceted market analysis. First, a data-intensive market analysis will enable us to determine more precisely where, and to what extent, actual and potential competition for special access is likely to constrain prices as well as the factors that drive investment and competition, as described above.<sup>152</sup> At this time there is insufficient evidence in the record upon which to base general or categorical conclusions as to the competitiveness of the special access market.<sup>153</sup> Likewise, the record provides an insufficient basis for us to identify reliable competitive showing rules for granting pricing flexibility in defined geographic areas going forward.<sup>154</sup>

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<sup>150</sup> Traditionally, federal antitrust agencies have begun competitive analyses in a variety of contexts by defining relevant product and geographic markets. However, these agencies have more recently noted that “analysis need not start with market definition... although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.” In particular, “[e]vidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects.” *2010 DOJ/FTC Horizontal Merger Guidelines* at § 4.

<sup>151</sup> See *supra* para. 40.

<sup>152</sup> See *supra* para. 67. *Special Access Pricing Flexibility Suspension Order*, 27 FCC Rcd at 10608-09, 10610-12, paras. 91, 97-100. We agree with those commenters who state that the Commission's analysis must take account of both actual and potential competition, as well as sources of intramodal and intermodal competition. See *supra* para. 64. An identification of market participants is integral to performing a competitive analysis, see *2010 DOJ/FTC Horizontal Merger Guidelines* at § 5, and, as described herein, we propose to perform an analysis that considers all significant sources of facilities-based competition (both actual and potential). But see *tw telecom 2009 PN Comments* at 15-16, 21; *Public Knowledge 2009 PN Reply* at 9-10 (raising questions about the extent to which potential competition is germane to an analysis of special access market conditions). In doing so, we recognize that potential entry must be “timely, likely and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern.” *2010 DOJ/FTC Horizontal Merger Guidelines* at § 9.

<sup>153</sup> For instance, the record contains potentially conflicting evidence about the changes in special access prices in Phase I and Phase II pricing flexibility areas. While incumbent LECs assert that special access prices have fallen in pricing flexibility areas, competitors state that prices, particularly in Phase II areas, have increased. See, e.g., *Global Crossing 2009 PN Comments* at 4-6; *COMPTEL 2009 PN Reply* at 9-10; *Sprint 2007 Comments* at 16-17, 22-23; *T-Mobile 2007 Comments* at 7; *tw telecom / One Communications 2007 Comments* at 31-41. However, the evidence we do have indicates that granting pricing flexibility throughout an entire MSA based on collocation in only a small part of that MSA was inappropriate. See *Special Access Pricing Flexibility Suspension Order*, 27 FCC Rcd at 10568-99, paras. 22-75.

<sup>154</sup> See, e.g., Letter from Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed May 2, 2012); Letter from Linda Vandeloop, Director – Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Apr. 27, 2012). We disagree with commenters who urge the (continued....)

As a result, we believe that a one-time, multi-faceted market analysis, performed in conjunction with a comprehensive data collection, will aid the Commission in developing better tests for regulatory relief to replace the collocation-based standards.

70. Second, a one-time, multi-faceted market analysis will benefit special access providers and purchasers by facilitating a thorough assessment of competitive conditions.<sup>155</sup> For example, a wide range of commenters, including incumbent providers, competitive providers, and other interested parties, state that the Commission cannot gauge the extent of competition based on a single market characteristic, such as purchase prices, carrier revenues, or market share.<sup>156</sup> We agree, and we believe that the Commission must conduct a more comprehensive analysis of the state of competition prior to replacing the rules by which incumbent LECs may obtain regulatory relief in the provision of special access services. We propose to conduct a nuanced market analysis that incorporates a variety of factors, as detailed above, to assess the effect of competition on special access prices.<sup>157</sup>

71. Third, a one-time, multi-faceted market analysis supplements a structural market analysis with econometrically sound panel regressions. The Commission has repeatedly undertaken structural market analyses to assess competition for telecommunications services and determine whether deregulation is warranted.<sup>158</sup> Historically, the Commission's structural analysis—which focused on

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Commission to adopt a new regulatory regime for special access pricing flexibility without collecting additional data. To the contrary, we believe that it is necessary to supplement the existing record to ensure that we are able to adopt rules that are data-driven and reflective of market conditions. *See supra* para. 65. In light of the current record, it is premature to adopt blanket deregulation of certain special access services, as recommended by incumbent LECs, or conversely, to eliminate Phase II pricing flexibility as some competitive carriers request. *See supra* para. 63. Once the data has been collected and analyzed, the Commission may choose to consider a new or modified regulatory scheme. *See infra* Section IV.B. Similarly, the Commission may opt to adopt a price benchmark or other proposals raised by commenters in the record. *See supra* para. 62.

<sup>155</sup> *Special Access Pricing Flexibility Suspension Order*, 27 FCC Rcd at 10609-10, 10612, paras. 92, 97, 101; *see, e.g.*, AT&T 2009 PN Comments at 18, 42-43; Qwest 2009 PN Comments at 22-25; Verizon 2009 PN Comments at 9-10, 17, 27; AT&T 2009 PN Reply at 34-35; CenturyLink 2009 PN Reply at 3-4; Free State Foundation 2009 PN Reply at 4; tw telecom 2009 PN Reply at 21-23; Verizon 2009 PN Reply at 7, 30-32; XO 2009 PN Reply at 3.

<sup>156</sup> *See, e.g.*, AT&T 2009 PN Comments at 18, 42-43; Qwest 2009 PN Comments at 22-25; Verizon 2009 PN Comments at 9-10, 17, 27; AT&T 2009 PN Reply at 34-35; CenturyLink 2009 PN Reply at 3-4; Free State Foundation 2009 PN Reply at 4; tw telecom 2009 PN Reply at 21-23; Verizon 2009 PN Reply at 7, 30-32; XO 2009 PN Reply at 3.

<sup>157</sup> This type of structural analysis is generally consistent with the market power framework suggested by several commenters in the record. *See supra* para. 61. We agree with those commenters who advocate such an approach. *See, e.g.*, BT Americas 2009 PN Comments at 20-22; Sprint 2009 PN Comments at 7-8.

<sup>158</sup> *See, e.g., Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); *Competitive Carrier First Report and Order*, 85 FCC 2d at 1; *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (*Competitive Carrier First Further Notice*); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17308 (1982) (*Competitive Carrier Second Further Notice*); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Second Report and Order, 91 FCC 2d 59 (1982) (*Competitive Carrier Second Report and Order*); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Order on Reconsideration, 93 FCC 2d 54 (1983) (*Competitive Carrier Order on Reconsideration*); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Third Further Notice of (continued....)

certain “clearly identifiable market features,” including a carrier’s market share, number and size distribution of competing firms, the nature of competitors’ barriers to entry, the availability of reasonably substitutable services, the level of demand elasticity, and whether the firm controlled bottleneck facilities<sup>159</sup>—was designed to identify where competition is sufficient to constrain carriers from charging unjust or unreasonable rates, or from acting in an otherwise anticompetitive manner.<sup>160</sup> The one-time, multi-faceted market analysis follows this precedent by incorporating a structural market analysis,<sup>161</sup> but it also goes further by supplementing the analysis with econometrically sound panel regressions to determine how the intensity of competition (or lack thereof), whether actual or potential, affects prices, controlling for all other factors that affect prices.<sup>162</sup>

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Proposed Rulemaking, 48 Fed. Reg. 28292 (1983) (*Competitive Carrier Third Further Notice*); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Third Report and Order, 48 Fed. Reg. 46791 (1983) (*Competitive Carrier Third Report and Order*); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Fourth Report and Order, 95 FCC 2d 554 (1983) (*Competitive Carrier Fourth Report and Order*), vacated, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) (*AT&T v. FCC*), cert. denied, *MCI Telecomms. Corp. v. AT&T*, 509 U.S. 913 (1993); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Fifth Report and Order, 98 FCC 2d 1191 (1984) (*Competitive Carrier Fifth Report and Order*); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Sixth Report and Order, 99 FCC 2d 1020 (1985) (*Competitive Carrier Sixth Report and Order*), vacated, *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), aff’d, *MCI v. AT&T*, 512 U.S. 218 (1994) (*MCI v. AT&T*) (collectively, the *Competitive Carrier* proceedings); see also *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, CC Docket No. 96-149, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756 (1997) (*LEC Classification Order*), recon. denied, Second Order on Reconsideration and Memorandum Opinion and Order, 14 FCC Rcd 10771 (1999).

<sup>159</sup> *AT&T Non-Dominance Order*, 11 FCC Rcd at 3274-75, para. 5 (citing *Competitive Carrier First Report and Order*, 85 FCC 2d at 21-22, paras. 56-59).

<sup>160</sup> For example, in the *Competitive Carrier First Report and Order*, the Commission found that “firms lacking market power simply cannot rationally price their services in a way which, or impose terms and conditions, which would contravene Sections 201(b) and 202(a) of the Act.” *Competitive Carrier First Report and Order*, 85 FCC 2d at 31, para. 88; see also 47 U.S.C. §§ 201(b), 202(a). We disagree that the questions at the heart of a market power analysis, such as how to define markets or analyze demand and supply responsiveness, have been made irrelevant by competition. See *supra* para. 61. Rather, such questions are essential questions asked by both the Commission and the antitrust agencies when assessing the competitiveness of a market.

<sup>161</sup> More recently, the Commission has undertaken market analysis to evaluate competitive conditions in both merger proceedings and forbearance cases. See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5675-76, paras. 23-26; *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18303-04, paras. 20-23 (2005) (*SBC/AT&T Merger Order*); *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18446-47, paras. 20-23 (2005) (*Verizon/MCI Merger Order*); *Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4248-49, paras. 24, 26 (2011) (*Comcast/NBC Merger Order*); *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8622; *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007).

<sup>162</sup> To illustrate one advantage of the one-time, multi-faceted market analysis: Whereas a traditional market-power analysis, such as the analysis the Commission historically performed in the non-dominance proceedings, see, e.g., (continued....)

#### 4. Request for Comment on One-Time, Multi-Faceted Market Proposed Analysis

72. We seek comment on this one-time, multi-faceted market analysis.<sup>163</sup> In contrast to the approach of our pricing flexibility rules, which are currently suspended, we anticipate that this analysis is likely to identify all significant current and potential market participants, and consider their effect when assessing the level of competition in a market.<sup>164</sup> We seek comment on this conclusion. Are there significant competitors who would not be easily accounted for under the proposed analysis, such as firms who self-supply their own special access? Is such an approach likely to show whether a specific provider is a probable source of competition in a given geographic area, *i.e.*, that its presence could reasonably be found to constrain special access prices?<sup>165</sup>

73. Will the proposed one-time, multi-faceted market analysis facilitate a comprehensive, forward-looking evaluation of competitive conditions? Should certain factors be weighted more or less heavily in our analysis? How can we balance the need for an analysis that is forward-looking with the importance of relying on non-speculative data?

74. Does the one-time, multi-faceted market analysis effectively address concerns regarding use of a traditional structural analysis in this context? For example, incumbent LECs assert that special access pricing flexibility should not be treated as akin to the dominance / non-dominance analyses undertaken by the Commission in the *Competitive Carrier* proceeding.<sup>166</sup> They argue that a dominance / non-dominance analysis is inappropriate in the special access context because “[t]he pricing flexibility rules are merely an incremental measure within the context of dominant carrier regulation.”<sup>167</sup> Does the one-time, multi-faceted market analysis with panel regressions address these concerns?

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*Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3285-356, paras. 19-162 (1995), may lead to the conclusion that a particular provider is dominant in a given market, that determination, standing alone, only justifies the imposition of *some* regulation. It does not, by itself, dictate its content or scope. By contrast, the one-time, multi-faceted market analysis we propose here could well provide additional information such as the efficacy of various forms of regulations, including their effects on both prices and investment.

<sup>163</sup> We note that a peer review of the one-time, multi-faceted market analysis that incorporates the data we will collect through this Report and Order may be required. If so, the public will have additional opportunities to comment on that peer review through the *ex parte* process. See *Information Quality Act*, Pub. L. No. 106-554 § 515, 114 Stat. 2763, 2763A-153-154 (2000), supplementing the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.*

<sup>164</sup> See *Special Access Pricing Flexibility Suspension Order*, 27 FCC Rcd at 10608-09, 10610-12, paras. 91-92, 97-101; see also *supra* para. 66.

<sup>165</sup> For example, as detailed in the *Special Access Pricing Flexibility Suspension Order*, fiber maps submitted by SBC depict demand for DS1s and DS3s located more than 1,000 feet away from known alternative fiber providers. *Special Access Pricing Flexibility Suspension Order*, 27 FCC Rcd at 10588, para. 55.

<sup>166</sup> See, e.g., AT&T 2009 PN Comment at 7, 25-28. Commenters also contend that it is not necessary or administratively feasible for the Commission to determine whether “actual and potential competition extends to every nook and cranny of an MSA.” *Id.* at 23-26; see also Qwest 2009 PN Comment at 29; SBC 2005 NPRM Reply at 55. Rather, they argue that it is sufficient that significant competition exists in areas of high demand. AT&T 2009 PN Comments at 27; Verizon 2009 PN Comments at 10-12. We note, however, that the one-time, multi-faceted market analysis could indicate that, in some instances, a finding of non-dominance is appropriate. See *infra* Section IV.B.

<sup>167</sup> AT&T 2009 PN Comments at 25-26 (*italics removed*).

75. Will the market analysis we propose facilitate a useful examination of potential barriers to broadband deployment and investment? AT&T recently argued that the Commission's special access rules have hindered carriers' transition to IP-based services, and that they encourage reliance on legacy services.<sup>168</sup> How can we structure our analysis to appropriately take into account the fact that some carriers may be transitioning away from legacy services toward IP-enabled services? How can we structure our analysis to account for all services that enterprise customers view as substitutable, including services used by small- and medium-sized businesses? How should we analyze the markets to determine the effect that various federal regulations have on the pricing and deployment decisions of providers as well as the purchasing decisions of customers?

76. Specifically, how should our analysis account for "best efforts" services? To the extent best efforts services are potential substitutes for special access services, how should the price of such services inform our analysis of the justness and reasonableness of special access pricing?

77. Finally, we seek comment on how best to balance the need for analytic rigor with the requirement that our analysis be administratively feasible. We note that commenters have raised concerns about the administrative feasibility of a market analysis, in particular with respect to proposals to require individual market analyses on an ongoing basis in lieu of the competitive showing rules adopted in the *Pricing Flexibility Order*.<sup>169</sup> We seek comment on whether, because we will be analyzing many facets of the market only one time, our analysis will give rise to the administrative burdens raised by some commenters in the record.<sup>170</sup>

78. We note that the analysis we propose conducting here is a one-time analysis. We are mindful of the importance of balancing the accuracy of our analysis with the need for administrative efficiency.<sup>171</sup> The record makes clear that we are unlikely to be able to conduct a comprehensive market analysis—and thus are unlikely to be able to evaluate the impact of the suspended rules on the reasonableness of special access rates, terms and conditions or develop improved ones—without the data similar to that described above and a more detailed review of competitive conditions in the special access market than has been possible to date.<sup>172</sup> However, we anticipate that the one-time, multi-faceted market

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<sup>168</sup> Bob Quinn, *Repealing De-Regulation: How Not to Build a Roadmap Towards an All-IP World*, AT&T Public Policy Blog (June 5, 2012, 7:55 AM), <http://attpublicpolicy.com/broadband-policy/repealing-de-regulation-how-not-to-build-a-roadmap-towards-an-all-ip-world/>; Jess Kamen, *Morning Tech*, Politico (June 5, 2012, 9:30 AM), <http://www.politico.com/morningtech/0612/morningtech483.html>.

<sup>169</sup> See, e.g., AT&T 2009 PN Comments at 22, 27; Qwest 2009 PN Comments at 27; AT&T 2009 PN Reply at 40; Verizon 2007 PN Reply at 30; BellSouth 2005 NPRM Comments at 55.

<sup>170</sup> See, e.g., AT&T 2009 PN Comments at 27; BellSouth 2005 NPRM Comments at 55.

<sup>171</sup> See, e.g., *Pricing Flexibility Order*, 14 FCC Rcd at 14271-72, para. 90; Office of Management and Budget, Office of Information and Regulatory Affairs, 2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities at 4 (June 2011), available at [http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011\\_cb/2011\\_cba\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf) (stating that "careful consideration of costs and benefits is best understood as a way of ensuring that regulations will improve social welfare, above all by informing design and development of various options so as to identify opportunities for both minimizing the costs of achieving social goals (cost-effectiveness) and maximizing net social benefits (efficiency)."); See AT&T 2009 PN Reply at 17-18; HT Telecom 2009 PN Reply at 5; Verizon 2005 NPRM Reply at 37-38 (noting that the Commission's Part 69 rules impose costs on price cap LECs by limiting their ability to develop rate structures in response to market forces).

<sup>172</sup> See, e.g., AT&T 2009 PN Comments at 18-19, 42-43; Verizon 2009 PN Comments at 9-10; AT&T 2009 PN Reply at 34-35; CenturyLink 2009 PN Reply at 3-4; Free State Foundation 2009 PN Reply at 4; Qwest 2009 PN Reply at 7; Verizon 2009 PN Reply at 24-25, 30-32.

analysis will allow us to identify reliable new proxies for special access competition, which could be employed going forward to evaluate petitions for pricing flexibility in a consistent, streamlined manner.<sup>173</sup> The goal of the proposed market analysis is to gain a fulsome picture of competition in the special access market, so that we can develop rules to more precisely provide regulatory relief where it is justified. In subsection IV.B., below, we seek comment on possible changes to our pricing flexibility rules that we might adopt after we collect the data specified above and conduct the proposed market analysis.<sup>174</sup>

79. To the extent that commenters assert that a one-time, multi-faceted market analysis is not necessary or appropriate at this time, we urge such commenters to propose alternate actions that the Commission could take in the near future to obtain a more complete understanding of competitive conditions for special access services. Commenters are also encouraged to submit data to support their assertions, particularly those arguments concerning special access market conditions.

#### **B. Possible Changes to Pricing Flexibility Rules after Proposed One-Time, Multi-Faceted Market Analysis**

80. As discussed above, our market analysis is intended to provide a more complete picture of special access competition.<sup>175</sup> The comprehensive data request described in the Report and Order above will identify and require submission of the data needed to implement any market analysis we adopt, including the specific analysis proposed in this Further Notice. Once the data are collected and analyzed, we may modify the existing pricing flexibility rules or adopt a new set of rules that will apply to requests for special access pricing flexibility. As a general matter, however, we propose to adopt rules that will allow for the relaxation or even the elimination of price cap regulation where we find the presence of actual or potential competition sufficient to ensure that rates, terms and conditions for special access services remain just and reasonable. To that end, we seek comment on how the special access pricing flexibility rules might change after we conduct the market analysis proposed above. We also seek comment below on what steps the Commission should take where relief has been provided under our existing rules and where the data and our analysis demonstrate that competition is not sufficient to discipline the marketplace.

81. *Factors Demonstrating Competition.* Our proposed analysis may enable us to identify specific factors that could serve as a proxy for the presence or absence of special access competition in an identified geographic area. The competitive showing rules adopted in the 1999 *Pricing Flexibility Order* were intended to serve such a purpose; however, as the Commission noted in the *Special Access Pricing Flexibility Suspension Order*, those rules were not an effective proxy for special access competition as

<sup>173</sup> Nor do we rule out the possibility that the market analysis we propose today could result in our adoption of existing tools, such as the “screens” developed by the Department of Justice in the context of the AT&T/SBC and Verizon/MCI mergers. See *AT&T/BellSouth Order*, 22 FCC Rcd at 5682, para. 42 n.114. Specifically, the DOJ utilized “demand/distance” screens to identify buildings where the demand was at or above a minimum threshold and where a competing carrier had fiber facilities within the corresponding distance:

Minimum Demand	Distance
2 DS3s	0.1 mile
1 OC-12	0.25 mile
Over OC-48	1 mile

*Id.* The data collection set forth in the Report and Order adopted above will allow us to assess the usefulness of these screens in this context.

<sup>174</sup> See *infra* section IV.B.

<sup>175</sup> See *Special Access Pricing Flexibility Suspension Order*, 27 FCC Rcd at 10599-604, paras. 76-84.

predicted in the *Pricing Flexibility Order*.<sup>176</sup> We seek comment on the viability of proxies as a means of measuring special access competition going forward. Should we replace our MSA- and collocation-based competitive showing rules with proxy rules based on specific factors identified by our analysis? Or is it preferable to evaluate competition on a case-by-case approach?<sup>177</sup> Alternatively, should our rules incorporate elements of both a proxy-based and a case-by-case approach?

82. For those commenters who advocate a case-by-case approach as opposed to proxy-based rules for pricing flexibility, we request input on how such a process could operate. Should the Commission, for example, perform a market analysis in response to individual petitions for pricing flexibility? If so, who should be eligible to submit such petitions? How might we reduce the potential administrative burdens associated with such a process?

83. For those commenters who advocate a proxy-based approach, we seek comment on what appropriate proxies for special access competition are. For example, in the *Special Access Pricing Flexibility Suspension Order*, we used business establishment density as one means of measuring business density within an MSA.<sup>178</sup> Could business establishment density be an appropriate proxy for special access competition? Again, we expect that our data collection and proposed regression analysis will prove informative on this issue. However, in light of the suspension of the collocation-based triggers in the *Special Access Pricing Flexibility Suspension Order*, we welcome feedback on what a more accurate proxy might be. How could we craft rules to enable us to easily but effectively identify the existence of competition in a given geographic area?

84. We also seek particular comment on how to evaluate potential competition. How might the rules incorporate the factors identified by our analysis in determining where competition is likely to occur in the future? Conversely, how might the rules be crafted to account for areas where competition may decline in the future?

85. *Nature of Relief*. Our market analysis may indicate that different levels of competition warrant various levels of relief from regulation. We seek comment on what the appropriate level of relief is for various types of competition. For example, is it still appropriate to grant Phase I and Phase II pricing flexibility and, if so, what factors should guide the level of relief granted? Or are there some other variations of pricing deregulation we should adopt?<sup>179</sup> Is it appropriate, as incumbent LECs such as AT&T assert, to remove all dominant carrier regulations from those areas we deem competitive?<sup>180</sup> Are there other approaches? For example, should Phase I or Phase II relief only be available to those

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<sup>176</sup> See *id.* at 10568-99, paras. 22-75.

<sup>177</sup> See, e.g., *Qwest Corp.*, 689 F.3d at 1230 (holding that the Commission may adopt, for example, “a market-power framework [which] necessitate[s] a more rigorous inquiry than . . . undertaken in prior orders,” if it explained the reasoning for its policy shift).

<sup>178</sup> See *Special Access Pricing Flexibility Suspension Order*, 27 FCC Rcd at 10574-79, 10582-86, paras. 37-41, 48-52.

<sup>179</sup> See, e.g., *supra* para. 63 (noting that “AT&T recommends that, rather than perform a more granular analysis of individual petitions for pricing flexibility, the Commission extend blanket Phase I relief to all special access services, fully de-regulate OCn and packet-based services, and extend Phase II relief to areas where the existing competitive showing requirements do not fully detect the extent of competitive entry” and that Ad Hoc and Sprint “propose a ‘hybrid approach,’ in which carriers may obtain unlimited ‘downward pricing flexibility’ in combination with price caps in all markets”).

<sup>180</sup> See *Special Access Pricing Flexibility Suspension Order*, 27 FCC Rcd at 10613-14, para. 104 (citing AT&T 2009 PN Comments at 7, 25-28; Qwest 2009 PN Comments at 29; Verizon 2009 PN Comments at 10-12; SBC 2005 NPRM Reply at 55).

providers whose special access prices meet specific cost benchmarks, as proposed by a subset of special access purchasers?<sup>181</sup> What rules should we adopt in those areas which our data, and a sound market analysis, show are likely to be competitive in the future?

86. *Updating Competition Data.* We seek comment on whether and how the competitive information derived from the regression analysis should be updated. If so, how often should the data be updated? What process could the Commission employ to provide for recurrent updates of the competition data?

87. *Geographic Area.* In addition to providing information on the issues described above, the regression analysis proposed in this Further Notice may help identify with geographic precision those areas that are subject to actual and potential special access competition today. For example, the analysis may enable the Commission to create a map of the United States that details the extent of competition with respect to special access services, including potential competition, in different areas of the country. We seek comment on whether and how the Commission could use a granular geographic analysis of competition to modify its existing regulatory treatment of special access services. In particular, in addition to any proxies adopted to grant special access relief on a forward-going basis, should the Commission relieve incumbent LEC special access providers from price cap regulations in geographic areas that the analysis identifies as subject to competition? Should the Commission adopt a presumption that pricing flexibility is warranted in such areas? If so, should the Commission presume that Phase I relief or Phase II relief, or a combination of both, is appropriate?

88. Conversely, what should the Commission do if the analysis indicates that areas in which incumbent LECs have been granted pricing flexibility are not subject to competition? Some parties have suggested that the Commission should require incumbent LEC special access providers to automatically revert to price caps in areas without competition, while others have asserted that such a conversion would be impractical, unlawful, and unsupported by the record.<sup>182</sup> We seek comment on these proposals, and other potential approaches. Should the Commission require parties to prove harm, *i.e.*, that rates, terms and/or conditions are unjust and unreasonable, before changing the rules applicable to an area that where Phase I or Phase II relief has previously been granted? The Commission previously has sought comment on how to validate or rebut assertions that the current price cap rules are ensuring just and reasonable rates. Parties should include any new information or arguments that may be relevant to the Commission's consideration of what action, if any, may be appropriate with respect to modifying or updating our price cap rules.

89. Should the Commission incorporate a petition process by which a party can rebut a presumption that competition does or does not exist in a given geographic area? If so, who should be permitted to file such petitions and what showing should they be required to make? Alternatively, should the Commission adopt a petition process that requires carriers or others to supplement the results of our analysis to support specific requests for changes in regulatory treatment? If geographic areas are subject to regulatory adjustment based on such a petition process, who should be eligible to submit such petitions and how will they obtain access to the data they need to evaluate the existence of competition? Which regulatory changes should be covered by the petition process (*e.g.*, removal of price caps, reversion to price caps, change in status from Phase I to Phase II regulatory relief and vice versa)? If the Commission were to adopt any of the changes proposed above, what would be an appropriate transition period for such

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<sup>181</sup> See *supra* para. 62.

<sup>182</sup> Compare, *e.g.*, Sprint 2009 PN Comments at 6; PAETEC et. al 2009 PN Comments at 75-80; Ad Hoc 2005 NPRM Comments at 37, 43-50, with AT&T 2009 PN Reply at 6-16; Letter from Gary L. Phillips, General Attorney & Associate General Counsel, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (Jan. 15, 2008).

regulatory changes to take effect? What steps should we take to ensure that regulatory changes occur smoothly and predictably?

90. Our record contains a great deal of discussion about the appropriate geographic market to measure special access competition for the purposes of evaluating requests for pricing flexibility. Commenters have suggested, for example, that the Commission assess special access competition at the MSA level, at the wire center level, and on a building-by-building or a route-specific basis.<sup>183</sup> We seek to refresh the record on this issue based on the additional data that will be collected. What geographic area would be the most appropriate for us to employ in new or modified special access rules? How can we balance the potential administrative costs of a more granular review with the possible concerns associated with applying our pricing flexibility rules to large geographic areas? How could the results of our proposed regression analysis be incorporated into new or modified pricing flexibility rules? For instance, how should the Commission utilize a competition map, as described above, to select an appropriate geographic area for measuring special access competition? How could our rules account for likely variance in network footprints among classes of providers (for example, cable companies may have a nationwide footprint, while incumbent LECs and competitive LECs more often offer service on a regional basis).

### C. Terms and Conditions

91. To more fully understand competition in the special access market and appropriately craft rules for regulatory relief, we will also seek data and information on the terms and conditions offered by incumbent LECs for special access services. The *Special Access NPRM* initiated a broad examination of what regulatory framework to apply to price cap LECs' interstate special access services following the expiration of the CALLS plan.<sup>184</sup> In addition to asking whether to maintain or modify the Commission's pricing flexibility rules, the Commission sought comment on whether any of the terms and conditions under which incumbent LECs provide special access are exclusionary and unreasonable.<sup>185</sup> The Bureau subsequently sought data and information on this issue in the *Special Access Competition Data Public Notice*.<sup>186</sup> The record would benefit from additional, specific, and detailed discussion of terms and conditions which are alleged to be unjust or unreasonable.

92. The reasonableness of terms and conditions has triggered a significant amount of debate in the last two years.<sup>187</sup> Purchasers allege that to provide a viable retail service they must enter into volume

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<sup>183</sup> See, e.g., MA DTC 2009 PN Comments at 2; PAETEC *et al.* 2009 PN Comments at 32-36; Qwest 2009 PN Comments at 26-30; Verizon 2009 PN Comments at 32-34; NJ DRC 2009 PN Reply at 11-14; Sprint 2007 PN Comments at 15-16.

<sup>184</sup> *Special Access NPRM*, 20 FCC Red at 1995, para. 1.

<sup>185</sup> *Id.* at 2031-34, paras. 114-25; see also *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 24 FCC Rcd 13638, 13642-43 (2009) (seeking comment on an analytical framework that considers the “[e]ffectiveness of the Commission’s price cap and pricing flexibility rules in ensuring that terms and conditions in special access tariffs and contracts are just and reasonable”).

<sup>186</sup> *Special Access Competition Data Public Notice*, 26 FCC Rcd at 14000.

<sup>187</sup> See *Special Access NPRM*, 20 FCC Rcd at 2031-34, paras. 114-25; Letter from Donna Epps, Counsel to Verizon Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, Attach. (filed Sept. 23, 2010); see also Letter from Evan T. Leo, Counsel to Verizon Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, Attach. (filed July 16, 2012); Letter from Michael J. Mooney, Level 3 Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, Attach. (filed June 28, 2012); Letter from Thomas Jones, Counsel for tw telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. (continued....)

and term commitment plans with incumbent LECs to obtain price discounts and circuit portability benefits that are critical to their ability to remain competitive.<sup>188</sup> Purchasers further allege these plans are subject to shortfall, overage, and early termination penalties that, combined with the potential loss of a discount for failing to meet the requisite commitment level, effectively lock-in demand and deter market entry by preventing purchasers from switching to a competing provider.<sup>189</sup> Parties also allege that incumbent LECs are engaging in anticompetitive tying arrangements that give purchasers benefits for services purchased in areas where the incumbent has market power in exchange for the purchase of services in more competitive markets.<sup>190</sup> Incumbent LECs vigorously dispute these allegations.<sup>191</sup>

93. In light of this record, we seek data and information related to this issue in the comprehensive data request described above, and seek comment on these allegations.<sup>192</sup> What specific

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05-25, Attach. (filed June 5, 2012); Letter from Thomas Jones, Counsel for tw telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, Attach. (filed June 4, 2012); Letter from Michael J. Mooney, Level 3 Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Feb. 22, 2012); Letter from Erin Boone, Sr. Corporate Counsel, Federal Regulatory Affairs, Level 3 Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Mar. 7, 2011); Letter from Christopher M. Heimann, General Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Mar. 7, 2011); Letter from Donna Epps, Counsel to Verizon Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, Attach. (filed Feb. 28, 2011); Letter from Eric Branfman, Counsel for Level 3 Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Feb. 9, 2011).

<sup>188</sup> See Letter from Thomas Jones and Matthew Jones, Counsel for tw telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 5 (filed Aug. 21, 2012) (“tw telecom . . . would be unable to serve downstream retail customers on a large scale without sufficiently robust circuit portability solutions.”); see also Letter from Michael J. Mooney, Level 3 Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 5 (filed Aug. 23, 2012) (stating that “list prices” are set at “astronomically high rates” and that “[a] customer needing to buy *some* connections . . . will see its overall pricing skyrocket unless it commits to buy nearly all of its connections from [the incumbent LEC] in exchange for the discount.”) (emphasis in original).

<sup>189</sup> See, e.g., Letter from Michael J. Mooney, Level 3 Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 5 (filed Aug. 23, 2012) (stating that an incumbent LEC “makes it both really complicated, and really expensive for its large customers to extricate themselves from the grip of its lock-up arrangements, all in an effort to keep them in place so as to limit competition.”) (Level 3 Aug. 23 *Ex Parte* Letter); Letter from Thomas Jones and Matthew Jones, Counsel for tw telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 5 (filed Aug. 21, 2012) (“[E]ven if an alternative wholesale provider were available at a given location, the minimum volume commitment provisions of the ILEC discount plans would often prevent tw telecom from purchasing services that it currently purchases from the ILEC from that alternative wholesale provider.”). Purchasers have taken particular issue with those volume discount plans that require the purchaser to maintain a high percentage of volume based on previous purchases. See Level 3 Aug. 23 *Ex Parte* Letter.

<sup>190</sup> See, e.g., California Association of Competitive Telecommunications Companies (CALTEL), Response to *Special Access Competition Data Public Notice*, at 4 (filed Dec. 5, 2011) (stating that at least one ILEC has forestalled competition by waiving penalties associated with the purchase of DS1 circuits for a CMRS provider in exchange for the purchase of Ethernet circuits in high-revenue MSAs).

<sup>191</sup> See Letter from Christopher M. Heimann, General Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Mar. 7, 2011); Letter from Evan T. Leo, Counsel to Verizon Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, Attach. (filed July 16, 2012).

<sup>192</sup> *Special Access NPRM*, 20 FCC Red at 2031-34, paras. 114-25.

terms and conditions do commenters find unjust or unreasonable, and in what contexts? Are there terms and conditions that are unjust or unreasonable only when imposed in areas where a provider has market power? If so, is the analysis we propose above sufficient to allow us to identify areas where market power exists, and thus to determine whether a particular term or condition is unreasonable in a given area or that anticompetitive tying between competitive and non-competitive areas is occurring? If so, what would be the most effective remedy or remedies?

## V. PROCEDURAL MATTERS

### A. Paperwork Reduction Act Analysis

94. This document contains a new information collection requirement subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507 of the PRA, 44 U.S.C. § 3507. Prior to submission to OMB, the Commission will publish a notice in the Federal Register seeking public comment on the information collection requirement. In addition, that notice will also seek comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4). The information collection contained in this Report and Order will not go into effect until OMB approves the collection and the Commission has published a notice in the Federal Register announcing the effective date of the information collection.

### B. Congressional Review Act

95. The Commission will send a copy of this Report and Order and Further Notice of Proposed Rulemaking to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>193</sup>

### C. Initial Regulatory Flexibility Analysis

96. As required by the Regulatory Flexibility Act of 1980, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document.<sup>194</sup> The IRFA is set forth in Appendix C. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Further Notice of Proposed Rulemaking provided on or before the dates indicated on the first page of this Report and Order and FNPRM. The Commission will send a copy of the Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.<sup>195</sup> In addition, the Report and Order and FNPRM and IRFA (or summaries thereof) will be published in the Federal Register.<sup>196</sup>

### D. Final Regulatory Flexibility Analysis

97. The Regulatory Flexibility Act (RFA)<sup>197</sup> requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that “the rule will not,

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<sup>193</sup> *See* 5 U.S.C. 801(a)(1)(A).

<sup>194</sup> *See id.* § 603.

<sup>195</sup> *See id.* § 603(a).

<sup>196</sup> *Id.*

<sup>197</sup> *See id.* § 601–12. The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>198</sup> Accordingly, we have prepared a Final Regulatory Flexibility Analysis concerning the possible impact of the *Report and Order* on small entities. The Final Regulatory Flexibility Analysis is set forth in Appendix B.

#### **E. Ex Parte Presentations**

98. The proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>199</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

#### **F. Comment Filing Procedures**

99. Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document.<sup>200</sup> Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

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<sup>198</sup> 5 U.S.C. § 605(b).

<sup>199</sup> 47 C.F.R. §§ 1.1200 *et seq.*

<sup>200</sup> If we determine that additional time is needed to provide meaningful comment, the Bureau may extend the comment and reply comment filing deadlines *sua sponte*.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.

100. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

101. For further information, contact Jamie Susskind in the Pricing Policy Division, Wireline Competition Bureau at (202) 418-1520.

## VI. ORDERING CLAUSES

102. Accordingly, IT IS ORDERED that pursuant to sections 1, 4(i), 4(j), 5, 201-205, 211, 215, 218, 219, 303(r), 332, 403, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155, 201, 202, 203, 204, 205, 211, 215, 218, 219, 303(r), 332, 403, 503, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302, this Report and Order, with all attachments, is ADOPTED, effective sixty (60) days after publication in the Federal Register, except for those rules and requirements involving Paperwork Reduction Act burdens, which shall become effective upon announcement in the Federal Register of OMB approval and an effective date of the rule(s), and except as specified in paragraph 105.

103. IT IS FURTHER ORDERED that pursuant to sections 1, 4(i), 4(j), 5, 201-205, 211, 215, 218, 219, 303(r), 332, 403, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155, 201, 202, 203, 204, 205, 211, 215, 218, 219, 303(r), 332, 403, 503, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302, this Further Notice of Proposed Rulemaking, with all attachments, is ADOPTED.

104. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on the Further Notice of Proposed Rulemaking for Sections IV.A and IV.C 30 days after publication in the Federal Register and for Section IV.B on or before [August 19, 2013], and reply comments for Sections IV.A and IV.C on or before 60 days after publication in the Federal Register and for Section IV.B on or before [September 30, 2013].

105. IT IS FURTHER ORDERED that we delegate authority to the Wireline Competition Bureau to implement a data collection in accordance with the terms of this Report and Order, and that this delegation of authority is effective upon adoption, *see* 47 U.S.C. § 155(c).

106. IT IS FURTHER ORDERED that the data collection shall become effective upon announcement in the Federal Register of Office of Management and Budget approval and an effective date of the requirements.

107. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this Report and Order and Further Notice of Proposed Rulemaking to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Mandatory Data Collection

## I. DEFINITIONS

The following definitions apply for purposes of this collection only. They are not intended to set or modify precedent outside the context of this collection.

*Affiliated Company* means a company, partnership, corporation, limited liability company, or other business entity that is affiliated with a *Provider*. An entity and a *Provider* are affiliated if one of them, or an entity that controls one of them, directly or indirectly holds a greater than 25 percent ownership interest in, or controls, the other one.

*Best Efforts Business Broadband Internet Access Service* means a best efforts Internet access data service with a capacity equal to or greater than a *DS1* connection that is marketed to enterprise customers (including small, medium, and large businesses). For purposes of this data collection, *Best Efforts Business Broadband Internet Access Services* do not include mobile wireless services, as that term is used in the *15th Annual Mobile Wireless Competition Report*.<sup>1</sup>

*Circuit-Based Dedicated Service (CBDS)* means a *Dedicated Service* that is circuit-based. Examples of *CBDS* include *DS1* and *DS3* services and Synchronous Optical Networking (SONET)/Optical Carrier N (OCN) services, including point-to-point and ring services.

*Collocation* is an offering by an *ILEC* whereby a requesting *Competitive Provider's* transmission equipment is located, for a tariffed charge, at the *ILEC's* central office.<sup>2</sup> It refers to the term as used pursuant to 47 C.F.R. § 69.701 *et seq.* of the Commission's rules for purposes of applying for a grant of *Phase I* or *Phase II Pricing Flexibility* from the Commission. The definition of *Collocation* excludes *Competitive Providers* that collocate in carrier hotels.

*Competitive Provider* means a competitive local exchange carrier (CLEC), interexchange carrier, cable operator, wireless provider or any other entity that is subject to the Commission's jurisdiction under the Communications Act of 1934, as amended, and either provides a *Dedicated Service* or provides a *Connection* over which a *Dedicated Service* could be provided. A *Competitive Provider* does not include an *ILEC* operating within its incumbent service territory.

*Connection* means a wired "line" or wireless "channel" that provides a dedicated communication path between an *End User's Location* and the first *Node* on a *Provider's* network. Multiple dedicated communication paths serving one or more *End Users* at the same *Location* should be counted as a single *Connection*. A *Connection* may be a *UNE*, including an *Unbundled Copper Loop*. A *Connection* must have the capability of being used to provide one or more *Dedicated Services*; however, a *Connection* can be used to provide other services as well. For example, a dedicated communication path that is currently

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<sup>1</sup> See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 10-133, Fifteenth Report, 26 FCC Rcd 9664, 9687-88, paras. 3-5 (2011).

<sup>2</sup> See *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Docket No. 93-162, Second Report and Order, 12 FCC Rcd 18730, 18736, para. 6 (1997); 47 C.F.R. § 51.5; see also 47 U.S.C. § 251(c)(6).

being used to provide a mass market broadband service but has the capability to provide a *Dedicated Service* is considered a *Connection* for the purpose of this data collection.

*Contract-Based Tariff* means a *Tariff*, other than a *Tariff Plan*, that is based on a service contract entered into between a customer and an *ILEC* which has obtained permission to offer contract-based tariff services pursuant to 47 C.F.R. § 69.701 *et seq.* of the Commission's pricing flexibility rules or a comparable tariffed intrastate service contract between a customer and an *ILEC*.

*Dedicated Service* transports data between two or more designated points, *e.g.*, between an *End User's* premises and a point-of-presence, between the central office of a local exchange carrier (LEC) and a point-of-presence, or between two *End User* premises, at a rate of at least 1.5 megabytes per second (Mbps) with prescribed performance requirements that include bandwidth-, latency-, or error-rate guarantees or other parameters that define delivery under a *Tariff* or in a service-level agreement. *Dedicated Service* includes, but is not limited to, *CBDS* and *PBDS*. For the purpose of this data collection, *Dedicated Service* does not include "best effort" services, *e.g.*, mass market broadband services such as DSL and cable modem broadband access.

*Disconnection* means the process by which a *Provider*, per a customer request, terminates billing on one or more of a customer's *Dedicated Service* circuits.

*DS1* and *DS3*, except where specified, refer to DS1s and DS3s that are not *UNEs*.<sup>3</sup> *DS1s* and *DS3s* are *Dedicated Services*.

*End User* means a business, institutional, or government entity that purchases *Dedicated Service* for its own purposes and does not resell such service. A mobile wireless service provider is considered an *End User* when it purchases *Dedicated Service* to make connections within its own network, *e.g.*, backhaul to a cell site.

*End User Channel Termination* means, as defined in 47 C.F.R. § 69.703(a)(2), a dedicated channel connecting a LEC end office and a customer premises, offered for purposes of carrying special access traffic.

*Incumbent Local Exchange Carrier (ILEC)* means, for the purpose of this data collection, a LEC that provides a *Dedicated Service* in study areas where it is subject to price cap regulation under sections 61.41-61.49 of the Commission's rules, 47 C.F.R. §§ 64.41-61.49.

*Indefeasible Right of Use (IRU)* means an indefeasible long-term leasehold interest that gives the grantee the right to exclusively use specified strands of fiber or allocated bandwidth to provide a service as determined by the grantee. An *IRU* confers on the grantee substantially all of the risks and rewards of ownership for the estimated economic life of the asset. *IRUs* typically include the following elements: (i) payment of a substantial fee up front to enter into the *IRU* contract;<sup>4</sup> (ii) a minimum total duration of 10

<sup>3</sup> See 47 U.S.C. § 251; see also 47 C.F.R. §§ 51.5 (defining network element), 51.319 (outlining specific unbundling requirements).

<sup>4</sup> To enter into an *IRU* contract, grantees are usually required to pay the total amount due under the terms of that contract. However, some *IRU* contracts require a smaller initial payment, with installment payments throughout the duration of the contract. At a minimum, a grantee typically pays at least 25 percent of the total amount due under the *IRU* contract upfront (excluding operations and maintenance fees), with commitments to make regularly scheduled installment payments, to qualify as an *IRU*. See Michael J. Lichtenstein & Charles A. Rohe, *The Treatment of IRUs in Bankruptcy Proceedings*, 11 J. Bankr. L. & Prac. 83, 86 (2001).

years;<sup>5</sup> (iii) conveyance of tax obligations commensurate with the risks and rewards of ownership to the grantee (*e.g.* as opposed to the lesser tax burdens associated with other forms of leases); (iv) terms for payment to the grantor for ancillary services, such as maintenance fees; (v) all additional rights and interests necessary to enable the *IRU* to be used by the grantee in the manner agreed to; and (vi) no unreasonable limit on the right of the grantee to use the asset as it wishes (*e.g.*, the grantee shall be permitted to splice into the *IRU* fiber, though such splice points must be mutually agreed upon by grantor and the grantee of the *IRU*).

*Location* means a building, other man-made structure, a cell site on a building, a free-standing cell site, or a cell site on some other man-made structure where the *End User* is connected. A *Node* is not a *Location*. For the purposes of this data collection, cell sites are to be treated as *Locations* and not as *Nodes*.

*Metropolitan Statistical Area (MSA)* is a geographic area as defined by 47 C.F.R. §§ 22.909(a), 69.703(b).

*Node* is an aggregation point, a branch point, or a point of interconnection on a *Provider*'s network, including a point of interconnection to other *Provider* networks. Examples include LEC central offices, remote terminal locations, splice points (including, for example, at manholes), controlled environmental vaults, cable system headends, cable modem termination system (CMTS) locations, and facility hubs.

*Non-MSA* is the portion of an *ILEC*'s study area that falls outside the boundaries of an *MSA*.<sup>6</sup>

*Non-Rate Benefit* means a benefit to the customer other than a discount on the *One Month Term Only Rate*, *e.g.*, a credit towards penalties or non-recurring charges or the ability to move circuits without incurring a penalty.

*One Month Term Only Rate* means, for purposes of this data collection, the non-discounted monthly recurring tariffed rate for *DS1*, *DS3* and/or *PBDS* services.

*Packet-Based Dedicated Service (PBDS)* means a *Dedicated Service* that is packet-based. Examples of *PBDS* include Multi-Protocol Label Switched (MPLS) services; permanent virtual circuits, virtual private lines and similar services provided using ATM, Frame Relay and other packet technologies; (Gigabit) Ethernet Services and Metro Ethernet Virtual Connections; and Virtual Private Networks (VPN).

*Phase I Pricing Flexibility* means regulatory relief for the pricing of *End User Channel Terminations* pursuant to 47 C.F.R. §§ 69.711(b), 69.727(a) of the Commission's rules.

*Phase II Pricing Flexibility* means regulatory relief for the pricing of *End User Channel Terminations* pursuant to 47 C.F.R. §§ 69.711(c), 69.727(b) of the Commission's rules.

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<sup>5</sup> This is measured at the time a grantee entered into the *IRU* agreement.

<sup>6</sup> See 47 C.F.R. § 69.707(b).

*Prior Purchase-Based Commitment* means a type of *Volume Commitment* where the commitment is based on either:

- (i) a certain percentage or number of the customer's purchased in-service circuits or lines as measured at the time of making the *Volume Commitment* or measured during a period of time prior to making the *Volume Commitment*, e.g., based on the customer's billing records for the current month or prior month(s); or
- (ii) a certain percentage of *Revenues* generated by the customer's purchases as measured at the time of making the *Volume Commitment* or during a period of time prior to making the *Volume Commitment*.

*Providers* collectively refers to both *ILECs* and *Competitive Providers*.

*Purchasers* means *Competitive Providers* and *End Users* that are subject to the Commission's jurisdiction under the Communications Act of 1934, as amended, and purchase *Dedicated Service*.

*Revenues* means intrastate and interstate billed amounts without any allowance for uncollectibles, commissions or settlements. *Revenues* do not include billed amounts that are subsequently discounted by the *Provider*, e.g., customer rebates.

*Tariff* means an intrastate or interstate schedule of rates and regulations filed by common carriers.

*Tariff Plan* means a *Tariff*, other than a *Contract-Based Tariff*, that provides a customer with either a discount from any *One Month Term Only Rate* for the purchase of *DS1* and/or *DS3* services or a *Non-Rate Benefit* that could be applied to these services.

*Term Commitment* means a commitment to purchase a *Dedicated Service* for a period of time, greater than a month, in exchange for a circuit-specific discount and/or a *Non-Rate Benefit*.

*Transport Service* means dedicated transport and includes the services set forth in 47 C.F.R. § 69.709(a)(1)-(3).

*Transport Provider* means a *Provider* that supplies *Transport Service*.

*Unbundled Copper Loop* means a copper wire local loop provided by *ILECs* to requesting telecommunications carriers on a non-discriminatory basis pursuant to 47 C.F.R. § 51.319(a)(1) that can be used by a *Competitive Provider* to provide a *Dedicated Service*, e.g., Ethernet over Copper. An *Unbundled Copper Loop* is typically a 2- or 4- wire loop that the *ILEC* has conditioned to remove intervening equipment such as bridge taps, load coils, repeaters, low pass filters, range extenders, etc. between the *End User's Location* and the serving wire center to allow for the provision of advanced digital services by a *Competitive Provider*. These loops are commonly referred to as dry copper, bare copper, or xDSL-compatible loops. An *Unbundled Copper Loop* is a type of *UNE*.

*Unbundled Network Element (UNE)* means a local loop provided by an *ILEC* to a requesting telecommunications carrier on a non-discriminatory basis pursuant to 47 C.F.R. § 51.319(a).

*Upgrade* means that a customer transitions one or more circuits to a higher capacity circuit.

*Volume Commitment* means a commitment to purchase a specified volume, *e.g.*, a certain number of circuits or *Revenues*, to receive a discount on *Dedicated Services* and/or a *Non-Rate Benefit*.

## II. MANDATORY DATA COLLECTION QUESTIONS

### A. Competitive Providers must respond to the following questions:

1. Are you an *Affiliated Company*?
  - Yes  No
  - a. If so, identify the *Provider(s)* with whom you have an affiliation (name/FRN).
2. Do you (i) own a *Connection*; (ii) lease a *Connection* from another entity under an *IRU* agreement; or (iii) obtain a *Connection* as a *UNE* from an *ILEC* to provide a *Dedicated Service*?
  - Yes  No
  - a. If yes, are any of these *Connections* to a *Location* within an area subject to price cap regulation or within an area where the Commission has granted *Phase I* or *Phase II Pricing Flexibility*?
    - Yes  No

If you answered “no” to question II.A.2 or II.A.2.a, then you are not required to respond to the remaining questions in II.A or the questions in II.D.

### Facilities Information

3. Provide the number of *Locations* to which you provided a *Connection* as of December 31, 2010 and as of December 31, 2012 where your company:
  - a. owns the *Connection*;
  - b. leases the *Connection* from another entity under an *IRU* agreement; or
  - c. obtains the *Connection* as a *UNE* from an *ILEC* to provide a *Dedicated Service*:
    - i. in total;
    - ii. in the form of *DSIs*;
    - iii. as a *DS3*; or
    - iv. as an *Unbundled Copper Loop*.
4. Provide the information requested below for each *Location* as of December 31, 2010 and as of December 31, 2012 to which your company provided a *Connection* that you: (i) own; (ii) lease from another entity under an *IRU* agreement; or (iii) obtained as a *UNE* from an *ILEC* to provide a *Dedicated Service*.
  - a. A unique ID for the *Location*;
  - b. The actual situs address for the *Location* (*i.e.*, land where the building or cell site is located);
  - c. The geocode for the *Location* (*i.e.*, latitude and longitude);
  - d. The *Location* type (*e.g.*, building, other man-made structure, cell site in or on a building, free-standing cell site, or a cell site on some other man-made structure like a water tower, billboard, etc.);
  - e. Whether the *Connection* provided to the location uses facilities leased from another entity under an *IRU* or obtained as a *DS1/DS3 UNE* or *Unbundled Copper Loop*, and in each case, the name of the lessor of the majority of the fiber strands and/or copper loop;
  - f. Whether any of the *Connections* to the location are provided using fiber;
  - g. The total sold bandwidth of all *Connections* provided by you to the *Location* in Mbps;

- h. The total bandwidth to the *Location* sold directly by you to an *End User*;
    - i. The total sold fixed wireless bandwidth provided by you to the *Location*; and
    - j. The total bandwidth sold by you to any cell sites at the *Location*.
5. Provide a map of the routes that constitute your network that are followed by fiber that you (a) own or (b) lease pursuant to an *IRU* agreement, excluding routes followed by fiber that you own or lease pursuant to an *IRU* agreement connecting your network to *End User Locations*. The map must include the locations of all *Nodes* on your network used to interconnect with third party networks, and the year that each *Node* went live. Also, provide a separate map of the routes followed by fiber that you (a) own or (b) lease pursuant to an *IRU* agreement that connect your network to *End User Locations*.
6. We will provide you with a selected list of the *Locations* you reported in response to question II.A.4. For each identified *Location*, state the month and year that you first provided a *Connection* to that *Location*, whether you originally supplied the *Location* over a *UNE*, and if so, when (if at all) you switched to using a *Connection* that you own or lease as an *IRU*. If the *Location* was first served by your *Connection* on or before January 2008, and the date the *Location* was first served is unknown, then enter 00/0000.
7. For each *ILEC* wire center where your company is collocated, provide the actual situs address, the geocode, and the CLLI code.
8. Explain your business rule(s) used to determine whether to build a *Connection* to a particular *Location*. Provide underlying assumptions.
  - a. List those geographic areas in which you have built the most *Connections* to *End Users* and explain why, in your view, your business rule has been most successful in those areas.
  - b. Explain how, if at all, business density is incorporated into your business rule, and if so, how you measure business density.
9. Provide the following information:
  - a. The current situs address of your U.S. headquarters (*i.e.*, the address of the land where the headquarters is located);
  - b. The year that this site became your headquarters;
  - c. Year established and situs address for any prior U.S. headquarters' location for your company, going as far back as 1995, if different from the headquarters' location listed in response to question II.A.9.a;
  - d. The name of any *Affiliated Company* that owned, or leased under an *IRU* agreement, *Connections* to five or more *Locations* in any *MSA* at the time you became affiliated with the *Affiliated Company*, going as far back as 1995.
  - e. For each *Affiliated Company* listed in response to question II.A.9.d, provide:
    - i. The situs address for each *Affiliated Company's* U.S. headquarters at the time of affiliation;
    - ii. The year that the *Affiliated Company* established the situs address listed in response to question II.A.9.e.i for its U.S. headquarters; and
    - iii. The year established and situs address for any prior U.S. headquarters' location designated by the *Affiliated Company*, going as far back as 1995, if different from the headquarters' location listed in response to question II.A.9.e.i.

10. Provide data, maps, information, marketing materials, and/or documents identifying those geographic areas where you, or an *Affiliated Company*, advertised or marketed *Dedicated Service* over existing facilities, via leased facilities, or by building out new facilities as of December 31, 2010 and as of December 31, 2012, or planned to advertise or market such services within twenty-four months of those dates.

11. Identify the five most recent Requests for Proposals (RFPs) for which you were selected as the winning bidder to provide each of the following: (a) *Dedicated Services*; (b) *Best Efforts Business Broadband Internet Access Services*; and, to the extent different from (a) or (b), (c) some other form of high-capacity data services to business customers.<sup>7</sup> In addition, identify the five largest RFPs (by number of connections) for which you submitted an unsuccessful competitive bid between 2010 and 2012 for each of (a) *Dedicated Services*; (b) *Best Efforts Business Broadband Internet Access Services*; and, to the extent different from (a) or (b), (c) some other form of high-capacity data services to business customers.<sup>8</sup> For each RFP identified, provide a description of the RFP, the area covered, the price offered, and other competitively relevant information. Lastly, identify the business rules you rely upon to determine whether to submit a bid in response to an RFP.

### Billing Information

12. For all *Dedicated Services* provided using transmission paths that you (i) own; (ii) lease from another entity under an *IRU* agreement; or (iii) obtain as a *UNE* from an *ILEC* to provide a *Dedicated Service*, submit the following information by rate element by circuit billed for each month from January 1 to December 31 for the years 2010 and 2012.

- a. The closing date of the monthly billing cycle in dd/mm/yyyy format;
- b. The six-digit 499-A Filer ID of the customer, where applicable, or other unique ID if customer does not have a 499-A Filer ID;
- c. The *Location* ID from question II.A.4.a that can be used to link the circuit rate elements to the terminating *Location* of the circuit (where applicable);
- d. The circuit ID common to all elements purchased in common for a particular circuit;
- e. The type of circuit (*PBDS*, or *DS1* or *DS3*, etc.) and its bandwidth;
- f. A unique billing code for the rate element (*see* question II.A.14);
- g. The number of units billed for this rate element (note that the bandwidth of the circuit must not be entered here);
- h. The dollar amount of non-recurring charges billed for the first unit of this rate element;
- i. The dollar amount of non-recurring charges billed for additional units of this rate element (if different from the amount billed for the initial unit);
- j. The monthly recurring dollar charge for the first unit of the rate element billed;
- k. The monthly recurring dollar charge for additional units (if different from the amount billed for the initial unit);
- l. The total monthly dollar amount billed for the rate element billed in the month;
- m. The *Term Commitment* associated with this circuit in months;
- n. Indicate whether this rate element is associated with a circuit that contributes to a *Volume Commitment*;

<sup>7</sup> To be clear, we expect *Competitive Providers* that have won RFPs in each service category to identify up to five RFPs in each category, not a total of five RFPs across the three categories.

<sup>8</sup> To be clear, we expect *Competitive Providers* that have submitted unsuccessful competitive bids for RFPs in each service category to identify up to five RFPs in each category, not a total of five RFPs across the three categories.

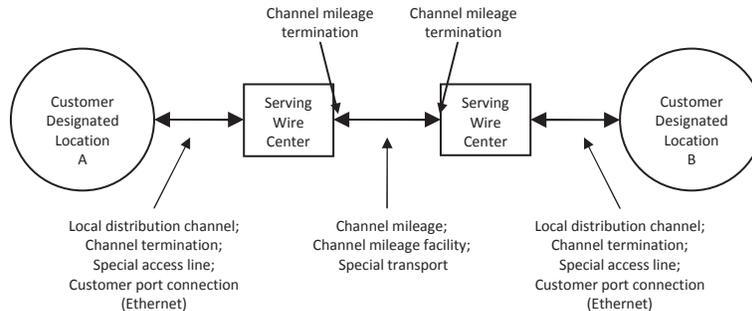
- o. Indicate whether the circuit element is owned by you or leased by you as an *IRU* but not as a *UNE*; and
- p. The adjustment ID (or multiple adjustment IDs) linking this rate element to the unique out-of-cycle billing adjustments in question II.A.13.a (below) if applicable.

13. For each adjustment, rebate, or true-up for billed *Dedicated Services*, provide the information requested below.

- a. A unique ID number for the billing adjustment, rebate, or true-up (*see* question II.A.12.p above);
- b. The beginning date of the time period covered by the adjustment or true-up;
- c. The ending date of the time period covered by the adjustment or true-up;
- d. The scope of the billing adjustment, *i.e.*, whether the adjustment applies to a single rate element on a single circuit, more than one rate element on a single circuit, more than one rate element across multiple circuits, or an overall adjustment that applies to every rate element on every circuit purchased by the customer;
- e. The dollar amount of the adjustment or true-up; and
- f. A brief description of the billing adjustment, rebate or true-up, *e.g.*, term discount, revenue target rebate, etc.

14. For each unique billing code, please provide the following information below.

- a. The billing code for the rate element;
- b. Select the phrase that best describes the rate element from the list. Names of some common rate elements are shown on the generalized circuit diagram below:



- i. Channel mileage facility, channel mileage, interoffice channel mileage, special transport (a transmission path between two serving wire centers associated with customer designated locations; a serving wire center and an international or service area boundary point; a serving wire center and a hub, or similar type of connection);
- ii. Channel mileage termination, special transport termination (the termination of channel mileage facility or similar transmission path);
- iii. Channel termination, local distribution channel, special access line, customer port connection (Ethernet) (a transmission path between a customer designated location and the associated wire center);
- iv. Clear channel capability (not shown) (an arrangement which allows a customer to transport, for example, 1.536 Mbps of information on a 1.544 Mbps line rate with no constraint on the quantity or sequence of one and zero bits);
- v. Cross-connection (not shown) (semi-permanent switching between facilities, sometimes combined with multiplexing/demultiplexing);
- vi. Multiplexing (not shown) (channelizing a facility into individual services requiring a Lower capacity or bandwidth); and

- vii. Class of service and/or committed information rate (not shown) (for Ethernet, the performance characteristics of the network and bandwidth available for a customer port connection).
- c. If none of the possible entries describes the rate element, enter a short description.

### Revenues, Terms and Conditions

15. What were your *Revenues* from the sale of *CBDS* in 2010 and 2012? For each year, report *Revenues* in total, separately by *DS1*, *DS3*, and other *CBDS* sales, and separately by customer category, *i.e.*, sales to *Providers* and *End Users*.

16. What were your *Revenues* from the sale of *PBDS* in 2010 and 2012? For each year, report *Revenues* in total, separately by customer category, *i.e.*, sales to *Providers* and *End Users*, and separately by bandwidth for the following categories:

- a. less than or equal to 1.5 Mbps;
- b. greater than 1.5, but less than or equal to 50 Mbps;
- c. greater than 50, but less than or equal to 100 Mbps;
- d. greater than 100, but less than or equal to 1 Gbps; and
- e. greater than 1 Gbps.

17. What percentage of your *Revenues* from the sale of *DS1*, *DS3*, and *PBDS* services in 2012 were generated from an agreement or *Tariff* that contains a *Prior Purchase-Based Commitment*?

18. If you offer *Dedicated Services* pursuant to an agreement or *Tariff* that contains either a *Prior Purchase-Based Commitment* or a *Non-Rate Benefit*, then explain how, if at all, those sales are distinguishable from similarly structured *ILEC* sales of *DS1s*, *DS3s*, and/or *PBDS*.

19. Provide the business justification for the *Term* or *Volume Commitments* associated with any *Tariff* or agreement you offer for the sale of *Dedicated Services*.

### **B. ILECs must respond to the following questions:**

1. Are you an *Affiliated Company*?
  - Yes  No
  - a. If so, identify the *Provider(s)* with whom you have an affiliation (name/FRN).

### Facilities Information

2. Provide the number of *Locations* to which you provided a *Connection* in your company study areas as of December 31, 2010 and as of December 31, 2012 where your company:

- a. owns the *Connection*;
- b. leases the *Connection* from another entity under an *IRU* agreement; or
- c. sells the *Connection* as a *UNE*:
  - i. in total;
  - ii. in the form of *DS1s*;
  - iii. as a *DS3*; or
  - iv. as an *Unbundled Copper Loop*.

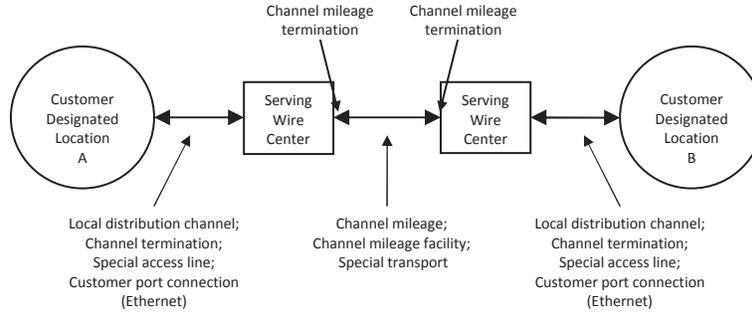
3. Provide the information requested below for each *Location* to which your company provided, as of December 31, 2010 and as of December 31, 2012, a *Connection* that you (i) own or (ii) you lease from another entity under an *IRU* agreement:
- a. A unique ID for the *Location*;
  - b. The actual situs address for the *Location* (*i.e.*, land where the building or cell site is located);
  - c. The geocode for the *Location* (*i.e.*, latitude and longitude);
  - d. The *Location* type (*e.g.*, building, other man-made structure, cell site in or on a building, free-standing cell site, or a cell site on some other man-made structure like a water tower, billboard, etc.);
  - e. Whether any of the *Connections* to the *Location* are provided using fiber;
  - f. The total sold bandwidth of all *Connections* provided by you to the *Location* in Mbps (exclude connections sold without a specified bandwidth, *e.g.*, *Unbundled Copper Loops*);
  - g. The total number of *Unbundled Copper Loops* sold by you to the *Location*;
  - h. The total bandwidth to the *Location* sold by you as *UNEs* in the form of *DS1s* and/or *DS3s*;
  - i. The total bandwidth to the *Location* sold directly by you to an *End User*;
  - j. The total sold fixed wireless bandwidth provided by you to the *Location*; and
  - k. The total bandwidth sold by you to any cell sites at the *Location*.

### Billing Information

4. For all *Dedicated Services* provided using transmission paths that you (i) own or (ii) lease from another entity under an *IRU* agreement and for *Unbundled Copper Loops* that you own and provision, submit the following information by rate element by circuit billed for each month from January 1 to December 31 for the years 2010 and 2012.
- a. The closing date of the monthly billing cycle in dd/mm/yyyy format;
  - b. The six-digit 499A Filer ID of the customer, where applicable, or other unique ID if customer does not have a 499A Filer ID;
  - c. The *Location* ID from question II.B.3.a that can be used to link the circuit rate elements to the terminating *Location* of the circuit (where applicable);
  - d. The circuit ID common to all elements purchased in common for a particular circuit;
  - e. The type of circuit, (*DS1* sold as a *UNE*, *DS3* sold as a *UNE*, *Unbundled Copper Loop*, *PBDS*, non-*UNE DS1s* or *DS3s*, etc.) and the bandwidth of the circuit;
  - f. The serving wire center / mileage rating point Common Language Location Identification (CLLI) of one end of the circuit (MRP1);
  - g. The serving wire center / mileage rating point CLLI of the other end of the circuit (MRP2);
  - h. The latitude of MRP1 to 5 decimal places;
  - i. The longitude of MRP1 to 5 decimal places;
  - j. The latitude of MRP2 to 5 decimal places;
  - k. The longitude of MRP2 to 5 decimal places;
  - l. End of the circuit (1=MRP1 or 2=MRP2) associated with this rate element;
  - m. The billing code for the rate element (*see* question II.B.6);
  - n. The density pricing zone for the rate element;<sup>9</sup>

<sup>9</sup> See 47 C.F.R. § 69.123 (density pricing zones for special access and switched transport).

- o. The number of units billed for this rate element (note that the bandwidth of the circuit must not be entered here);
  - p. The dollar amount of non-recurring charges billed for the first unit of this rate element;
  - q. The dollar amount of non-recurring charges billed for additional units of this rate element (if different from the amount billed for the initial unit);
  - r. The monthly recurring dollar charge for the first unit of the rate element billed;
  - s. The monthly recurring dollar charge for additional units (if different from the amount billed for the initial unit);
  - t. The total monthly dollar amount billed for the rate element;
  - u. The *Term Commitment* associated with this circuit in months;
  - v. Indicate whether this rate element is associated with a circuit that contributes to a *Volume Commitment*;
  - w. Indicate whether this rate element is associated with a circuit that contributes to a revenue commitment in a *Tariff Plan*;
  - x. Indicate whether this rate element was purchased pursuant to a *Contract-Based Tariff*;
  - y. Indicate whether the circuit element is owned by you or leased by you as an *IRU*;
  - z. The adjustment ID (or multiple adjustment IDs) linking this rate element to the unique out-of-cycle billing adjustments in question II.B.5.a (below) if applicable; and
  - aa. If the rate element is sold under a *Tariff*, list the *Tariff* name.
5. For each adjustment, rebate, or true-up for billed *Dedicated Services*, provide the information requested below.
- a. A unique ID for the billing adjustment or true-up (*see* question II.B.4.z above);
  - b. A unique ID number for the contract or *Tariff* from which the adjustment originates;
  - c. The beginning date of the time period covered by the adjustment or true-up;
  - d. The ending date of the time period covered by the adjustment or true-up;
  - e. The scope of the billing adjustment, *i.e.*, whether the adjustment applies to a single rate element on a single circuit, more than one rate element on a single circuit, more than one rate element across multiple circuits, or an overall adjustment that applies to every rate element on every circuit purchased by the customer;
  - f. The dollar amount of the adjustment or true-up;
  - g. Whether the adjustment is associated with a *Term Commitment*, and if so, the length of the term specified in the contract necessary to achieve the rebate;
  - h. Whether the adjustment is associated with a *Volume Commitment*, and if so, the number of circuits and/or dollar amount specified in the contract necessary to achieve the rebate; and
  - i. If the adjustment is for some other reason, a brief description of the reason for the adjustment.
6. For each unique billing code, please provide the following information below.
- a. The billing code for the rate element;
  - b. The phrase that best describes the rate element from the list. Names of some common rate elements are shown on the generalized circuit diagram below:



- i. Channel mileage facility, channel mileage, interoffice channel mileage, special transport (a transmission path between two serving wire centers associated with customer designated locations; a serving wire center and an international or service area boundary point; a serving wire center and a hub, or similar type of connection);
  - ii. Channel mileage termination, special transport termination (the termination of channel mileage facility or similar transmission path);
  - iii. Channel termination, local distribution channel, special access line, customer port connection (Ethernet) (a transmission path between a customer designated location and the associated wire center);
  - iv. Clear channel capability (not shown) (an arrangement which allows a customer to transport, for example, 1.536 Mbps of information on a 1.544 Mbps line rate with no constraint on the quantity or sequence of one and zero bits);
  - v. Cross-connection (not shown) (semi-permanent switching between facilities, sometimes combined with multiplexing/demultiplexing);
  - vi. Multiplexing (not shown) (channelizing a facility into individual services requiring a Lower capacity or bandwidth); and
  - vii. Class of service and/or committed information rate (not shown) (for Ethernet, the performance characteristics of the network and bandwidth available for a customer port connection).
- c. If none of the possible entries describes the rate element, enter a short description.

7. List the CLLI code for each one of your wire centers that was subject to price cap regulation as of December 31, 2010 and as of December 31, 2012, *i.e.*, those wire centers in your incumbent territory where the Commission had not granted you pricing flexibility. For those *MSAs* and *Non-MSAs* where the Commission granted you *Phase I* or *Phase II Pricing Flexibility* as of December 31, 2010 and as of December 31, 2012, list the CLLI codes for the wire centers associated with each *MSA* and *Non-MSA* for each year, the name of the relevant *MSA* and *Non-MSA* for each year, and the level of pricing flexibility granted for the *MSA* and *Non-MSA*, *i.e.*, *Phase I* and/or *Phase II Pricing Flexibility*.

**Revenues, Terms and Conditions Information**

8. What were your *Revenues* from the sale of *CBDS* services in 2010 and 2012? For each year, report *Revenues* in total, separately by *DS1*, *DS3*, and other *CBDS* sales, and separately by customer category, *i.e.*, sales to *Competitive Providers* and *End Users*.

9. What were your *Revenues* from the sale of *PBDS* services in 2010 and 2012? For each year, report *Revenues* in total, separately by customer category, *i.e.*, sales to *Competitive Providers* and *End Users*, and separately by bandwidth for the following categories:

- a. less than or equal to 1.5 Mbps;
- b. greater than 1.5, but less than or equal to 50 Mbps;

- c. greater than 50, but less than or equal to 100 Mbps;
- d. greater than 100, but less than or equal to 1 gigabyte per second (Gbps); and
- e. greater than 1 Gbps.

10. What were your *Revenues* from the *One Month Term Only Rate* charged for *DS1*, *DS3*, and/or *PBDS* services in 2010 and 2012? For each year, report *Revenues* in total, separately by *DS1*, *DS3*, and *PBDS* sales as applicable, and separately by customer category, *i.e.*, sales to *Competitive Providers* and *End Users*.

11. How many customers were purchasing *DS1*, *DS3*, and/or *PBDS* services pursuant to your *One Month Term Only Rates* as of December 31, 2012? Report customer numbers in total, separately for *DS1*, *DS3*, and *PBDS* services as applicable, and separately by customer category, *i.e.*, the number of *DS1*, *DS3*, and *PBDS* service customers that were *Competitive Providers* and *End Users*.

12. Separately list all available *Tariff Plans* and *Contract-Based Tariffs* that can be applied to the purchase of *DS1*, *DS3* and/or *PBDS* services and provide the information requested below for each plan.

- a. This plan is a:
  - Tariff Plan*  *Contract-Based Tariff* (select one)
- b. Plan name:
- c. *Tariff* and Section Number(s):
- d. This plan contains:
  - Term Commitment(s)*  *Volume Commitment(s)*
  - Non-Rate Benefit* option(s) (select all that apply)
- e. If the plan contains options for *Non-Rate Benefits*, explain of the available *Non-Rate Benefits*.
- f. This plan can be applied to the purchase of:
  - DS1* services  *DS3* services  *PBDS*  Other (select all that apply)
- g. In what geographic areas is this plan available, *e.g.*, nationwide, a particular region of the country, certain states, certain *MSAs*, a particular study area?
- h. To receive a discount or *Non-Rate Benefit* under this plan, must the customer make a *Prior Purchase-Based Commitment*?
  - Yes  No
- i. Do purchases of *DS1* or *DS3* services in areas outside of your price cap study area(s) (*e.g.*, purchases from an *Affiliated Company* that is a CLEC) count towards meeting any *Volume Commitment* to receive a discount or *Non-Rate Benefit* under this plan?
  - Yes  No  N/A (no *Volume Commitment*)
- j. Do *DS1* or *DS3* purchases in areas where you are subject to price cap regulation and where pricing flexibility has not been granted count towards meeting any *Volume Commitment* to receive a discount or *Non-Rate Benefit* under this plan?
  - Yes  No  N/A (no *Volume Commitment*)
- k. Do non-tariffed *PBDS* purchases by the customer count towards meeting any *Volume Commitment* to receive a discount or *Non-Rate Benefit* under this plan?
  - Yes  No  N/A (no *Volume Commitment*)

- l. Do purchases by the customer for services other than *DSIs*, *DS3s*, and *PBDS* count towards meeting any *Volume Commitment* to receive a discount or *Non-Rate Benefit* under this plan?  
 Yes  No  N/A (no *Volume Commitment*)
- m. Is the discount or *Non-Rate Benefit* available under this plan conditioned on the customer limiting its purchase of *UNEs*, e.g., customer must keep its purchase of *UNEs* below a certain percentage of the customer's total spend?  
 Yes  No
- n. What were your *Revenues* from the provision of *DSI*, *DS3*, and/or *PBDS* services under this plan in 2010 and in 2012? For each year, report *Revenues* in total, separately by *DSI*, *DS3*, and *PBDS* sales as applicable, and separately by customer category, i.e., sales to *Competitive Providers* and *End Users*.
- o. What percentage of the *Revenues* reported above in response to question II.B.12.n for 2010 and 2012 were generated and also reported as *Revenues* under a separately identified *Tariff Plan* or *Contract-Based Tariff*?
- p. What percentage of the *Revenues* generated by this plan in 2012 resulted from a *Term Commitment* of five or more years?<sup>10</sup>
- q. What is the business justification for any *Term* or *Volume Commitments* associated with this plan?
- r. How many customers were subscribed to this plan as of December 31, 2012? Report customer numbers in total, separately for *DSI*, *DS3*, and *PBDS* services as applicable, and separately by customer category, i.e., the number of *DSI*, *DS3*, and/or *PBDS* customers that were *Competitive Providers* and *End Users*.
- s. Of those customers subscribed as of December 31, 2012, how many in 2012 failed to meet any *Volume Commitment* or *Term Commitment* required to retain a discount or *Non-Rate Benefit* they originally agreed to when entering into this plan?
13. Do you have any non-tariffed agreement with an *End User* or *Competitive Provider* that, directly or indirectly, provides a discount or a *Non-Rate Benefit* on the purchase of tariffed *DSIs*, *DS3s*, and/or *PBDS*, restricts the ability of the *End User* or *Competitive Provider* to obtain *UNEs*, or negatively affects the ability of the *End User* or *Competitive Provider* to purchase *Dedicated Services*?  
 Yes  No
- a. If so, identify each agreement below, including the parties to the agreements, the effective date, and a summary of the relevant provisions.

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<sup>10</sup> The purpose of this question is to account for the double counting of *Revenues*.

**C. Entities that provide *Best Efforts Business Broadband Internet Access Services* must respond to the following questions:**

1. Do you have fewer than 15,000 customers and fewer than 1,500 business broadband customers?

Yes  No

2. If you answered “no” to question II.C.1, then answer the following questions:

a. Did you submit data in connection with the State Broadband Initiative (SBI) Grant Program for 2010?

Yes  No

b. Did you submit data in connection with the SBI Grant Program for 2012?

Yes  No

If you answered “no” to questions II.C.1.a and II.C.1.b, then you do not need to answer any further questions in this section.

c. Did the data you submitted in connection with the SBI Grant Program in 2010 accurately and completely identify the areas in which you offered *Best Efforts Business Broadband Internet Access Services* and exclude those areas where you did not offer such services as of December 31, 2010?

Yes  No

i. If yes, then provide the list of prices for those *Best Efforts Business Broadband Internet Access Services* that you were marketing in each census block submitted in connection with the SBI Grant Program as of December 31, 2010. If there is a price variation within your service footprint, indicate which prices are associated with which census blocks.

ii. If no, then provide a list of all the census blocks in which you were providing *Best Efforts Business Broadband Internet Access Services* as of December 31, 2010, and a list of the prices for those *Best Efforts Business Broadband Internet Access Services* that you were marketing in each census block as of December 31, 2010. If there is a price variation within your service footprint, indicate which prices are associated with which census blocks.

d. Did the data you submitted in connection with the SBI Grant Program in 2012 accurately and completely identify the areas in which you offered *Best Efforts Business Broadband Internet Access Services* and exclude those areas where you did not offer such services as of December 31, 2012?

Yes  No

i. If yes, then provide the list of prices for those *Best Efforts Business Broadband Internet Access Services* that you were marketing in each census block submitted in connection with the SBI Grant Program as of December 31, 2012. If there is a price variation within your service footprint, indicate which prices are associated with which census blocks.

ii. If no, then provide a list of all the census blocks in which you were providing *Best Efforts Business Broadband Internet Access Services* as of December 31, 2012, and a list of the prices for those *Best Efforts Business Broadband Internet Access Services* that you were marketing in each census block as of December

31, 2012. If there is a price variation within your service footprint, indicate which prices are associated with which census blocks.

**D. All Providers must respond to the following questions:**

1. Describe your company's short term and long-range promotional and advertising strategies and objectives for winning new – or retaining current – customers for *Dedicated Services*. In your description, please describe the size (e.g., companies with 500 employees or less, etc.), geographic scope (e.g., national, southeast, Chicago, etc.), and type of customers your company targets or plans to target through these strategies.
2. Identify where your company's policies are recorded on the following *Dedicated Service*-related processes: (a) initiation of service; (b) service *Upgrades*; and (c) service *Disconnections*. For instance, identify where your company records recurring and non-recurring charges associated with the processes listed above. If recorded in a *Tariff*, provide the specific *Tariff* section(s). If these policies are recorded in documents other than *Tariffs*, list those documents and state whether they are publicly available. If they are publicly available, explain how to find them. For documents that are not publicly available, state whether they are conveyed to customers orally or in writing.
3. Explain the procedures your company follows when a customer continues to purchase *End-user Channel Terminations* from your company but requests to change *Transport Providers* from your company to another *Provider*. In addition, answer the following questions regarding your process:
  - a. Where are your procedures that govern these changes recorded? Provide the relevant *Tariff* number and section(s), if applicable, or identify which documents other than *Tariffs* contain these procedures. For documents that are not publicly available, state whether they are conveyed to customers orally or in writing.
  - b. In 2012, what was the average length of time that it took your company to complete the process of connecting *End User Channel Terminations* to a new *Transport Provider*?
  - c. Can purchasers negotiate timelines on a case-by-case basis?
  - d. Do any of your company's policies, whether contained in *Tariffs* or other documents, limit the maximum number of circuits that can be connected to a new *Transport Provider* per day, per week, or per month? If yes, what is that number and what is the business rationale for this requirement?
  - e. How does connecting to a new *Transport Provider* impact the rate a customer pays for the *End User Channel Terminations* the customer continues to purchase from your company?
  - f. While the change in *Transport Providers* is pending completion and before there is a *Disconnection* in the *Transport Service* provided by your company, are there instances where the customer must pay a higher rate for the *Transport Service* provided by your company? If so, then detail those circumstances and what rates would apply before and after the request is made. For example, if the customer's contract expires or is terminated while a request to connect to a new *Transport Provider* is pending, would the customer pay a *One Month Term Only Rate* until there is a *Disconnection* in the *Transport Service* provided by your company?

**E. Purchasers that are mobile wireless service providers must respond to the following questions:**

1. How many cell sites do you have on your network?
2. Provide the information requested below for each cell site on your network as of December 31, 2010 and as of December 31, 2012.
  - a. A unique ID for the cell site;
  - b. The actual situs address of the cell site (*i.e.*, land where the cell site is located) if the cell site is located in or on a building;
  - c. The geocode for the cell site (*i.e.*, latitude and longitude);
  - d. The CLLI code of the incumbent LEC wire center that serves the cell site, where applicable;
  - e. Whether the cell site is in or on a building, is a free-standing cell site, or is on some other type of man-made structure, *e.g.*, a water tower, billboard, etc.;
  - f. If the cell site is served by a *CBDS*, indicate the equivalent number of *DSIs* used;
  - g. If the cell site is served by a *PBDS*, indicate the bandwidth of the circuit in Mbps;
  - h. If the cell site is served by a wireless *Connection*, indicate the bandwidth of the circuit in Mbps;
  - i. The name of the *Provider(s)* that supplies your *Connection* to the cell site; and
  - j. If you self-provide a *Connection* to the cell site, the provisioned bandwidth of that self-provided *Connection*.

**F. All Purchasers must respond to the following questions:**

**Expenditures Information**

1. What is the principal nature of your business, *e.g.*, are you a CLEC, cable system operator, fixed wireless service provider, wireless Internet service provider, terrestrial or satellite mobile wireless service provider, interconnected VoIP service provider, etc.?
2. What were your expenditures, *i.e.*, dollar volume of purchases, on *Dedicated Services* for 2010 and 2012? For each year, report expenditures in total, separately for *CBDS* and *PBDS* purchases, and separately for purchases from *ILECs* and *Competitive Providers*.
3. Provide your company's expenditures, *i.e.*, dollar volume of purchases, for *DSIs*, *DS3s*, and/or *PBDS* purchased from *ILECs* pursuant to a *Tariff* in 2010 and in 2012. For each of the following categories, report expenditures for each year in total and separately for *DSIs*, *DS3s* and *PBDS*:
  - a. All *DSIs*, *DS3s*, and *PBDS*;
  - b. *DSIs*, *DS3s*, and *PBDS* purchased at *One Month Term Only Rates*;
  - c. *DSIs*, *DS3s*, and *PBDS* purchased under *Tariff Plans*;
  - d. *DSIs*, *DS3s*, and *PBDS* purchased under *Contract-Based Tariffs*;
  - e. *DSIs*, *DS3s*, and *PBDS* purchased under *Tariff Plans* that contained a *Term Commitment* but not a *Volume Commitment*;
  - f. *DSIs*, *DS3s*, and *PBDS* purchased under *Tariff Plans* that contained a *Prior Purchase-Based Commitment*;
  - i. Of the total (and for the separate *DSI*, *DS3*, and *PBDS* totals where applicable), indicate the average discount from the *One Month Term Only Rate* incorporated in the expenditures.

For purposes of calculating the percentages described above, an example would be a *Tariff Plan* that requires a purchase of 20 *DS1s* and 10 *DS3s* and generates expenditures of \$2,000 for calendar-year 2012. If those same circuits were purchased at *One Month Term Only Rates* of \$100 per *DS1* and \$200 per *DS3*, then total expenditures would instead be \$4,000. Since the *Tariff Plan* under this scenario generated 50% of the expenditures that would be generated from *One Month Term Only Rates*, the discount would be 50%.

- g. *DS1s*, *DS3s*, and *PBDS* purchased under *Contract-Based Tariffs* that contained a *Term Commitment* but not a *Volume Commitment*; and
- h. *DS1s*, *DS3s*, and *PBDS* purchased under *Contract-Based Tariffs* that contained a *Prior Purchase-Based Commitment*;
- i. Of the total (and for the separate *DS1* and *DS3* totals if available), indicate the average discount from the *One Month Term Only Rate* incorporated in the expenditures.

An example of how to calculate this percentage can be found at question II.F.3.f.i.

4. What were your expenditures, *i.e.*, dollar volume of purchases, on *DS1s*, *DS3s*, and/or *PBDS* purchased from *Competitive Providers* pursuant to a *Tariff* in 2010 and in 2012? Report expenditures in total and separately for *DS1s*, *DS3s* and *PBDS*, as applicable, for the following categories for each year:
- a. All *DS1s*, *DS3s*, and *PBDS*;
  - b. *DS1s*, *DS3s*, and *PBDS* purchased at *One Month Term Only Rates*;
  - c. *DS1s*, *DS3s*, and *PBDS* purchased under *Tariffs* that contained a *Term Commitment* but not a *Volume Commitment*;
  - d. *DS1s*, *DS3s*, and *PBDS* purchased under *Tariffs* that contained a *Prior Purchase-Based Commitment*;
  - i. Of the total (and for the separate *DS1*, *DS3*, and *PBDS* totals where applicable), indicate the average discount from the *One Month Term Only Rate* incorporated in the expenditures.

An example of how to calculate this percentage can be found at question II.F.3.f.i

5. What were your expenditures, *i.e.*, dollar volume of purchases, on *DS1s*, *DS3s*, and/or *PBDS* purchased from *ILECs* and *Competitive Providers* pursuant to an agreement (not a *Tariff*) in 2010 and in 2012? Report expenditures in total, separately for purchases from *ILECs* and *Competitive Providers*, and separately for *DS1s*, *DS3s* and *PBDS*, as applicable, for the following categories for each year:
- a. All *DS1s*, *DS3s*, and *PBDS*;
  - b. *DS1s*, *DS3s*, and *PBDS* purchased at a non-discounted rate;
  - c. *DS1s*, *DS3s*, and *PBDS* purchased under a non-tariffed agreement that contained a *Term Commitment* but not a *Volume Commitment*;
  - d. *DS1s*, *DS3s*, and *PBDS* purchased under a non-tariffed agreement that contained a *Prior Purchase-Based Commitment*;
  - i. Of the total (and for the separate *DS1*, *DS3*, and *PBDS* totals where applicable), indicate the average discount from the non-discounted rate incorporated in the expenditures.

An example of how to calculate this percentage can be found at question II.F.3.f.i

6. What were your expenditures, *i.e.*, dollar volume of purchases, on *PBDS* purchased under a *Tariff* in 2010 and in 2012?
- a. Separately for purchases from *ILECs* and *Competitive Providers* for the following service bandwidth categories:
    - i. less than or equal to 1.5 Mbps;
    - ii. greater than 1.5, but less than or equal to 50 Mbps;
    - iii. greater than 50, but less than or equal to 100 Mbps;
    - iv. greater than 100, but less than or equal to 1 Gbps; or
    - v. greater than 1 Gbps.
7. What were your expenditures, *i.e.*, dollar volume of purchases, on non-tariffed *PBDS* in 2010 and in 2012?
- a. Separately for purchases from *ILECs* and *Competitive Providers* for the following service bandwidth categories:
    - i. less than or equal to 1.5 Mbps;
    - ii. greater than 1.5, but less than or equal to 50 Mbps;
    - iii. greater than 50, but less than or equal to 100 Mbps;
    - iv. greater than 100, but less than or equal to 1 Gbps; or
    - v. greater than 1 Gbps.

### Terms and Conditions Information

8. Explain whether the terms and conditions of any contract to which you are a party for the purchase of *Dedicated Services* or the policies of any of your *Providers* constrain your ability to:
- a. Decrease your purchases from your current *Provider(s)*;
  - b. Purchase services from another *Provider* currently operating in the geographic areas in which you purchase services;
  - c. Purchase non-tariffed services, such as Ethernet services, from your current *Provider* of tariffed *DS1*, *DS3*, and/or *PBDS* services or from other *Providers* operating in the geographic areas in which you purchase tariffed services;
  - d. Contract with companies that are considering entering the geographic areas in which you purchase tariffed services;
  - e. Move circuits, for example, moving your *DS1* and/or *DS3 End-User Channel Terminations* to connect to another *Transport Provider*; or
  - f. Obtain *Dedicated Services*.

Relevant terms and conditions, among others, may include: (a) early termination penalties; (b) shortfall provisions; (c) overlapping/supplemental discounts plans with different termination dates; (d) requirements to include all services, including new facilities, under a *Tariff Plan* or *Contract-Based Tariff*; or (e) requiring purchases in multiple geographic areas to obtain maximum discounts.

In your answer, highlight contracts with particularly onerous constraints by comparison with more typical contract provisions. Also, at a minimum, list: (a) the *Provider* and indicate whether the *Provider* is an *ILEC* or a *Competitive Provider*; (b) a description of the term or condition; (c) the geographic area in which the tariffed services are provided; (d) the name of the vendor providing the tariffed service; and (e) the specific *Tariff* number(s) and section(s), or if the policy at issue is recorded in documents other than *Tariffs*, list those documents and how you obtained them.

If you allege that a term, condition, or *Provider's* policy negatively affects your ability to obtain *Dedicated Services*, state whether you have brought a complaint to the Commission, a state commission or court about this issue and the outcome. If you have not brought a complaint, explain why not.

9. Explain your experience with changing *Transport Providers* between January 1, 2010 and December 31, 2012, describing whether and how it has impacted your ability to purchase *Dedicated Services*. Where appropriate, identify the *Provider(s)* in your responses below.
  - a. How many times did you change *Transport Providers* while keeping your *End User Channel Terminations* with an *ILEC* or *Competitive Provider*? An estimate of the number of circuits moved to a new *Transport Provider*, or the number of such changes requested for each year, is sufficient.
  - b. What was the length of time, on average, it took for the *ILEC* or *Competitive Provider* to complete the process of connecting your last-mile *End-user Channel Terminations* to another *Transport Provider*? An estimate is sufficient.
  - c. Were you given the opportunity to negotiate time lines on a case-by-case basis?
  - d. How did connecting to a new *Transport Provider* impact the rate you paid for the *End User Channel Terminations* you continued to purchase from the *ILEC* or *Competitive Provider*?
  - e. Did connecting to a new *Transport Provider* typically impact the rate you continued to pay for *Transport Service* from the incumbent *Provider* while the change in *Transport Providers* remained pending? If so, what was the average percentage change in rates? Did you ever pay a *One Month Term Only Rate* during that time?
10. Describe any circumstances since January 1, 2010, in which you have purchased circuits pursuant to a *Tariff*, solely for the purpose of meeting a *Volume Commitment* required for a discount or *Non-Rate Benefit* from your *Provider* (i.e., you did not utilize the circuits). In your description, provide at least one example, which at a minimum, lists:
  - a. The geographic area (e.g., *MSA* or *Non-MSA*) in which you purchased the unnecessary circuits;
  - b. The name of the *Provider* providing the circuits at issue;
  - c. A description of the *Volume Commitment*;
  - d. The *Tariff* and section number(s), if applicable, of the specific terms and conditions described;
  - e. A comparison of the dollar amount of the unnecessary circuit(s) purchased versus the dollar amount of penalties your company would have had to pay had it not purchased and/or maintained the circuit(s), and a description of how that comparison was calculated.
11. For each year for the past five years, state the number of times and in what geographic area(s) you have switched from one *Provider of Dedicated Services* to another.
12. Explain the circumstances since January 1, 2010 under which you have paid *One Month Term Only Rates* for *DS1*, *DS3*, and/or *PBDS* services and the impact, if any, it had on your business and your customers. In your response, indicate any general rules you follow, if any, concerning the maximum number of circuits and maximum amount of time you will pay at *One Month Term Only Rates*, and your business rationale for any such rules.

13. Separately list all available *Tariffs* under which your company purchases *DSIs*, *DS3s*, and/or *PBDS* and provide the information requested below for each plan.

- a. This plan is a:  
 *Tariff Plan*  *Contract-Based Tariff* (select one)
- b. Plan name:
- c. *Provider* name:
- d. *Tariff* and Section Number(s):
- e. *Tariff* type:  
 Interstate  Intrastate
- f. This plan contains:  
 *Term Commitment(s)*  *Volume Commitment(s)*  
 *Non-Rate Benefit* option(s) (select all that apply)
- g. If the plan contains *Non-Rate Benefits*, identify the *Non-Rate Benefits* that were relevant to your decision to purchase services under this plan.
- h. This plan can be applied to the purchase of:  
 *DS1* services  *DS3* services  *PBDS*  Other (select all that apply)
- i. In what geographic areas do you purchase *DSIs*, *DS3s*, and/or *PBDS* under this plan, *e.g.*, nationwide, a particular region of the country, certain states, certain *MSAs*, a particular study area?
- j. To receive a discount or *Non-Rate Benefit* under this plan, does your company make a *Prior Purchase-Based Commitment*?  
 Yes  No
- k. If this is an *ILEC* plan, do *DS1* or *DS3* purchases your company makes outside the study area(s) of the *ILEC* (*e.g.*, purchases from an *Affiliated Company* of the *ILEC* that is providing out-of-region service as a *CLEC*) count towards meeting any *Volume Commitment* to receive a discount or *Non-Rate Benefit* under this plan?  
 Yes  No  N/A (no *Volume Commitment*, not an *ILEC* plan)
- i. If you answered yes, in what geographic areas outside the study area(s) of the *ILEC*, do you purchase these *DSIs* and/or *DS3s*?
  - ii. Of the geographic areas identified, in which of those areas would your company have purchased from a different *Provider*, if at all, had it not been for the discounts or *Non-Rate Benefits* received under this plan? In your response, indicate whether the *Provider* that you would have purchased from has *Connections* serving that geographic area.
- l. If this is an *ILEC* plan, do *DS1* and/or *DS3* purchases your company makes from the *ILEC* in price cap areas where the Commission has not granted the *ILEC* pricing flexibility count towards meeting any *Volume Commitment* to receive a discount or *Non-Rate Benefit* under this plan?  
 Yes  No  N/A (no *Volume Commitment*, not an *ILEC* plan)

- i. If you answered yes, then identify the price cap areas where you purchase *DSIs* and/or *DS3s* that count towards meeting any *Volume Commitment* to receive a discount or *Non-Rate Benefit* under this plan?
- m. If this is an *ILEC* plan, do *DSI* and/or *DS3* purchases your company makes from the *ILEC* in areas where the Commission has granted either *Phase I* or *Phase II Pricing Flexibility* count towards meeting any *Volume Commitment* to receive a discount or *Non-Rate Benefit* under this plan?  
 Yes  No  N/A (no *Volume Commitment*, not an *ILEC* plan)
- i. If you answered yes, in what geographic areas subject to pricing flexibility do you purchase *DSIs* and/or *DS3s* that count towards meeting any *Volume Commitment* to receive a discount or *Non-Rate Benefit* under this plan?
- ii. Of the geographic areas identified, in which of those areas would your company have purchased from a different *Provider*, if at all, had it not been for the requirements of the *Tariff Plan*? In your response, indicate whether the *Provider* that you would have purchased from has *Connections* serving that geographic area.
- n. If this is an *ILEC* plan, do non-tariffed *PBDS* purchases you make from this *ILEC* count towards meeting any *Volume Commitment* to receive a discount or *Non-Rate Benefit* under this plan?  
 Yes  No  N/A (no *Volume Commitment*, not an *ILEC* plan)
- i. If you answered yes, in what geographic areas do you purchase non-tariffed *PBDS* that counts towards meeting any *Volume Commitment* to receive a discount or *Non-Rate Benefit* under this plan.
- ii. Of the geographic areas identified, in which of those areas would your company have purchased *PBDS* from a different *Provider*, if at all, had it not been for the requirements of the plan? In your response, indicate whether the *Provider* that you would have purchased from has *Connections* serving that geographic area.
- o. If this is an *ILEC* plan, do purchases you make for services other than *DSIs*, *DS3s*, and *PBDS* from this *ILEC* count towards meeting any *Volume Commitment* to receive a discount or *Non-Rate Benefit* under this plan?  
 Yes  No  N/A (no *Volume Commitment*, not an *ILEC* plan)
- i. If you answered yes, identify the other services purchased and the geographic areas where you purchase these services that count towards meeting any *Volume Commitment* to receive a discount or *Non-Rate Benefit* under this plan.
- ii. Of the geographic areas identified, in which of those areas would your company have purchased those other services from a different *Provider*, had it not been for the requirements of the plan? In your response, indicate whether the *Provider* that you would have purchased from has *Connections* serving that geographic area.
- p. Is the discount or *Non-Rate Benefit* available under this plan conditioned on the customer limiting its purchase of *UNEs*, e.g., the customer must keep its purchase of *UNEs* below a certain percentage of the customer's total spend? If yes, then provide additional details about the condition.

14. Do you have any non-tariffed agreement with an *ILEC* that, directly or indirectly, provides a discount or a *Non-Rate Benefit* on the purchase of tariffed *DS1*, *DS3*, and/or *PBDS* services, restricts your ability to obtain *UNEs*, or negatively affects your ability to purchase *Dedicated Services*?

Yes  No

a. If so, identify each agreement below, including the parties to the agreement, the effective date, and a summary of the relevant provisions.

**G. Non-Providers and Non-Purchasers instructed to respond to this data collection must respond to the following:**

1. If you must respond to this data collection because you filed the FCC Form 477 in 2012 to report the provision of “broadband connections to end user locations” but are not (a) a *Provider* or a *Purchaser* as defined in this data collection or (b) an entity that provides *Best Efforts Business Broadband Internet Access Services*, then indicate as such below and complete the certification accompanying this data collection.

I am not a *Provider*.

I am not a *Purchaser*.

I do not provide *Best Efforts Business Broadband Internet Access Services*.

(select all that apply)

## CERTIFICATION

I have examined the response and certify that, to the best of my knowledge, all statements of fact, data, and information contained therein are true and correct.

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

\* Respondents are reminded that failure to comply with these data reporting requirements may subject them to monetary forfeitures of up to \$150,000 for each violation or each day of a continuing violation, up to a maximum of \$1,500,000 for any single act or failure to act that is a continuing violation.<sup>11</sup> False statements or misrepresentations to the Commission may be punishable by fine or imprisonment under Title 18 of the U.S. Code.

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<sup>11</sup> 47 U.S.C. § 503(b)(2); 47 C.F.R. § 1.80(b); *Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 23 FCC Rcd 9845 (2008).

## APPENDIX B

## Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980 (RFA),<sup>1</sup> as amended, Initial Regulatory Flexibility analyses (IRFAs) were incorporated in the *Special Access NPRM* for this proceeding.<sup>2</sup> The Commission sought written public comment on the proposals in the *Special Access NPRM*, including comment on the IRFA. Comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

**A. Need for, and Objectives of, the Order**

2. In 2005, the Commission initiated this proceeding as a broad examination of what regulatory framework to apply to price cap local exchange carriers' (LECs) interstate special access services following the expiration of the CALLS plan,<sup>3</sup> including whether to maintain or modify the Commission's pricing flexibility rules.<sup>4</sup> Moreover, the NPRM sought to examine whether the available marketplace data supported maintaining, modifying, or repealing these rules.<sup>5</sup> In this Report and Order, the Commission continues the process of reviewing our special access rules to ensure that they reflect the state of competition today and promote competition, investment, and access to dedicated communications services businesses across the country rely on every day to deliver their products and services to American consumers. Specifically, the Commission initiates a comprehensive data collection and seek comment on a proposal to use the data to evaluate competition in the market for special access services.

3. In this Report and Order, we require providers and purchasers of special access service and certain other services—including best efforts business broadband Internet access services—as well as entities that provide certain other services, to submit data, information and documents to allow the Commission to conduct a comprehensive evaluation of competition in the special access market. The

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<sup>1</sup> 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, 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> *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 2037-40, paras. 134-146 (2005) (*Special Access NPRM*).

<sup>3</sup> The CALLS plan was a five-year interim, industry-proposed regime designed to move towards a more market-based approach to rate setting. See *Access Charge Reform*, CC Docket No. 96-262; *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1; *Low-Volume Long-Distance Users*, CC Docket No. 99-249; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 12965, 12977-79, paras. 4, 36-42 (2000) (*CALLS Order*), *aff'd in part, rev'd in part, and remanded in part*, *Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied*, *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002), *on remand*, *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, Order on Remand, 18 FCC Rcd 14976 (2003).

<sup>4</sup> *Special Access NPRM*, 20 FCC Rcd at 1995, para. 1.

<sup>5</sup> *Id.* at 1996-97, para. 5. The Commission noted its commitment to re-examine periodically rules that were adopted on the basis of predictive judgments to evaluate whether those judgments are, in fact, corroborated by marketplace developments. Accordingly, the Commission sought data and comments on whether actual marketplace developments supported the predictive judgments used to support the special access pricing flexibility rules. *Id.*

data, information, and documents required fall into five general categories: market structure; pricing; demand (*i.e.*, observed sales and purchases), terms and conditions; and competition and pricing decisions. We will collect the majority of the data for calendar years 2010 and 2012.

**B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA**

4. The Office of Advocacy of the U.S. Small Business Administration (SBA) filed reply comments to the *Notice of Proposed Rulemaking* and the Initial Regulatory Flexibility Act Analysis (IRFA).<sup>6</sup> The SBA asserts that the Commission's IRFA did not consider the effect of new special access rules on small competitive carriers and urged the Commission to do so.<sup>7</sup> SBA contended that because the Commission's 2005 Triennial Review Remand Order (TRRO) required both large and small competitive carriers to purchase special access services instead of UNEs in many metropolitan markets, the Commission should consider the impact that changes in special access prices would have on small competitive carriers.<sup>8</sup> SBA suggested a number of potential alternatives to special access pricing regulation that it asserted might minimize the impact on small competitive carriers.<sup>9</sup> No other comments were filed in response to the IRFA.

**C. Description and Estimate of the Number of Small Entities to which the Proposed 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>10</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>11</sup> In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act.<sup>12</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 SBA.<sup>13</sup>

6. **Small Businesses.** Nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.<sup>14</sup>

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<sup>6</sup> SBA 2005 NPRM IRFA Reply.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.* at 6-9 (discussing use of a forward-looking cost model to set price caps; allowing downward pricing flexibility; "revisiting" cost studies to establish a new rate of return; imposing restrictions on bundling; restricting carriers from making discounts conditional on previous purchase levels; restricting the length of term commitments; and restricting carriers' ability to award discounts based on customers' terminating their services with competing carriers).

<sup>10</sup> See 5 U.S.C. § 603(b)(3).

<sup>11</sup> See *id.* § 601(6).

<sup>12</sup> See *id.* § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of 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."

<sup>13</sup> See 15 U.S.C. § 632.

<sup>14</sup> See SBA, Office of Advocacy, "FAQs," available at <http://www.sba.gov/sites/default/files/sbfaq.pdf> (last visited Dec. 17, 2012).

7. **Wired Telecommunications Carriers.** The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.<sup>15</sup> According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.<sup>16</sup> Of this total, 3144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.<sup>17</sup> Thus, under this size standard, the majority of firms can be considered small.

8. **Local Exchange Carriers (LECs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>18</sup> According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.<sup>19</sup> Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.<sup>20</sup> Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the rules and policies proposed in the Order.

9. **Incumbent Local Exchange Carriers (incumbent LECs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>21</sup> According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.<sup>22</sup> Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.<sup>23</sup> Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by rules adopted pursuant to the Order

10. We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”<sup>24</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>25</sup> We have therefore included small incumbent LECs in this RFA analysis, although we emphasize

<sup>15</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>16</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110” (issued Nov. 2010).

<sup>17</sup> *See id.*

<sup>18</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>19</sup> *See Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

<sup>20</sup> *See id.*

<sup>21</sup> *See* 13 C.F.R. § 121.201, NAICS code 517110.

<sup>22</sup> *See Trends in Telephone Service* at Table 5.3.

<sup>23</sup> *See id.*

<sup>24</sup> 5 U.S.C. § 601(3) (RFA); *see also* 15 U.S.C. § 632 (Small Business Act) .

<sup>25</sup> *See* Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” *See* 15 U.S.C. § 632(a); *see also* 5 U.S.C. § 601(3). SBA regulations (continued....)

that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

11. **Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>26</sup> According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.<sup>27</sup> Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.<sup>28</sup> In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.<sup>29</sup> In addition, 72 carriers have reported that they are Other Local Service Providers.<sup>30</sup> Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.<sup>31</sup> Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by rules adopted pursuant to the Order.

12. **Interexchange Carriers (IXCs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>32</sup> According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.<sup>33</sup> Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.<sup>34</sup> Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by rules adopted pursuant to the Order.

13. **Prepaid Calling Card Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>35</sup> According to Commission data, 193 carriers have reported that they are engaged in the provision of prepaid calling cards.<sup>36</sup> Of these, an estimated all 193 (Continued from previous page) \_\_\_\_\_ interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

<sup>26</sup> See 13 C.F.R. § 121.201, NAICS code 517110.

<sup>27</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*

<sup>32</sup> See 13 C.F.R. § 121.201, NAICS code 517110.

<sup>33</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>34</sup> See *id.*

<sup>35</sup> See 13 C.F.R. § 121.201, NAICS code 517911.

<sup>36</sup> See *Trends in Telephone Service* at Table 5.3.

have 1,500 or fewer employees and none have more than 1,500 employees.<sup>37</sup> Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by rules adopted pursuant to the Order.

14. **Local Resellers.** The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>38</sup> According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.<sup>39</sup> Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.<sup>40</sup> Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by rules adopted pursuant to the Order.

15. **Toll Resellers.** The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>41</sup> According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services.<sup>42</sup> Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees.<sup>43</sup> Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by rules adopted pursuant to the Order.

16. **Other Toll Carriers.** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>44</sup> According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.<sup>45</sup> Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.<sup>46</sup> Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by the rules and policies adopted pursuant to the Order.

17. **800 and 800-Like Service Subscribers.**<sup>47</sup> Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service (toll free) subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>48</sup> The most reliable source of information regarding the number of these service subscribers appears to be data the Commission

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<sup>37</sup> *See id.*

<sup>38</sup> *See* 13 C.F.R. § 121.201, NAICS code 517911.

<sup>39</sup> *See Trends in Telephone Service* at Table 5.3.

<sup>40</sup> *See id.*

<sup>41</sup> *See* 13 C.F.R. § 121.201, NAICS code 517911.

<sup>42</sup> *See Trends in Telephone Service* at Table 5.3.

<sup>43</sup> *See id.*

<sup>44</sup> *See* 13 C.F.R. § 121.201, NAICS code 517110.

<sup>45</sup> *See Trends in Telephone Service* at Table 5.3.

<sup>46</sup> *See id.*

<sup>47</sup> We include all toll-free number subscribers in this category, including those for 888 numbers.

<sup>48</sup> *See* 13 C.F.R. § 121.201, NAICS code 517911.

collects on the 800, 888, 877, and 866 numbers in use.<sup>49</sup> According to our data, as of September 2009, the number of 800 numbers assigned was 7,860,000; the number of 888 numbers assigned was 5,588,687; the number of 877 numbers assigned was 4,721,866; and the number of 866 numbers assigned was 7,867,736.<sup>50</sup> We do not have data specifying the number of these subscribers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, we estimate that there are 7,860,000 or fewer small entity 800 subscribers; 5,588,687 or fewer small entity 888 subscribers; 4,721,866 or fewer small entity 877 subscribers; and 7,867,736 or fewer small entity 866 subscribers.

18. **Wireless Telecommunications Carriers (except Satellite).** Since 2007, the SBA has recognized wireless firms within this new, broad, economic census category.<sup>51</sup> Prior to that time, such firms were within the now-superseded categories of Paging and Cellular and Other Wireless Telecommunications.<sup>52</sup> Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.<sup>53</sup> For this category, census data for 2007 show that there were 1,383 firms that operated for the entire year.<sup>54</sup> Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more.<sup>55</sup> Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.<sup>56</sup> Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.<sup>57</sup> Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

19. **Broadband Personal Communications Service.** The broadband personal communications service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined “small entity” for Blocks C and F as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.<sup>58</sup> For Block F, an additional classification for “very small business” was added and is defined as an

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<sup>49</sup> See *Trends in Telephone Service* at Tables 18.7-18.10.

<sup>50</sup> See *id.*

<sup>51</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>52</sup> U.S. Census Bureau, 2007, 517210 Wireless Telecommunications Carriers (except satellite), <http://www.census.gov/eos/www/naics/> (last visited Dec. 17, 2012).

<sup>53</sup> 13 C.F.R. § 121.201, NAICS code 517210. The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

<sup>54</sup> U.S. Census Bureau, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210” (issued Nov. 2010).

<sup>55</sup> *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “100 employees or more.”

<sup>56</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>57</sup> See *id.*

<sup>58</sup> See generally *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824 (1996) (*Broadband PCS Competitive Bidding Report and Order*); see also 47 C.F.R. § 24.720(b)(1).

entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>59</sup> These standards defining “small entity” in the context of broadband PCS auctions have been approved by the SBA.<sup>60</sup> No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.<sup>61</sup> In 1999, the Commission re-auctioned 347 C, E, and F Block licenses.<sup>62</sup> There were 48 small business winning bidders. In 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction 35.<sup>63</sup> Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction 58. There were 24 winning bidders for 217 licenses.<sup>64</sup> Of the 24 winning bidders, 16 claimed small business status and won 156 licenses. In 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction 71.<sup>65</sup> Of the 14 winning bidders, six were designated entities.<sup>66</sup> In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F block licenses in Auction 78.<sup>67</sup>

20. **Advanced Wireless Services.** In 2008, the Commission conducted the auction of Advanced Wireless Services (“AWS”) licenses.<sup>68</sup> This auction, which as designated as Auction 78, offered 35 licenses in the AWS 1710-1755 MHz and 2110-2155 MHz bands (“AWS-1”). The AWS-1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A bidder with attributed average annual gross revenues that exceeded \$15 million and did not exceed \$40 million for the preceding three years (“small business”) received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues

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<sup>59</sup> See generally *Broadband PCS Competitive Bidding Report and Order*, 11 FCC Rcd 7824; see also 47 C.F.R. § 24.720(b)(2).

<sup>60</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 Rcd 5532 (1994).

<sup>61</sup> See FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. Jan. 14, 1997); see also *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 16436 (1997).

<sup>62</sup> See *C, D, E, and F Block Broadband PCS Auction Closes*, DA 99-757, Public Notice, 14 FCC Rcd 6688 (WTB 1999).

<sup>63</sup> See *C and F Block Broadband PCS Auction Closes; Winning Bidders Announced*, DA 01-211, Public Notice, 16 FCC Rcd 2339 (2001).

<sup>64</sup> See *Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58*, DA 05-459, Public Notice, 20 FCC Rcd 3703 (2005).

<sup>65</sup> See *Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71*, DA 07-2142, Public Notice, 22 FCC Rcd 9247 (2007).

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

<sup>67</sup> See *Auction of AWS-1 and Broadband PCS Licenses Rescheduled For August 13, 2008, Notice of Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures For Auction 78*, Public Notice, 23 FCC Rcd 7496 (2008) (*AWS-1 and Broadband PCS Procedures Public Notice*).

<sup>68</sup> See *AWS-1 and Broadband PCS Procedures Public Notice*, 23 FCC Rcd 7496. Auction 78 also included an auction of Broadband PCS licenses.

that did not exceed \$15 million for the preceding three years (“very small business”) received a 25 percent discount on its winning bid. A bidder that had combined total assets of less than \$500 million and combined gross revenues of less than \$125 million in each of the last two years qualified for entrepreneur status.<sup>69</sup> Four winning bidders that identified themselves as very small businesses won 17 licenses.<sup>70</sup> Three of the winning bidders that identified themselves as a small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

21. **Narrowband Personal Communications Services.** In 1994, the Commission conducted an auction for Narrowband PCS licenses. A second auction was also conducted later in 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less.<sup>71</sup> Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.<sup>72</sup> To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order.<sup>73</sup> A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.<sup>74</sup> A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.<sup>75</sup> The SBA has approved these small business size standards.<sup>76</sup> A third auction was conducted in 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.<sup>77</sup> Three of these claimed status as a small or very small entity and won 311 licenses.

22. **Paging (Private and Common Carrier).** In the *Paging Third Report and Order*, we developed a small business size standard for “small businesses” and “very small businesses” for purposes

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<sup>69</sup> *Id.* at 7521-22.

<sup>70</sup> See *Auction of AWS-1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period*, Public Notice, 23 FCC Rcd 12749 (2008).

<sup>71</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, PP Docket No. 93-253, GEN Docket No. 90-314, ET Docket No. 92-100, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

<sup>72</sup> See *Announcing the High Bidders in the Auction of Ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674*, Public Notice, PNWL 94-004 (rel. Aug. 2, 1994); *Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787*, Public Notice, PNWL 94-27 (rel. Nov. 9, 1994).

<sup>73</sup> *Amendment of the Commission’s Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, ET Docket No. 92-100, PP Docket No. 93-253, Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000) (*Narrowband PCS Second Report and Order*).

<sup>74</sup> *Narrowband PCS Second Report and Order*, 15 FCC Rcd at 10476, para. 40.

<sup>75</sup> *Id.*

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

<sup>77</sup> See *Narrowband PCS Auction Closes*, Public Notice, 16 FCC Rcd 18663 (WTB 2001).

of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>78</sup> A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. The SBA has approved these small business size standards.<sup>79</sup> According to Commission data, 291 carriers have reported that they are engaged in Paging or Messaging Service.<sup>80</sup> Of these, an estimated 289 have 1,500 or fewer employees, and two have more than 1,500 employees.<sup>81</sup> Consequently, the Commission estimates that the majority of paging providers are small entities that may be affected by our action. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses.<sup>82</sup> A subsequent auction of MEA and Economic Area (“EA”) licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold.<sup>83</sup> One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.<sup>84</sup> A fourth auction, consisting of 9,603 lower and upper paging band licenses was held in the year 2010. Twenty-nine bidders claiming small or very small business status won 3,016 licenses.<sup>85</sup>

23. **220 MHz Radio Service – Phase I Licensees.** The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to Wireless Telecommunications Carriers (except Satellite). Under this category, the SBA deems a wireless business to be small if it has 1,500 or fewer employees.<sup>86</sup> The Commission estimates that nearly all such licensees are small businesses under the SBA’s small business size standard that may be affected by rules adopted pursuant to the Order.

24. **220 MHz Radio Service – Phase II Licensees.** The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. In the 220 MHz

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<sup>78</sup> See *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, PR Docket No. 93-253, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, 10085–88, paras. 98–107 (1999) (*Paging Third Report and Order*)

<sup>79</sup> See *Alvarez Letter 1998*.

<sup>80</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

<sup>83</sup> See *Lower and Upper Paging Band Auction Closes*, Public Notice, 16 FCC Rcd 21821 (WTB 2002).

<sup>84</sup> See *Lower and Upper Paging Bands Auction Closes*, Public Notice, 18 FCC Rcd 11154 (WTB 2003). The current number of small or very small business entities that hold wireless licenses may differ significantly from the number of such entities that won in spectrum auctions due to assignments and transfers of licenses in the secondary market over time. In addition, some of the same small business entities may have won licenses in more than one auction.

<sup>85</sup> See *Auction of Lower and Upper Paging Bands Licenses Closes*, Public Notice, 25 FCC Rcd 18164 (WTB 2010).

<sup>86</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

*Third Report and Order*, we adopted a small business size standard for “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>87</sup> This small business size standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.<sup>88</sup> A “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.<sup>89</sup> The SBA has approved these small business size standards.<sup>90</sup> Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.<sup>91</sup> In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.<sup>92</sup>

25. **Specialized Mobile Radio.** The Commission awards small business bidding credits in auctions for Specialized Mobile Radio (“SMR”) geographic area licenses in the 800 MHz and 900 MHz bands to entities that had revenues of no more than \$15 million in each of the three previous calendar years.<sup>93</sup> The Commission awards very small business bidding credits to entities that had revenues of no more than \$3 million in each of the three previous calendar years.<sup>94</sup> The SBA has approved these small business size standards for the 800 MHz and 900 MHz SMR Services.<sup>95</sup> The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction was completed in 1996.<sup>96</sup> Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band.<sup>97</sup> The 800 MHz SMR auction for the upper 200 channels was conducted in 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.<sup>98</sup> A second auction for the 800 MHz band was conducted in 2002

<sup>87</sup> See *Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068–70, paras. 291–295 (1997) (*220 MHz Third Report and Order*).

<sup>88</sup> See *id.* at 11068–69, para. 291.

<sup>89</sup> See *id.* at 11068–70, paras. 291–95.

<sup>90</sup> See Letter to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998) (*Alvarez to Phythyon Letter 1998*).

<sup>91</sup> See *Phase II 220 MHz Service Auction Closes*, Public Notice, 14 FCC Rcd 605 (1998).

<sup>92</sup> See *Phase II 220 MHz Service Spectrum Auction Closes*, Public Notice, 14 FCC Rcd 11218 (1999).

<sup>93</sup> 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

<sup>94</sup> *Id.*

<sup>95</sup> See Letter from Aida Alvarez, Administrator, SBA, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, FCC (Aug. 10, 1999) (*Alvarez Letter 1999*).

<sup>96</sup> *FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas: Down Payments due April 22, 1996, FCC Form 600s due April 29, 1996*, Public Notice, 11 FCC Rcd 18599 (WTB 1996).

<sup>97</sup> *Id.*

<sup>98</sup> See *Correction to Public Notice DA 96-586 ‘FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,’* Public Notice, 11 FCC Rcd 18637 (WTB 1996).

and included 23 BEA licenses. One bidder claiming small business status won five licenses.<sup>99</sup>

26. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels was conducted in 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard.<sup>100</sup> In an auction completed in 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.<sup>101</sup> Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

27. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees.<sup>102</sup> We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

28. **Broadband Radio Service and Educational Broadband Service.** Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (“MDS”) and Multichannel Multipoint Distribution Service (“MMDS”) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) (previously referred to as the Instructional Television Fixed Service (“ITFS”)).<sup>103</sup> In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.<sup>104</sup> The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (“BTAs”). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.<sup>105</sup> After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as

<sup>99</sup> See *Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

<sup>100</sup> See *800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Closes; Winning Bidders Announced*, Public Notice, 15 FCC Rcd 17162 (WTB 2000).

<sup>101</sup> See *800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 1736 (WTB 2000).

<sup>102</sup> See generally 13 C.F.R. § 121.201, NAICS code 517210.

<sup>103</sup> *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593 para. 7 (1995).

<sup>104</sup> 47 C.F.R. § 21.961(b)(1).

<sup>105</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard.

small businesses under either the SBA or the Commission's rules. The Commission has adopted three levels of bidding credits for BRS: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) is eligible to receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) is eligible to receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) is eligible to receive a 35 percent discount on its winning bid.<sup>106</sup> In 2009, the Commission conducted Auction 86, which offered 78 BRS licenses.<sup>107</sup> Auction 86 concluded with ten bidders winning 61 licenses.<sup>108</sup> Of the ten, two bidders claimed small business status and won 4 licenses; one bidder claimed very small business status and won three licenses; and two bidders claimed entrepreneur status and won six licenses.

29. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.<sup>109</sup> Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."<sup>110</sup> The SBA defines a small business size standard for this category as any such firms having 1,500 or fewer employees. The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.<sup>111</sup> Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.<sup>112</sup> Thus, under this size standard, the majority of firms can be considered small and may be affected by rules adopted pursuant to the Order.

30. **Lower 700 MHz Band Licenses.** The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special

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<sup>106</sup> 47 C.F.R. § 27.1218. See also "Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86," *Public Notice*, 24 FCC Rcd 8277, 8296 (WTB 2009) (*Auction 86 Procedures Public Notice*).

<sup>107</sup> *Auction 86 Procedures Public Notice*, 24 FCC Rcd at 8280.

<sup>108</sup> "Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period," *Public Notice*, 24 FCC Rcd 13572 (WTB 2009).

<sup>109</sup> The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on EBS licensees.

<sup>110</sup> U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110> (last visited Nov. 6, 2012).

<sup>111</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

<sup>112</sup> See *id.*

provisions such as bidding credits.<sup>113</sup> The Commission defined a “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>114</sup> A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>115</sup> Additionally, the Lower 700 MHz Band had a third category of small business status for Metropolitan/Rural Service Area (“MSA/RSA”) licenses, identified as “entrepreneur” and defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.<sup>116</sup> The SBA approved these small size standards.<sup>117</sup> The Commission conducted an auction in 2002 of 740 Lower 700 MHz Band licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)). Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders.<sup>118</sup> Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.<sup>119</sup> The Commission conducted a second Lower 700 MHz Band auction in 2003 that included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses.<sup>120</sup> Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.<sup>121</sup> In 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz Band, designated Auction 60. There were three winning bidders for five licenses. All three winning bidders claimed small business status.<sup>122</sup>

31. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.<sup>123</sup> The *700 MHz Second Report and Order* revised the band plan for the commercial (including Guard Band) and public safety spectrum, adopted services rules, including stringent build-out requirements, an open platform requirement on the C Block, and a requirement on the

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<sup>113</sup> See *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, GN Docket No. 01-74, Report and Order, 17 FCC Rcd 1022 (2002) (*Channels 52-59 Report and Order*).

<sup>114</sup> See *Channels 52-59 Report and Order*, 17 FCC Rcd at 1087-88, para. 172.

<sup>115</sup> See *id.*

<sup>116</sup> See *id.* at 1088 para. 173.

<sup>117</sup> See *Alvarez Letter 1999*.

<sup>118</sup> See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 17 FCC Rcd 17272 (WTB 2002).

<sup>119</sup> *Id.*

<sup>120</sup> See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

<sup>121</sup> See *id.*

<sup>122</sup> “Auction of Lower 700 MHz Band Licenses Closes, Winning Bidders Announced for Auction No. 60, Down Payments due August 19, 2005, FCC Forms 601 and 602 due August 19, 2005, Final Payment due September 2, 2005, Ten-Day Petition to Deny Period,” *Public Notice*, 20 FCC Rcd 13424 (WTB 2005).

<sup>123</sup> See *Service Rules for the 698-746, 747-762 and 777-792 MHz Band, WT Docket No. 06-150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephone, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, Implementing a Nationwide, Broadband Interoperable Public Safety Network in the 700 MHz Band, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Communications Requirements Through the Year 2010*, WT Docket Nos. 96-86, 01-309, 03-264, 06-169, PS Docket No. 06-229, *Second Report and Order*, 22 FCC Rcd 15289 (2007) (*700 MHz Second Report and Order*).

D Block licensee to construct and operate a nationwide, interoperable wireless broadband network for public safety users.<sup>124</sup> An auction of A, B and E block licenses in the Lower 700 MHz band was held in 2008.<sup>125</sup> Twenty winning bidders claimed small business status (those with attributable average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years). Thirty three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years). In 2011, the Commission conducted Auction 92, which offered 16 Lower 700 MHz band licenses that had been made available in Auction 73 but either remained unsold or were licenses on which a winning bidder defaulted. Two of the seven winning bidders in Auction 92 claimed very small business status, winning a total of four licenses.<sup>126</sup>

32. **Upper 700 MHz Band Licenses.** In the *700 MHz Second Report and Order*, the Commission revised its rules regarding Upper 700 MHz band licenses.<sup>127</sup> In 2008, the Commission conducted Auction 73 in which C and D block licenses in the Upper 700 MHz band were available.<sup>128</sup> Three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years).

33. **700 MHz Guard Band Licensees.** In the *700 MHz Guard Band Order*, we adopted a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>129</sup> A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>130</sup> Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>131</sup> An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.<sup>132</sup> Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.<sup>133</sup>

34. **Cellular Radiotelephone Service.** Auction 77 was held to resolve one group of mutually

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<sup>124</sup> *Id.*

<sup>125</sup> See Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 FCC Rcd 4572 (WTB 2008).

<sup>126</sup> See “Auction of 700 MHz Band Licenses Closes, Winning Bidders Announced for Auction 92, Down Payments and FCC Forms 601 and 602 Due August 11, 2011, Final Payments Due August 25, 2011, Ten-Day Petition to Deny Period,” *Public Notice*, 26 FCC Rcd 10494 (WTB 2011).

<sup>127</sup> *700 MHz Second Report and Order*, 22 FCC Rcd 15289.

<sup>128</sup> See Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 FCC Rcd 4572 (2008).

<sup>129</sup> See *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 99-168, Second Report and Order, 15 FCC Rcd 5299 (2000) (*700 MHz Guard Band Order*).

<sup>130</sup> See *id.* at 5343–45 paras. 106–10.

<sup>131</sup> See *id.*

<sup>132</sup> See “700 MHz Guard Band Auction Closes,” *Public Notice*, 15 FCC Rcd 18026 (2000).

<sup>133</sup> See “700 MHz Guard Band Auction Closes,” *Public Notice*, 16 FCC Rcd 4590 (2001).

exclusive applications for Cellular Radiotelephone Service licenses for unserved areas in New Mexico.<sup>134</sup> Bidding credits for designated entities were not available in Auction 77.<sup>135</sup> In 2008, the Commission completed the closed auction of one unserved service area in the Cellular Radiotelephone Service, designated as Auction 77. Auction 77 concluded with one provisionally winning bid for the unserved area totaling \$25,002.<sup>136</sup>

35. **Private Land Mobile Radio (“PLMR”).** PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee’s primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we use the broad census category, Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.<sup>137</sup> The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. We note that PLMR licensees generally use the licensed facilities in support of other business activities, and therefore, it would also be helpful to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.<sup>138</sup>

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

37. **Rural Radiotelephone Service.** The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.<sup>139</sup> A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (“BETRS”).<sup>140</sup> In the present context, we will use the SBA’s small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.<sup>141</sup> There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

38. **Air-Ground Radiotelephone Service.** The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.<sup>142</sup> We will use SBA’s small business

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<sup>134</sup> See “Closed Auction of Licenses for Cellular Unserved Service Area Scheduled for June 17, 2008, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 77,” *Public Notice*, 23 FCC Rcd 6670 (WTB 2008).

<sup>135</sup> *Id.* at 6685.

<sup>136</sup> See *Auction of Cellular Unserved Service Area License Closes, Winning Bidder Announced for Auction 77, Down Payment due July 2, 2008, Final Payment due July 17, 2008*, Public Notice, 23 FCC Rcd 9501 (WTB 2008).

<sup>137</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>138</sup> See generally 13 C.F.R. § 121.201.

<sup>139</sup> The service is defined in 47 C.F.R. § 22.99.

<sup>140</sup> BETRS is defined in 47 C.F.R. §§ 22.757 and 22.759.

<sup>141</sup> 13 C.F.R. § 121.201, NAICS code 517210.

<sup>142</sup> See 47 C.F.R. § 22.99.

size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.<sup>143</sup> There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard and may be affected by rules adopted pursuant to the Order.

39. **Aviation and Marine Radio Services.** Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.<sup>144</sup> Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.<sup>145</sup> Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a “small” business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$15 million dollars.<sup>146</sup> In addition, a “very small” business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$3 million dollars.<sup>147</sup> There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as “small” businesses under the above special small business size standards and may be affected by rules adopted pursuant to the Order.

40. **Fixed Microwave Services.** Fixed microwave services include common carrier,<sup>148</sup> private operational-fixed,<sup>149</sup> and broadcast auxiliary radio services.<sup>150</sup> At present, there are approximately 22,015

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<sup>143</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>144</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>145</sup> U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-\\_skip=700&-ds\\_name=EC0751SSSZ5&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en).

<sup>146</sup> See generally *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853, 19884-88 paras. 64-73 (1998).

<sup>147</sup> See *id.*

<sup>148</sup> See 47 C.F.R. §§ 101 *et seq.* (formerly, Part 21 of the Commission's Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

<sup>149</sup> Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. See 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

<sup>150</sup> Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the (continued....)

common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.<sup>151</sup> The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

41. **Offshore Radiotelephone Service.** This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.<sup>152</sup> There are presently approximately 55 licensees in this service. The Commission is unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for the category of Wireless Telecommunications Carriers (except Satellite). Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.<sup>153</sup> Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.<sup>154</sup> Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus, under this category and the associated small business size standard, the majority of firms can be considered small.

42. **39 GHz Service.** The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of \$40 million or less in the three previous calendar years.<sup>155</sup> An additional size standard for “very small business” is: an entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>156</sup> The SBA has approved these small business size standards.<sup>157</sup> The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by rules adopted pursuant to the Report and Order.

43. **Local Multipoint Distribution Service.** Local Multipoint Distribution Service (“LMDS”)

(Continued from previous page) \_\_\_\_\_

transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

<sup>151</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>152</sup> This service is governed by Subpart I of Part 22 of the Commission's Rules. See 47 C.F.R. §§ 22.1001-22.1037.

<sup>153</sup> *Id.*

<sup>154</sup> U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-\\_skip=700&-ds\\_name=EC0751SSSZ5&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en).

<sup>155</sup> See *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, PP Docket No. 93-253, Report and Order, 12 FCC Rcd 18600, 18661-64, paras. 149-151 (1997).

<sup>156</sup> See *id.*

<sup>157</sup> See Letter to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998).

is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.<sup>158</sup> The auction of the 986 LMDS licenses began and closed in 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>159</sup> An additional small business size standard for “very small business” was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>160</sup> The SBA has approved these small business size standards in the context of LMDS auctions.<sup>161</sup> There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. In 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

44. **218-219 MHz Service.** The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.<sup>162</sup> In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we established a small business size standard for a “small business” as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed \$15 million for the preceding three years.<sup>163</sup> A “very small business” is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed \$3 million for the preceding three years.<sup>164</sup> These size standards will be used in future auctions of 218-219 MHz spectrum.

45. **2.3 GHz Wireless Communications Services.** This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined “small business” for the wireless communications services (“WCS”) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the three preceding years.<sup>165</sup> The SBA has approved these

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<sup>158</sup> See *Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997) (“*LMDS Second Report and Order*”).

<sup>159</sup> See *LMDS Second Report and Order*, 12 FCC Rcd at 12689-90, para. 348.

<sup>160</sup> See *id.*

<sup>161</sup> See *Alvarez to Phythyon Letter 1998*.

<sup>162</sup> See generally *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

<sup>163</sup> See generally *Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999).

<sup>164</sup> See *id.*

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

definitions.<sup>166</sup> The Commission auctioned geographic area licenses in the WCS service. In the auction, which was conducted in 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

46. **1670-1675 MHz Band.** An auction for one license in the 1670-1675 MHz band was conducted in 2003. The Commission defined a “small business” as an entity with attributable average annual gross revenues of not more than \$40 million for the preceding three years and thus would be eligible for a 15 percent discount on its winning bid for the 1670-1675 MHz band license. Further, the Commission defined a “very small business” as an entity with attributable average annual gross revenues of not more than \$15 million for the preceding three years and thus would be eligible to receive a 25 percent discount on its winning bid for the 1670-1675 MHz band license. One license was awarded. The winning bidder was not a small entity.

47. **3650–3700 MHz band.** In March 2005, the Commission released a *Report and Order and Memorandum Opinion and Order* that provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (*i.e.*, 3650–3700 MHz).<sup>167</sup> As of April 2010, more than 1270 licenses have been granted and more than 7433 sites have been registered. The Commission has not developed a definition of small entities applicable to 3650–3700 MHz band nationwide, non-exclusive licensees. However, we estimate that the majority of these licensees are Internet Access Service Providers (ISPs) and that most of those licensees are small businesses.

48. **24 GHz – Incumbent Licensees.** This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. For this service, the Commission uses the SBA small business size standard for the category “Wireless Telecommunications Carriers (except satellite),” which is 1,500 or fewer employees.<sup>168</sup> To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.<sup>169</sup> Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census’ use of the classifications “firms” does not track the number of “licenses”. The Commission believes that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent<sup>170</sup> and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

49. **24 GHz – Future Licensees.** With respect to new applicants in the 24 GHz band, the size standard for “small business” is an entity that, together with controlling interests and affiliates, has

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

<sup>167</sup> The service is defined in section 90.1301 *et seq.* of the Commission’s Rules, 47 C.F.R. § 90.1301 *et seq.*

<sup>168</sup> 13 C.F.R. § 121.201, NAICS code 517210.

<sup>169</sup> U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-\\_skip=700&-ds\\_name=EC0751SSSZ5&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en).

<sup>170</sup> Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

average annual gross revenues for the three preceding years not in excess of \$15 million.<sup>171</sup> “Very small business” in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.<sup>172</sup> The SBA has approved these small business size standards.<sup>173</sup> These size standards will apply to a future 24 GHz license auction, if held.

50. **Satellite Telecommunications.** Since 2007, the SBA has recognized satellite firms within this revised category, with a small business size standard of \$15 million.<sup>174</sup> The most current Census Bureau data are from the economic census of 2007, and we will use those figures to gauge the prevalence of small businesses in this category. Those size standards are for the two census categories of “Satellite Telecommunications” and “Other Telecommunications.” Under the “Satellite Telecommunications” category, a business is considered small if it had \$15 million or less in average annual receipts.<sup>175</sup> Under the “Other Telecommunications” category, a business is considered small if it had \$25 million or less in average annual receipts.<sup>176</sup>

51. The first category of Satellite Telecommunications “comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”<sup>177</sup> For this category, Census Bureau data for 2007 show that there were a total of 512 firms that operated for the entire year.<sup>178</sup> Of this total, 464 firms had annual receipts of under \$10 million, and 18 firms had receipts of \$10 million to \$24,999,999.<sup>179</sup> Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by rules adopted pursuant to the Order.

52. The second category of Other Telecommunications “primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.”<sup>180</sup> For this category, Census

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<sup>171</sup> See *Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967, para. 77 (2000); see also 47 C.F.R. § 101.538(a)(2).

<sup>172</sup> See *Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967, para. 77 (2000); see also 47 C.F.R. § 101.538(a)(1).

<sup>173</sup> See Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

<sup>174</sup> See 13 C.F.R. § 121.201, NAICS code 517410.

<sup>175</sup> *Id.*

<sup>176</sup> See 13 C.F.R. § 121.201, NAICS code 517919.

<sup>177</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517410 Satellite Telecommunications”.

<sup>178</sup> See 13 C.F.R. § 121.201, NAICS code 517410.

<sup>179</sup> See *id.* An additional 38 firms had annual receipts of \$25 million or more.

<sup>180</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517919 Other Telecommunications”, <http://www.census.gov/naics/2007/def/ND517919.HTM>.

Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year.<sup>181</sup> Of this total, 2,346 firms had annual receipts of under \$25 million.<sup>182</sup> Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

53. **Cable and Other Program Distribution.** Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”<sup>183</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>184</sup> According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.<sup>185</sup> Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.<sup>186</sup> Thus, under this size standard, the majority of firms can be considered small and may be affected by rules adopted pursuant to the Order.

54. **Cable Companies and Systems.** The Commission has developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.<sup>187</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.<sup>188</sup> In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.<sup>189</sup> Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have fewer than 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.<sup>190</sup> Thus, under this second size standard, most cable systems are small and may be affected by rules adopted pursuant to the Order.

55. **Cable System Operators.** The Act also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate less than

<sup>181</sup> See 13 C.F.R. § 121.201, NAICS code 517919.

<sup>182</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517919” (issued Nov. 2010).

<sup>183</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110> (last visited Nov. 6, 2012).

<sup>184</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>185</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

<sup>186</sup> See *id.*

<sup>187</sup> See 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. See *Implementation of Sections of the 1992 Cable Television Consumer Protection and Competition Act: Rate Regulation*, MM Docket Nos. 92-266, 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 para. 28 (1995).

<sup>188</sup> These data are derived from R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006 A-8 & C-2 (2005) (Top 25 Cable/Satellite Operators) (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006 D-1805 to D-1857 (2005) (Ownership of Cable Systems in the United States).

<sup>189</sup> See 47 C.F.R. § 76.901(c).

<sup>190</sup> TELEVISION & CABLE FACTBOOK 2006, *supra* note 188, at F-2 (U.S. Cable Systems by Subscriber Size) (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”<sup>191</sup> The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>192</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.<sup>193</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>194</sup> and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

56. **Open Video Services.** The open video system (“OVS”) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.<sup>195</sup> The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,<sup>196</sup> OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”<sup>197</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.<sup>198</sup> Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.<sup>199</sup> Thus, under this second size standard, most cable systems are small and may be affected by rules adopted pursuant to the Order. In addition, we note that the Commission has certified some OVS operators, with some now providing service.<sup>200</sup> Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.<sup>201</sup> The Commission

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<sup>191</sup> 47 U.S.C. § 543(m)(2); *see also* 47 C.F.R. § 76.901(f) & nn.1–3.

<sup>192</sup> 47 C.F.R. § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

<sup>193</sup> These data are derived from R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006 A-8 & C-2 (2005) (Top 25 Cable/Satellite Operators) (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006 D-1805 to D-1857 (2005) (Ownership of Cable Systems in the United States).

<sup>194</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules.

<sup>195</sup> 47 U.S.C. § 571(a)(3)-(4). *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 606, para. 135 (2009) (“*Thirteenth Annual Cable Competition Report*”).

<sup>196</sup> *See* 47 U.S.C. § 573.

<sup>197</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110> (last visited Nov. 6, 2012).

<sup>198</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

<sup>199</sup> *See id.*

<sup>200</sup> A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsccer.html> (last visited Nov. 6, 2012).

<sup>201</sup> *See Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07, para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

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

57. **Internet Service Providers.** Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”<sup>202</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>203</sup> According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.<sup>204</sup> Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.<sup>205</sup> Thus, under this size standard, the majority of firms can be considered small. In addition, according to Census Bureau data for 2007, there were a total of 396 firms in the category Internet Service Providers (broadband) that operated for the entire year.<sup>206</sup> Of this total, 394 firms had employment of 999 or fewer employees, and two firms had employment of 1000 employees or more.<sup>207</sup> Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the Order.

58. **Internet Publishing and Broadcasting and Web Search Portals.** Our action may pertain to interconnected VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The Commission has not adopted a size standard for entities that create or provide these types of services or applications. However, the Census Bureau has identified firms that “primarily engaged in 1) publishing and/or broadcasting content on the Internet exclusively or 2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals).”<sup>208</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 500 or fewer employees.<sup>209</sup> According to Census Bureau data for 2007, there were 2,705 firms in this category that operated for the entire year.<sup>210</sup> Of this total, 2,682 firms had employment of 499 or fewer employees, and 23 firms had employment of 500 employees or more.<sup>211</sup> Consequently, we estimate that the majority of these firms are small entities

<sup>202</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110> (last visited Nov. 6, 2012).

<sup>203</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>204</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110” (issued Nov. 2010).

<sup>205</sup> *See id.*

<sup>206</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171103 (issued Nov. 2010).

<sup>207</sup> *See id.*

<sup>208</sup> U.S. Census Bureau, “2007 NAICS Definitions: 519130 Internet Publishing and Broadcasting and Web Search Portals,” <http://www.naics.com/censusfiles/ND519130.HTM> (last visited Nov. 6, 2012).

<sup>209</sup> *See* 13 C.F.R. § 121.201, NAICS code 519130.

<sup>210</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 519130” (issued Nov. 2010).

<sup>211</sup> *Id.*

that may be affected by rules adopted pursuant to the Order.

59. **Data Processing, Hosting, and Related Services.** Entities in this category “primarily ... provid[e] infrastructure for hosting or data processing services.”<sup>212</sup> The SBA has developed a small business size standard for this category; that size standard is \$25 million or less in average annual receipts.<sup>213</sup> According to Census Bureau data for 2007, there were 8,060 firms in this category that operated for the entire year.<sup>214</sup> Of these, 7,744 had annual receipts of under \$24,999,999.<sup>215</sup> Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the Order.

60. **All Other Information Services.** The Census Bureau defines this industry as including “establishments primarily engaged in providing other information services (except news syndicates, libraries, archives, Internet publishing and broadcasting, and Web search portals).”<sup>216</sup> Our action pertains to interconnected VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The SBA has developed a small business size standard for this category; that size standard is \$7.0 million or less in average annual receipts.<sup>217</sup> According to Census Bureau data for 2007, there were 367 firms in this category that operated for the entire year.<sup>218</sup> Of these, 334 had annual receipts of under \$5.0 million, and an additional 11 firms had receipts of between \$5 million and \$9,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

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

61. The data, information and document collection required by this Report and Order falls into five general categories: market structure, pricing, demand (*i.e.*, observed sales and purchases), terms and conditions, and competition and pricing decisions.

62. Market structure data consists of, among other things, the situs and type of facilities owned by a provider (or leased subject to an indefeasible right of use) capable of providing special access, by sold and potential capacity and ownership, and the proximity of such facilities to sources of demand. We also require incumbent LEC providers to submit data concerning the number, nature, and situs of UNEs sold. In addition, we also require additional market structure data from competitive providers, such as detailed information related to non-price factors that may impact where special access providers build facilities or expand their network via UNEs and the history of their facility deployments in a sample of locations they serve.

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<sup>212</sup> U.S. Census Bureau, “2007 NAICS Definitions: 518210 Data Processing, Hosting, and Related Services”, <http://www.census.gov/naics/2007/def/NDEF518.HTM> (last visited Nov. 6, 2012).

<sup>213</sup> See 13 C.F.R. § 121.201, NAICS code 518210.

<sup>214</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 4, “Establishment and Firm Size: Receipts Size of Firms for the United States: 2007 NAICS Code 518210” (issued Nov. 2010).

<sup>215</sup> *Id.*

<sup>216</sup> U.S. Census Bureau, “2007 NAICS Definitions: 519190 All Other Information Services”, <http://www.census.gov/naics/2007/def/ND519190.HTM> (last visited Nov. 6, 2012).

<sup>217</sup> See 13 C.F.R. § 121.201, NAICS code 519190.

<sup>218</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 4, “Establishment and Firm Size: Receipts Size of Firms for the United States: 2007 NAICS Code 519190” (issued Nov. 2010).

63. Pricing data includes the quantities sold and prices charged for special access services, by circuit element, and information regarding the regulatory environment for incumbent LECs.

64. Demand data includes, among other things, data that identify the bandwidth of the special access services sold or purchased, the locations being served, and other material facts, such as where those purchases occur (*e.g.*, buildings, cell towers) and the nature of the purchaser (*e.g.*, provider or end user).

65. Terms and conditions data and information include, but are not limited to, information regarding contracts or generally available plans for special access services that offer discounts, circuit portability, or other competitively relevant benefits, and whether the terms and conditions associated with those offerings may inhibit a buyer's ability to switch to other providers, which in turn may inhibit facilities-based entry into special access markets.

66. Competition and pricing data, information and documents include, but are not limited to, those materials related to requests for proposals, advertising and marketing materials, and in very limited circumstances, pricing decision documents.

67. Best efforts business broadband Internet access services include, but are not limited to, data showing where a provider or entity provides such services, as well as price lists.

68. Questions related to terms and conditions, competition and pricing decisions will span a variety of timeframes specific to the issue addressed. The majority of the market structure, pricing and demand data will be collected for a two-year period. This period of time allows the analysis to control for factors that may vary substantially across geographic areas, but not within a given geographic area.

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

69. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives, among others: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>219</sup>

70. Entities required to respond to this data request include all providers and purchasers of special access services as well as some entities that provide best efforts business broadband Internet access services.<sup>220</sup> By "providers," we mean any entity subject to the Commission's jurisdiction under the Communications Act, as amended, that provides special access services or provides a connection that is capable of providing special access services.<sup>221</sup> By "purchasers," we mean any entity subject to the Commission's jurisdiction under the Communications Act, as amended, that purchases special access

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<sup>219</sup> 5 U.S.C. § 603.

<sup>220</sup> For purposes of this Report and Order, best efforts business broadband Internet access services do not include mobile wireless services, as that term is used in the 15th Annual Mobile Wireless Competition Report. See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 10-133, Fifteenth Report, 26 FCC Rcd 9664, 9687-88, paras. 3-5 (2011) (15th Annual Mobile Wireless Competition Report).

<sup>221</sup> Section 1 of the Communications Act of 1934, as amended, confers on the Commission jurisdiction over "interstate and foreign commerce in communication by wire and radio." See 47 U.S.C. § 151.

services.<sup>222</sup> Providers and purchasers may include price cap regulated incumbent LECs, competitive LECs, interexchange carriers, cable operators, and companies that provide fixed wireless communications services.<sup>223</sup> Some entities that fall under the Commission's jurisdiction and provide best efforts broadband Internet access services, but fall outside our definitions of "provider" and "purchaser," are also required to respond.

71. Because the focus of this proceeding is on the regulation of special access services in price-cap territories, a rate-of-return carrier, which is not subject to our pricing flexibility rules, shall not be considered a "provider" to the extent it provides special access within its rate-of-return service area. Likewise, we will not require data from any provider with regard to its operations in any geographic area in which a rate-of-return carrier is the incumbent. Moreover, we will not require a purchaser to produce data based on purchases it makes in those areas in which a rate-of-return carrier is the incumbent. If, however, a provider or purchaser prefers to provide data for all areas without distinguishing between areas served by price cap LECs and rate-of-return LECs, it may do so.

72. Small business concerns were considered when determining the nature of the data to be collected, and identified data, information, and document requirements were modified to reduce burdens on small businesses where possible. The Wireline Competition Bureau previously issued two voluntary data requests in this proceeding. These voluntary requests allowed each potential respondent to make its own determination concerning participation. The responses to the voluntary data requests provided the Commission the means and opportunity to assess which data elements are most important to its ability to assess the special access market, and to eliminate or revise those questions that otherwise yield less valuable information. The voluntary data requests also allowed the Commission to carefully assess the need to obtain data from all providers and purchasers of special access services and certain other services—including small businesses—to conduct a comprehensive analysis of the special access market.

73. In order to conduct a comprehensive analysis of the special access market, the Commission will collect data from all providers and purchasers of special access services as well as some entities that provide best efforts business broadband Internet access services. The Commission notes concerns regarding the burden that this data collection will impose on small companies, and is mindful of the importance of seeking to reduce information collection burdens for small business concerns, and in particular those "with fewer than 25 employees."<sup>224</sup> Competition in the provision of special access, however, appears to occur at a very granular level—perhaps as low as the building/tower. Accordingly, the Commission finds it necessary to obtain data from special access providers and purchasers of all sizes.

74. We structured the collection somewhat differently for best efforts and special access services to minimize the burden on submitters consistent with our data requirements and taking into consideration data that the Commission already has available to it. Because the record indicates that entities that provide best efforts business broadband Internet access services generally deliver those services throughout their footprint over the same network facilities they use to deliver mass market broadband Internet access, we need not collect this data at the same level of granularity as location and facilities data for special access. We also do not require entities with fewer than 15,000 customers and

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<sup>222</sup> *See id.*

<sup>223</sup> Section 151 of the Communications Act of 1934, as amended, confers on the Commission the authority to regulate "interstate and foreign commerce in communication by wire and radio." *See* 47 U.S.C. § 151. However, rate-of-return carriers, which are not subject to our pricing flexibility rules, are not required to respond to questions asked of providers. To the extent a rate-of-return carrier also owns or is affiliated with a provider of facilities-based special access services outside of its rate-of-return service area, this exemption only applies to rate-of-return facilities and services.

<sup>224</sup> Small Business Paperwork Relief Act of 2002 § 2(c)(3), Pub. L. No. 107-198, *see* 44 U.S.C. § 3506(c)(4).

fewer than 1,500 business broadband customers to provide data regarding their best efforts business broadband Internet access services. Commenters assert that those entities incur the greatest burden when producing data for the State Broadband Initiative broadband mapping effort.<sup>225</sup>

75. Other modifications made by the Commission include: allowing a provider or purchaser to provide data for all areas without distinguishing between areas served by price cap LECs and rate-of-return LECs; applying sampling methods where possible; limiting the market structure, pricing and demand data collection to a two-year period; and tailoring the timeframes for the terms and conditions, competition and pricing questions to the specific issue addressed. In addition, the Commission chose to limit the production of documents showing the internal analyses undertaken by providers in 2010 or thereafter to evaluate, *inter alia*, competitive market shares, changes in competition, changes in the costs of supplying services, whether to respond to RFPs, and identified rate increases and decreases to circumstances where the Wireline Competition Bureau determines the initial data collection was incomplete or insufficient for analysis.

76. We note that this Report and Order does not change special access pricing regulation. We therefore do not consider the potential alternatives to special access pricing regulation that SBA asserted might minimize the impact on small competitive carriers.

#### **F. Report to Congress**

77. The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>226</sup> In addition, the Commission will send a copy of the Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>227</sup>

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<sup>225</sup> See Letter from Thomas Cohen, Counsel to American Cable Association, to Michael Steffen, Legal Advisor to Chairman Genachowski, Federal Communications Commission, WC Docket No. 05-25 (filed Nov. 27, 2012).

<sup>226</sup> 5 U.S.C. § 801(a)(1)(A).

<sup>227</sup> See *id.* § 604(b).

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**APPENDIX C****Initial Regulatory Flexibility Analysis**

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this FNPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the FNPRM provided in section V.C of the item. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the FNPRM and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

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

2. In this FNPRM we commence a process to more effectively determine where relief from special access regulation is appropriate and otherwise update our special access rules to ensure that they reflect the state of competition today and promote competition, investment, and access to dedicated communications services businesses across the country rely on every day to deliver their products and services to American consumers. In Section IV.A we propose and seek comment on a market analysis that we intend to undertake in the coming months to assist the Commission in evaluating whether the pricing flexibility rules result in just and reasonable special access rates and what regulatory changes may be needed.<sup>4</sup> In section IV.B we seek comment on how the special access pricing flexibility rules might change after we conduct our market analysis. We also seek comment on what steps the Commission should take where relief has been provided under our existing rules and where the data and our analysis demonstrate that competition is not sufficient to discipline the marketplace. Finally, we seek in section IV.C comment on the terms and conditions offered by incumbent LECs for special access services to facilitate our understanding of competition in the special access market and our ability to craft rules for regulatory relief that properly address the state of the marketplace.

**B. Legal Basis**

3. This rulemaking action is supported by sections 1, 4(i), 4(j), 5, 201-205, 211, 215, 218, 219, 303(r), 332, 403, and 503 of the Communications Act of 1934, as amended.<sup>5</sup>

**C. Description and Estimate of the Number of Small Entities to Which the Notice will Apply**

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>6</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small

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

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

<sup>4</sup> See 47 U.S.C. § 201(b) (“All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable . . .”).

<sup>5</sup> 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, and 303.

<sup>6</sup> See 5 U.S.C. § 603(b)(3).

organization,” and “small governmental jurisdiction.”<sup>7</sup> In addition, the term “small business” has the same meaning as the term “small-business concern” under the Small Business Act.<sup>8</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 SBA.<sup>9</sup> SBA restated its concerns in its comments filed in 2007.<sup>10</sup>

5. **Small Businesses.** Nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.<sup>11</sup>

6. **Wired Telecommunications Carriers.** The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.<sup>12</sup> According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.<sup>13</sup> Of this total, 3144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.<sup>14</sup> Thus, under this size standard, the majority of firms can be considered small.

7. **Local Exchange Carriers (LECs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>15</sup> According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.<sup>16</sup> Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.<sup>17</sup> Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the rules and policies proposed in the Order.

8. **Incumbent Local Exchange Carriers (incumbent LECs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer

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<sup>7</sup> See *id.* § 601(6).

<sup>8</sup> See *id.* § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of 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.”

<sup>9</sup> See 15 U.S.C. § 632.

<sup>10</sup> Comments of the Office of Advocacy, U.S. Small Business Administration, WC Docket No. 0525, RM-10593, (Filed Aug. 8, 2007).

<sup>11</sup> See SBA, Office of Advocacy, “FAQs,” available at <http://www.sba.gov/sites/default/files/sbfaq.pdf>.

<sup>12</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>13</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110” (issued Nov. 2010).

<sup>14</sup> See *id.*

<sup>15</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>16</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

<sup>17</sup> See *id.*

employees.<sup>18</sup> According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.<sup>19</sup> Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.<sup>20</sup> Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by rules adopted pursuant to the Order

9. We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”<sup>21</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>22</sup> We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

10. Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>23</sup> According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.<sup>24</sup> Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.<sup>25</sup> In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.<sup>26</sup> In addition, 72 carriers have reported that they are Other Local Service Providers.<sup>27</sup> Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.<sup>28</sup> Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by rules adopted pursuant to the Order.

11. **Interexchange Carriers (IXCs).** Neither the Commission nor the SBA has developed a size

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<sup>18</sup> See 13 C.F.R. § 121.201, NAICS code 517110.

<sup>19</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>20</sup> See *id.*

<sup>21</sup> 5 U.S.C. § 601(3).

<sup>22</sup> See Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a); see also 5 U.S.C. § 601(3). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

<sup>23</sup> See 13 C.F.R. § 121.201, NAICS code 517110.

<sup>24</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> See *id.*

standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>29</sup> According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.<sup>30</sup> Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.<sup>31</sup> Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by rules adopted pursuant to the Order.

**12. Prepaid Calling Card Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>32</sup> According to Commission data, 193 carriers have reported that they are engaged in the provision of prepaid calling cards.<sup>33</sup> Of these, an estimated all 193 have 1,500 or fewer employees and none have more than 1,500 employees.<sup>34</sup> Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by rules adopted pursuant to the Order.

**13. Local Resellers.** The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>35</sup> According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.<sup>36</sup> Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.<sup>37</sup> Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by rules adopted pursuant to the Order.

**14. Toll Resellers.** The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>38</sup> According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services.<sup>39</sup> Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees.<sup>40</sup> Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by rules adopted pursuant to the Order.

**15. Other Toll Carriers.** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling

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<sup>29</sup> See 13 C.F.R. § 121.201, NAICS code 517110.

<sup>30</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>31</sup> See *id.*

<sup>32</sup> See 13 C.F.R. § 121.201, NAICS code 517911.

<sup>33</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>34</sup> See *id.*

<sup>35</sup> See 13 C.F.R. § 121.201, NAICS code 517911.

<sup>36</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>37</sup> See *id.*

<sup>38</sup> See 13 C.F.R. § 121.201, NAICS code 517911.

<sup>39</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>40</sup> See *id.*

card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>41</sup> According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.<sup>42</sup> Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.<sup>43</sup> Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by the rules and policies adopted pursuant to the Order.

**16. 800 and 800-Like Service Subscribers.**<sup>44</sup> Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service (toll free) subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>45</sup> The most reliable source of information regarding the number of these service subscribers appears to be data the Commission collects on the 800, 888, 877, and 866 numbers in use.<sup>46</sup> According to our data, as of September 2009, the number of 800 numbers assigned was 7,860,000; the number of 888 numbers assigned was 5,588,687; the number of 877 numbers assigned was 4,721,866; and the number of 866 numbers assigned was 7,867,736.<sup>47</sup> We do not have data specifying the number of these subscribers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, we estimate that there are 7,860,000 or fewer small entity 800 subscribers; 5,588,687 or fewer small entity 888 subscribers; 4,721,866 or fewer small entity 877 subscribers; and 7,867,736 or fewer small entity 866 subscribers.

**17. Wireless Telecommunications Carriers (except Satellite).** Since 2007, the SBA has recognized wireless firms within this new, broad, economic census category.<sup>48</sup> Prior to that time, such firms were within the now-superseded categories of Paging and Cellular and Other Wireless Telecommunications.<sup>49</sup> Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.<sup>50</sup> For this category, census data for 2007 show that there were 1,383 firms that operated for the entire year.<sup>51</sup> Of this total, 1,368 firms had employment of 999 or

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<sup>41</sup> See 13 C.F.R. § 121.201, NAICS code 517110.

<sup>42</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>43</sup> See *id.*

<sup>44</sup> We include all toll-free number subscribers in this category, including those for 888 numbers.

<sup>45</sup> See 13 C.F.R. § 121.201, NAICS code 517911.

<sup>46</sup> See *Trends in Telephone Service* at Tables 18.7-18.10.

<sup>47</sup> See *id.*

<sup>48</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>49</sup> U.S. Census Bureau, 2002 NAICS Definitions, “517211 Paging”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM> (last visited Nov. 6, 2012); U.S. Census Bureau, 2002 NAICS Definitions, “517212 Cellular and Other Wireless Telecommunications,” <http://www.census.gov/epcd/naics02/def/NDEF517.HTM> (last visited Nov. 6, 2012).

<sup>50</sup> 13 C.F.R. § 121.201, NAICS code 517210. The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

<sup>51</sup> U.S. Census Bureau, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210” (issued Nov. 2010).

fewer employees and 15 had employment of 1000 employees or more.<sup>52</sup> Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.<sup>53</sup> Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.<sup>54</sup> Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

18. Broadband Personal Communications Service. The broadband personal communications service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined “small entity” for Blocks C and F as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.<sup>55</sup> For Block F, an additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>56</sup> These standards defining “small entity” in the context of broadband PCS auctions have been approved by the SBA.<sup>57</sup> No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.<sup>58</sup> In 1999, the Commission re-auctioned 347 C, E, and F Block licenses.<sup>59</sup> There were 48 small business winning bidders. In 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction 35.<sup>60</sup> Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction 58. There were 24 winning bidders for 217 licenses.<sup>61</sup> Of the

<sup>52</sup> *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “100 employees or more.”

<sup>53</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>54</sup> See *id.*

<sup>55</sup> See generally *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824 (1996); see also 47 C.F.R. § 24.720(b)(1).

<sup>56</sup> See generally *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824 (1996); see also 47 C.F.R. § 24.720(b)(2).

<sup>57</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 Rcd 5532 (1994).

<sup>58</sup> See FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. Jan. 14, 1997). See also *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 16436 (1997).

<sup>59</sup> See “C, D, E, and F Block Broadband PCS Auction Closes” *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

<sup>60</sup> See “C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 2339 (2001).

24 winning bidders, 16 claimed small business status and won 156 licenses. In 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction 71.<sup>62</sup> Of the 14 winning bidders, six were designated entities.<sup>63</sup> In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F block licenses in Auction 78.<sup>64</sup>

**19. Advanced Wireless Services.** In 2008, the Commission conducted the auction of Advanced Wireless Services (“AWS”) licenses.<sup>65</sup> This auction, which as designated as Auction 78, offered 35 licenses in the AWS 1710-1755 MHz and 2110-2155 MHz bands (“AWS-1”). The AWS-1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A bidder with attributed average annual gross revenues that exceeded \$15 million and did not exceed \$40 million for the preceding three years (“small business”) received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed \$15 million for the preceding three years (“very small business”) received a 25 percent discount on its winning bid. A bidder that had combined total assets of less than \$500 million and combined gross revenues of less than \$125 million in each of the last two years qualified for entrepreneur status.<sup>66</sup> Four winning bidders that identified themselves as very small businesses won 17 licenses.<sup>67</sup> Three of the winning bidders that identified themselves as a small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

**20. Narrowband Personal Communications Services.** In 1994, the Commission conducted an auction for Narrowband PCS licenses. A second auction was also conducted later in 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less.<sup>68</sup> Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.<sup>69</sup> To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-

(Continued from previous page) \_\_\_\_\_

<sup>61</sup> See “Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58,” *Public Notice*, 20 FCC Rcd 3703 (2005).

<sup>62</sup> See “Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71,” *Public Notice*, 22 FCC Rcd 9247 (2007).

<sup>63</sup> *Id.*

<sup>64</sup> See “Auction of AWS-1 and Broadband PCS Licenses Rescheduled For August 13, 2008, Notice of Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures For Auction 78,” *Public Notice*, 23 FCC Rcd 7496 (2008) (*AWS-1 and Broadband PCS Procedures Public Notice*).

<sup>65</sup> See *AWS-1 and Broadband PCS Procedures Public Notice*, 23 FCC Rcd 7496. Auction 78 also included an auction of Broadband PCS licenses.

<sup>66</sup> *Id.* at 7521-22.

<sup>67</sup> See “Auction of AWS-1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period,” *Public Notice*, 23 FCC Rcd 12749 (2008).

<sup>68</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, PP Docket No. 93-253, GEN Docket No. 90-314, ET Docket No. 92-100, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

<sup>69</sup> See *Announcing the High Bidders in the Auction of Ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674*, Public Notice, PNWL 94-004 (rel. Aug. 2, 1994); *Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787*, Public Notice, PNWL 94-27 (rel. Nov. 9, 1994).

tiered small business size standard in the Narrowband PCS Second Report and Order.<sup>70</sup> A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.<sup>71</sup> A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.<sup>72</sup> The SBA has approved these small business size standards.<sup>73</sup> A third auction was conducted in 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.<sup>74</sup> Three of these claimed status as a small or very small entity and won 311 licenses.

**21. Paging (Private and Common Carrier).** In the *Paging Third Report and Order*, we developed a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>75</sup> A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. The SBA has approved these small business size standards.<sup>76</sup> According to Commission data, 291 carriers have reported that they are engaged in Paging or Messaging Service.<sup>77</sup> Of these, an estimated 289 have 1,500 or fewer employees, and two have more than 1,500 employees.<sup>78</sup> Consequently, the Commission estimates that the majority of paging providers are small entities that may be affected by our action. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses.<sup>79</sup> A subsequent auction of MEA and Economic Area (“EA”) licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold.<sup>80</sup> One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming

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<sup>70</sup> *Amendment of the Commission’s Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, ET Docket No. 92-100, PP Docket No. 93-253, Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000) (*Narrowband PCS Second Report and Order*).

<sup>71</sup> *Narrowband PCS Second Report and Order*, 15 FCC Rcd at 10476, para. 40.

<sup>72</sup> *Id.*

<sup>73</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (Dec. 2, 1998) (*Alvarez Letter 1998*).

<sup>74</sup> See “Narrowband PCS Auction Closes,” *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

<sup>75</sup> See *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, PR Docket No. 93-253, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, 10085–88, paras. 98–107 (1999) (*Paging Third Report and Order*).

<sup>76</sup> See *Alvarez Letter 1998*.

<sup>77</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See “*Lower and Upper Paging Band Auction Closes*,” *Public Notice*, 16 FCC Rcd 21821 (WTB 2002).

small or very small business status won 2,093 licenses.<sup>81</sup> A fourth auction, consisting of 9,603 lower and upper paging band licenses was held in the year 2010. Twenty-nine bidders claiming small or very small business status won 3,016 licenses.<sup>82</sup>

**22. 220 MHz Radio Service – Phase I Licensees.** The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to Wireless Telecommunications Carriers (except Satellite). Under this category, the SBA deems a wireless business to be small if it has 1,500 or fewer employees.<sup>83</sup> The Commission estimates that nearly all such licensees are small businesses under the SBA’s small business size standard that may be affected by rules adopted pursuant to the Order.

**23. 220 MHz Radio Service – Phase II Licensees.** The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>84</sup> This small business size standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.<sup>85</sup> A “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.<sup>86</sup> The SBA has approved these small business size standards.<sup>87</sup> Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.<sup>88</sup> In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies

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<sup>81</sup> See “*Lower and Upper Paging Bands Auction Closes*,” Public Notice, 18 FCC Rcd 11154 (WTB 2003). The current number of small or very small business entities that hold wireless licenses may differ significantly from the number of such entities that won in spectrum auctions due to assignments and transfers of licenses in the secondary market over time. In addition, some of the same small business entities may have won licenses in more than one auction.

<sup>82</sup> See “*Auction of Lower and Upper Paging Bands Licenses Closes*,” Public Notice, 25 FCC Rcd 18,164 (WTB 2010).

<sup>83</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>84</sup> See *Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068–70, paras. 291–295 (1997) (*220 MHz Third Report and Order*).

<sup>85</sup> See *id.* at 11068–69, para. 291.

<sup>86</sup> See *id.* at 11068–70, paras. 291–95.

<sup>87</sup> See Letter to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998) (*Alvarez to Phythyon Letter 1998*).

<sup>88</sup> See “*Phase II 220 MHz Service Auction Closes*,” *Public Notice*, 14 FCC Rcd 605 (1998).

claiming small business status won 158 licenses.<sup>89</sup>

24. **Specialized Mobile Radio.** The Commission awards small business bidding credits in auctions for Specialized Mobile Radio (“SMR”) geographic area licenses in the 800 MHz and 900 MHz bands to entities that had revenues of no more than \$15 million in each of the three previous calendar years.<sup>90</sup> The Commission awards very small business bidding credits to entities that had revenues of no more than \$3 million in each of the three previous calendar years.<sup>91</sup> The SBA has approved these small business size standards for the 800 MHz and 900 MHz SMR Services.<sup>92</sup> The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction was completed in 1996.<sup>93</sup> Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band.<sup>94</sup> The 800 MHz SMR auction for the upper 200 channels was conducted in 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.<sup>95</sup> A second auction for the 800 MHz band was conducted in 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.<sup>96</sup>

25. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels was conducted in 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard.<sup>97</sup> In an auction completed in 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.<sup>98</sup> Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

26. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One

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<sup>89</sup> See “Phase II 220 MHz Service Spectrum Auction Closes,” *Public Notice*, 14 FCC Rcd 11218 (1999).

<sup>90</sup> 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

<sup>91</sup> 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

<sup>92</sup> See Letter from Aida Alvarez, Administrator, SBA, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, FCC (Aug. 10, 1999) (*Alvarez Letter 1999*).

<sup>93</sup> “FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas: Down Payments due April 22, 1996, FCC Form 600s due April 29, 1996,” *Public Notice*, 11 FCC Rcd 18599 (WTB 1996).

<sup>94</sup> *Id.*

<sup>95</sup> See “Correction to Public Notice DA 96-586 ‘FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,’” *Public Notice*, 11 FCC Rcd 18637 (WTB 1996).

<sup>96</sup> See *Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

<sup>97</sup> See “800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Closes; Winning Bidders Announced,” *Public Notice*, 15 FCC Rcd 17162 (WTB 2000).

<sup>98</sup> See “800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 1736 (WTB 2000).

firm has over \$15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees.<sup>99</sup> We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

**27. Broadband Radio Service and Educational Broadband Service.** Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (“MDS”) and Multichannel Multipoint Distribution Service (“MMDS”) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) (previously referred to as the Instructional Television Fixed Service (“ITFS”)).<sup>100</sup> In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.<sup>101</sup> The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (“BTAs”). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.<sup>102</sup> After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission’s rules. The Commission has adopted three levels of bidding credits for BRS: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) is eligible to receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) is eligible to receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) is eligible to receive a 35 percent discount on its winning bid.<sup>103</sup> In 2009, the Commission conducted Auction 86, which offered 78 BRS licenses.<sup>104</sup> Auction 86 concluded with ten bidders winning 61 licenses.<sup>105</sup> Of the ten, two bidders claimed small business status and won 4 licenses; one bidder claimed very small business status and won three licenses; and two bidders claimed entrepreneur status and won

<sup>99</sup> See generally 13 C.F.R. § 121.201, NAICS code 517210.

<sup>100</sup> *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593 para. 7 (1995).

<sup>101</sup> 47 C.F.R. § 21.961(b)(1).

<sup>102</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard.

<sup>103</sup> 47 C.F.R. § 27.1218. See also “Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86,” *Public Notice*, 24 FCC Rcd 8277, 8296 (WTB 2009) (*Auction 86 Procedures Public Notice*).

<sup>104</sup> *Auction 86 Procedures Public Notice*, 24 FCC Rcd at 8280.

<sup>105</sup> “Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period,” *Public Notice*, 24 FCC Rcd 13572 (WTB 2009).

six licenses.

28. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.<sup>106</sup> Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."<sup>107</sup> The SBA defines a small business size standard for this category as any such firms having 1,500 or fewer employees. The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.<sup>108</sup> Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.<sup>109</sup> Thus, under this size standard, the majority of firms can be considered small and may be affected by rules adopted pursuant to the Order.

29. **Lower 700 MHz Band Licenses.** The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.<sup>110</sup> The Commission defined a "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>111</sup> A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>112</sup> Additionally, the Lower 700 MHz Band had a third category of small business status for Metropolitan/Rural Service Area ("MSA/RSA") licenses, identified as "entrepreneur" and defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.<sup>113</sup> The SBA approved these small size standards.<sup>114</sup> The Commission conducted an auction in 2002 of 740 Lower 700 MHz Band licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)). Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders.<sup>115</sup>

<sup>106</sup> The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on EBS licensees.

<sup>107</sup> U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110> (last visited Nov. 6, 2012).

<sup>108</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

<sup>109</sup> *See id.*

<sup>110</sup> *See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, GN Docket No. 01-74, Report and Order, 17 FCC Rcd 1022 (2002) (*Channels 52-59 Report and Order*).

<sup>111</sup> *See Channels 52-59 Report and Order*, 17 FCC Rcd at 1087-88, para. 172.

<sup>112</sup> *See id.*

<sup>113</sup> *See id.* at 1088 para. 173.

<sup>114</sup> *See Alvarez Letter 1999*.

<sup>115</sup> *See "Lower 700 MHz Band Auction Closes," Public Notice*, 17 FCC Rcd 17272 (WTB 2002).

Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.<sup>116</sup> The Commission conducted a second Lower 700 MHz Band auction in 2003 that included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses.<sup>117</sup> Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.<sup>118</sup> In 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz Band, designated Auction 60. There were three winning bidders for five licenses. All three winning bidders claimed small business status.<sup>119</sup>

30. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.<sup>120</sup> The *700 MHz Second Report and Order* revised the band plan for the commercial (including Guard Band) and public safety spectrum, adopted services rules, including stringent build-out requirements, an open platform requirement on the C Block, and a requirement on the D Block licensee to construct and operate a nationwide, interoperable wireless broadband network for public safety users.<sup>121</sup> An auction of A, B and E block licenses in the Lower 700 MHz band was held in 2008.<sup>122</sup> Twenty winning bidders claimed small business status (those with attributable average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years). Thirty three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years). In 2011, the Commission conducted Auction 92, which offered 16 Lower 700 MHz band licenses that had been made available in Auction 73 but either remained unsold or were licenses on which a winning bidder defaulted. Two of the seven winning bidders in Auction 92 claimed very small business status, winning a total of four licenses.<sup>123</sup>

**31. Upper 700 MHz Band Licenses.** In the *700 MHz Second Report and Order*, the Commission revised its rules regarding Upper 700 MHz band licenses.<sup>124</sup> In 2008, the Commission

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<sup>116</sup> *Id.*

<sup>117</sup> See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

<sup>118</sup> See *id.*

<sup>119</sup> “Auction of Lower 700 MHz Band Licenses Closes, Winning Bidders Announced for Auction No. 60, Down Payments due August 19, 2005, FCC Forms 601 and 602 due August 19, 2005, Final Payment due September 2, 2005, Ten-Day Petition to Deny Period,” *Public Notice*, 20 FCC Rcd 13424 (WTB 2005).

<sup>120</sup> See *Service Rules for the 698-746, 747-762 and 777-792 MHz Band, WT Docket No. 06-150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephone, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, Implementing a Nationwide, Broadband Interoperable Public Safety Network in the 700 MHz Band, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Communications Requirements Through the Year 2010, WT Docket Nos. 96-86, 01-309, 03-264, 06-169, PS Docket No. 06-229, Second Report and Order*, 22 FCC Rcd 15289 (2007) (*700 MHz Second Report and Order*).

<sup>121</sup> *Id.*

<sup>122</sup> See *Auction of 700 MHz Band Licenses Closes, Public Notice*, 23 FCC Rcd 4572 (WTB 2008).

<sup>123</sup> See “Auction of 700 MHz Band Licenses Closes, Winning Bidders Announced for Auction 92, Down Payments and FCC Forms 601 and 602 Due August 11, 2011, Final Payments Due August 25, 2011, Ten-Day Petition to Deny Period,” *Public Notice*, 26 FCC Rcd 10,494 (WTB 2011).

<sup>124</sup> *700 MHz Second Report and Order*, 22 FCC Rcd 15289.

conducted Auction 73 in which C and D block licenses in the Upper 700 MHz band were available.<sup>125</sup> Three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years).

**32. 700 MHz Guard Band Licensees.** In the *700 MHz Guard Band Order*, we adopted a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>126</sup> A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>127</sup> Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>128</sup> An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.<sup>129</sup> Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.<sup>130</sup>

**33. Cellular Radiotelephone Service.** Auction 77 was held to resolve one group of mutually exclusive applications for Cellular Radiotelephone Service licenses for unserved areas in New Mexico.<sup>131</sup> Bidding credits for designated entities were not available in Auction 77.<sup>132</sup> In 2008, the Commission completed the closed auction of one unserved service area in the Cellular Radiotelephone Service, designated as Auction 77. Auction 77 concluded with one provisionally winning bid for the unserved area totaling \$25,002.<sup>133</sup>

**34. Private Land Mobile Radio (“PLMR”).** PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee’s primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we use the broad census category, Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.<sup>134</sup> The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under

<sup>125</sup> See Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 FCC Rcd 4572 (2008).

<sup>126</sup> See *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 99-168, Second Report and Order, 15 FCC Rcd 5299 (2000) (*700 MHz Guard Band Order*).

<sup>127</sup> See *id.* at 5343–45 paras. 106–10.

<sup>128</sup> See *id.*

<sup>129</sup> See “700 MHz Guard Band Auction Closes,” *Public Notice*, 15 FCC Rcd 18026 (2000).

<sup>130</sup> See “700 MHz Guard Band Auction Closes,” *Public Notice*, 16 FCC Rcd 4590 (2001).

<sup>131</sup> See “Closed Auction of Licenses for Cellular Unserved Service Area Scheduled for June 17, 2008, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 77,” *Public Notice*, 23 FCC Rcd 6670 (WTB 2008).

<sup>132</sup> *Id.* at 6685.

<sup>133</sup> See *Auction of Cellular Unserved Service Area License Closes, Winning Bidder Announced for Auction 77, Down Payment due July 2, 2008, Final Payment due July 17, 2008*, *Public Notice*, 23 FCC Rcd 9501 (WTB 2008).

<sup>134</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

this definition. We note that PLMR licensees generally use the licensed facilities in support of other business activities, and therefore, it would also be helpful to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.<sup>135</sup>

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

**36. Rural Radiotelephone Service.** The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.<sup>136</sup> A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (“BETRS”).<sup>137</sup> In the present context, we will use the SBA’s small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.<sup>138</sup> There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

**37. Air-Ground Radiotelephone Service.** The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.<sup>139</sup> We will use SBA’s small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.<sup>140</sup> There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard and may be affected by rules adopted pursuant to the Order.

**38. Aviation and Marine Radio Services.** Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.<sup>141</sup> Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.<sup>142</sup> Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the

<sup>135</sup> See generally 13 C.F.R. § 121.201.

<sup>136</sup> The service is defined in 47 C.F.R. § 22.99.

<sup>137</sup> BETRS is defined in 47 C.F.R. §§ 22.757 and 22.759.

<sup>138</sup> 13 C.F.R. § 121.201, NAICS code 517210.

<sup>139</sup> See 47 C.F.R. § 22.99.

<sup>140</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>141</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>142</sup> U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-\\_skip=700&-ds\\_name=EC0751SSSZ5&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en).

Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a “small” business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$15 million dollars.<sup>143</sup> In addition, a “very small” business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$3 million dollars.<sup>144</sup> There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as “small” businesses under the above special small business size standards and may be affected by rules adopted pursuant to the Order.

**39. Fixed Microwave Services.** Fixed microwave services include common carrier,<sup>145</sup> private operational-fixed,<sup>146</sup> and broadcast auxiliary radio services.<sup>147</sup> At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.<sup>148</sup> The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA’s small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

**40. Offshore Radiotelephone Service.** This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.<sup>149</sup> There are presently approximately 55 licensees in this service. The Commission is unable to estimate at this time the number of licensees that would qualify as small under the SBA’s small business size standard for the category of Wireless Telecommunications Carriers (except Satellite). Under

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<sup>143</sup> See generally *Amendment of the Commission’s Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853, 19884–88 paras. 64–73 (1998).

<sup>144</sup> See *id.*

<sup>145</sup> See 47 C.F.R. §§ 101 *et seq.* (formerly, Part 21 of the Commission’s Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

<sup>146</sup> Persons eligible under parts 80 and 90 of the Commission’s Rules can use Private Operational-Fixed Microwave services. See 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee’s commercial, industrial, or safety operations.

<sup>147</sup> Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission’s Rules. See 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

<sup>148</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>149</sup> This service is governed by Subpart I of Part 22 of the Commission’s Rules. See 47 C.F.R. §§ 22.1001-22.1037.

that SBA small business size standard, a business is small if it has 1,500 or fewer employees.<sup>150</sup> Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.<sup>151</sup> Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus, under this category and the associated small business size standard, the majority of firms can be considered small.

41. **39 GHz Service.** The Commission created a special small business size standard for 39 GHz licenses—an entity that has average gross revenues of \$40 million or less in the three previous calendar years.<sup>152</sup> An additional size standard for “very small business” is: an entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>153</sup> The SBA has approved these small business size standards.<sup>154</sup> The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by rules adopted pursuant to the Order.

42. **Local Multipoint Distribution Service.** Local Multipoint Distribution Service (“LMDS”) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.<sup>155</sup> The auction of the 986 LMDS licenses began and closed in 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>156</sup> An additional small business size standard for “very small business” was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>157</sup> The SBA has approved these small business size standards in the context of LMDS auctions.<sup>158</sup> There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. In 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

43. **218-219 MHz Service.** The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were

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<sup>150</sup> *Id.*

<sup>151</sup> U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-\\_skip=700&-ds\\_name=EC0751SSSZ5&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en).

<sup>152</sup> *See Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, PP Docket No. 93-253, Report and Order, 12 FCC Rcd 18600, 18661–64, paras. 149–151 (1997).

<sup>153</sup> *See id.*

<sup>154</sup> *See* Letter to Kathleen O’Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998).

<sup>155</sup> *See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997) (“*LMDS Second Report and Order*”).

<sup>156</sup> *See LMDS Second Report and Order*, 12 FCC Rcd at 12689-90, para. 348.

<sup>157</sup> *See id.*

<sup>158</sup> *See Alvarez to Phythyon Letter 1998*.

won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.<sup>159</sup> In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we established a small business size standard for a “small business” as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed \$15 million for the preceding three years.<sup>160</sup> A “very small business” is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed \$3 million for the preceding three years.<sup>161</sup> These size standards will be used in future auctions of 218-219 MHz spectrum.

**44. 2.3 GHz Wireless Communications Services.** This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined “small business” for the wireless communications services (“WCS”) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the three preceding years.<sup>162</sup> The SBA has approved these definitions.<sup>163</sup> The Commission auctioned geographic area licenses in the WCS service. In the auction, which was conducted in 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

**45. 1670-1675 MHz Band.** An auction for one license in the 1670-1675 MHz band was conducted in 2003. The Commission defined a “small business” as an entity with attributable average annual gross revenues of not more than \$40 million for the preceding three years and thus would be eligible for a 15 percent discount on its winning bid for the 1670-1675 MHz band license. Further, the Commission defined a “very small business” as an entity with attributable average annual gross revenues of not more than \$15 million for the preceding three years and thus would be eligible to receive a 25 percent discount on its winning bid for the 1670-1675 MHz band license. One license was awarded. The winning bidder was not a small entity.

**46. 3650–3700 MHz band.** In March 2005, the Commission released a *Report and Order and Memorandum Opinion and Order* that provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (*i.e.*, 3650–3700 MHz).<sup>164</sup> As of April 2010, more than 1270 licenses have been granted and more than 7433 sites have been registered. The Commission has not developed a definition of small entities applicable to 3650–3700 MHz band nationwide, non-exclusive licensees. However, we estimate that the majority of these licensees are Internet Access Service Providers (ISPs) and that most of those licensees are small businesses.

**47. 24 GHz – Incumbent Licensees.** This analysis may affect incumbent licensees who were

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<sup>159</sup> See generally *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

<sup>160</sup> See generally *Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999).

<sup>161</sup> See *id.*

<sup>162</sup> *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (WCS)*, GN Docket No. 96-228, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

<sup>163</sup> See Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (Dec. 2, 1998) (*Alvarez Letter 1998*).

<sup>164</sup> The service is defined in section 90.1301 *et seq.* of the Commission’s Rules, 47 C.F.R. § 90.1301 *et seq.*

relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. For this service, the Commission uses the SBA small business size standard for the category “Wireless Telecommunications Carriers (except satellite),” which is 1,500 or fewer employees.<sup>165</sup> To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.<sup>166</sup> Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census’ use of the classifications “firms” does not track the number of “licenses”. The Commission believes that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent<sup>167</sup> and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

48. **24 GHz – Future Licensees.** With respect to new applicants in the 24 GHz band, the size standard for “small business” is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of \$15 million.<sup>168</sup> “Very small business” in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.<sup>169</sup> The SBA has approved these small business size standards.<sup>170</sup> These size standards will apply to a future 24 GHz license auction, if held.

49. **Satellite Telecommunications.** Since 2007, the SBA has recognized satellite firms within this revised category, with a small business size standard of \$15 million.<sup>171</sup> The most current Census Bureau data are from the economic census of 2007, and we will use those figures to gauge the prevalence of small businesses in this category. Those size standards are for the two census categories of “Satellite Telecommunications” and “Other Telecommunications.” Under the “Satellite Telecommunications” category, a business is considered small if it had \$15 million or less in average annual receipts.<sup>172</sup> Under the “Other Telecommunications” category, a business is considered small if it had \$25 million or less in average annual receipts.<sup>173</sup>

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<sup>165</sup> 13 C.F.R. § 121.201, NAICS code 517210.

<sup>166</sup> U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-\\_skip=700&-ds\\_name=EC0751SSSZ5&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en).

<sup>167</sup> Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

<sup>168</sup> See *Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967, para. 77 (2000); see also 47 C.F.R. § 101.538(a)(2).

<sup>169</sup> See *Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, 15 FCC Rcd at 16967, para. 77; see also 47 C.F.R. § 101.538(a)(1).

<sup>170</sup> See Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

<sup>171</sup> See 13 C.F.R. § 121.201, NAICS code 517410.

<sup>172</sup> *Id.*

<sup>173</sup> See 13 C.F.R. § 121.201, NAICS code 517919.

50. The first category of Satellite Telecommunications “comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”<sup>174</sup> For this category, Census Bureau data for 2007 show that there were a total of 512 firms that operated for the entire year.<sup>175</sup> Of this total, 464 firms had annual receipts of under \$10 million, and 18 firms had receipts of \$10 million to \$24,999,999.<sup>176</sup> Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by rules adopted pursuant to the Order.

51. The second category of Other Telecommunications “primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.”<sup>177</sup> For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year.<sup>178</sup> Of this total, 2,346 firms had annual receipts of under \$25 million.<sup>179</sup> Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

**52. Cable and Other Program Distribution.** Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”<sup>180</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>181</sup> According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.<sup>182</sup> Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.<sup>183</sup> Thus, under this size standard, the majority of firms can be considered small and may be affected by rules adopted pursuant to the Order.

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<sup>174</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517410 Satellite Telecommunications”.

<sup>175</sup> See 13 C.F.R. § 121.201, NAICS code 517410.

<sup>176</sup> See *id.* An additional 38 firms had annual receipts of \$25 million or more.

<sup>177</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517919 Other Telecommunications”, <http://www.census.gov/naics/2007/def/ND517919.HTM> (last visited Nov. 6, 2012).

<sup>178</sup> See 13 C.F.R. § 121.201, NAICS code 517919.

<sup>179</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517919” (issued Nov. 2010).

<sup>180</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110> (last visited Nov. 6, 2012).

<sup>181</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>182</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

<sup>183</sup> See *id.*

53. **Cable Companies and Systems.** The Commission has developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.<sup>184</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.<sup>185</sup> In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>186</sup> Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have fewer than 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.<sup>187</sup> Thus, under this second size standard, most cable systems are small and may be affected by rules adopted pursuant to the Order.

54. **Cable System Operators.** The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate less than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>188</sup> The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>189</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.<sup>190</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>191</sup> and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

55. **Open Video Services.** The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.<sup>192</sup> The OVS framework provides opportunities for the distribution of video

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<sup>184</sup> See 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. See *Implementation of Sections of the 1992 Cable Television Consumer Protection and Competition Act: Rate Regulation*, MM Docket Nos. 92-266, 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 para. 28 (1995).

<sup>185</sup> These data are derived from R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006 A-8 & C-2 (2005) (Top 25 Cable/Satellite Operators) (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006 D-1805 to D-1857 (2005) (Ownership of Cable Systems in the United States).

<sup>186</sup> See 47 C.F.R. § 76.901(c).

<sup>187</sup> WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

<sup>188</sup> 47 U.S.C. § 543(m)(2); see also 47 C.F.R. § 76.901(f) & nn.1-3.

<sup>189</sup> 47 C.F.R. § 76.901(f); see *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

<sup>190</sup> These data are derived from R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006 A-8 & C-2 (2005) (Top 25 Cable/Satellite Operators) (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006 D-1805 to D-1857 (2005) (Ownership of Cable Systems in the United States).

<sup>191</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules.

<sup>192</sup> 47 U.S.C. § 571(a)(3)-(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 606, para. 135 (2009) ("*Thirteenth Annual Cable Competition Report*").

programming other than through cable systems. Because OVS operators provide subscription services,<sup>193</sup> OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”<sup>194</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.<sup>195</sup> Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.<sup>196</sup> Thus, under this second size standard, most cable systems are small and may be affected by rules adopted pursuant to the Order. In addition, we note that the Commission has certified some OVS operators, with some now providing service.<sup>197</sup> Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.<sup>198</sup> The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

**56. Internet Service Providers.** Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”<sup>199</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>200</sup> According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.<sup>201</sup> Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.<sup>202</sup> Thus, under this size standard, the majority of firms can be considered small. In addition, according to Census Bureau data for 2007, there were a total of 396 firms in the category Internet Service Providers (broadband) that operated for the entire year.<sup>203</sup> Of this total, 394 firms had employment of 999 or fewer employees, and two firms had employment of 1000

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<sup>193</sup> See 47 U.S.C. § 573.

<sup>194</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110> (last visited Nov. 6, 2012).

<sup>195</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

<sup>196</sup> See *id.*

<sup>197</sup> A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/esovscer.html> (last visited Nov. 6, 2012).

<sup>198</sup> See *Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07, para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

<sup>199</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110> (last visited Nov. 6, 2012).

<sup>200</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>201</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110” (issued Nov. 2010).

<sup>202</sup> See *id.*

<sup>203</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171103 (issued Nov. 2010).

employees or more.<sup>204</sup> Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the Order.

**57. Internet Publishing and Broadcasting and Web Search Portals.** Our action may pertain to interconnected VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The Commission has not adopted a size standard for entities that create or provide these types of services or applications. However, the Census Bureau has identified firms that “primarily engaged in 1) publishing and/or broadcasting content on the Internet exclusively or 2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals).”<sup>205</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 500 or fewer employees.<sup>206</sup> According to Census Bureau data for 2007, there were 2,705 firms in this category that operated for the entire year.<sup>207</sup> Of this total, 2,682 firms had employment of 499 or fewer employees, and 23 firms had employment of 500 employees or more.<sup>208</sup> Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the Order.

**58. Data Processing, Hosting, and Related Services.** Entities in this category “primarily ... provid[e] infrastructure for hosting or data processing services.”<sup>209</sup> The SBA has developed a small business size standard for this category; that size standard is \$25 million or less in average annual receipts.<sup>210</sup> According to Census Bureau data for 2007, there were 8,060 firms in this category that operated for the entire year.<sup>211</sup> Of these, 7,744 had annual receipts of under \$24,999,999.<sup>212</sup> Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the Order. .

**59. All Other Information Services.** The Census Bureau defines this industry as including “establishments primarily engaged in providing other information services (except news syndicates, libraries, archives, Internet publishing and broadcasting, and Web search portals).”<sup>213</sup> Our action pertains to interconnected VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The SBA has developed a small business size standard for this category; that size standard is

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<sup>204</sup> *See id.*

<sup>205</sup> U.S. Census Bureau, “2007 NAICS Definitions: 519130 Internet Publishing and Broadcasting and Web Search Portals,” <http://www.naics.com/censusfiles/ND519130.HTM> (last visited Nov. 6, 2012).

<sup>206</sup> *See* 13 C.F.R. § 121.201, NAICS code 519130.

<sup>207</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 519130” (issued Nov. 2010).

<sup>208</sup> *Id.*

<sup>209</sup> U.S. Census Bureau, “2007 NAICS Definitions: 518210 Data Processing, Hosting, and Related Services”, <http://www.census.gov/naics/2007/def/NDEF518.HTM> (last visited Nov. 6, 2012).

<sup>210</sup> *See* 13 C.F.R. § 121.201, NAICS code 518210.

<sup>211</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 4, “Establishment and Firm Size: Receipts Size of Firms for the United States: 2007 NAICS Code 518210” (issued Nov. 2010).

<sup>212</sup> *Id.*

<sup>213</sup> U.S. Census Bureau, “2007 NAICS Definitions: 519190 All Other Information Services”, <http://www.census.gov/naics/2007/def/ND519190.HTM> (last visited Nov. 6, 2012).

\$7.0 million or less in average annual receipts.<sup>214</sup> According to Census Bureau data for 2007, there were 367 firms in this category that operated for the entire year.<sup>215</sup> Of these, 334 had annual receipts of under \$5.0 million, and an additional 11 firms had receipts of between \$5 million and \$9,999,999.

Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

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

60. The analysis addressed in this Initial Regulatory Flexibility Analysis will be performed on data collected as described in the Report and Order section of this document. There are no reporting requirements associated with the proposals in this Further Notice of Proposed Rulemaking. A Final Regulatory Flexibility Analysis of that data collection is addressed in Appendix B.

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

61. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives, among others: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>216</sup>

62. The proposals in this Further Notice of Proposed Rulemaking address the analysis of data. It does not address the collection of that data. The data collection is addressed in the Report and Order and the Final Regulatory Flexibility Analysis at Appendix B. Therefore, there are no reporting requirements considered in this Further Notice of Proposed Rulemaking and no burdens imposed on small entities.

63. Section IV.B of the Further Notice of Proposed Rulemaking seek comment on possible changes to the Commission's pricing flexibility rules after it conducts the one-time, multi-faceted market analysis discussed in Section IV.A of the Further Notice of Proposed Rulemaking. Section IV.C seeks comment on the reasonableness of terms and conditions offered by incumbent LECs in the special access market. As SBA observed, changes in special access prices may have an impact on small carriers, including small competitive carriers.<sup>217</sup> Once the data described in the Report and Order is collected and analyzed, we may modify the existing pricing flexibility rules or adopt a new set of rules that will apply to requests for special access pricing flexibility, and/or adopt remedies when we identify areas where market power exists, and determine whether a particular term or condition is unreasonable in a given area or that anticompetitive tying between competitive and non-competitive areas is occurring. Any such actions will accrue to the benefit of all carriers, including small competitive carriers, as it they will ensure the availability of special access services at just and reasonable rates.

**F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules**

64. None.

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<sup>214</sup> See 13 C.F.R. § 121.201, NAICS code 519190.

<sup>215</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 4, "Establishment and Firm Size: Receipts Size of Firms for the United States: 2007 NAICS Code 519190" (issued Nov. 2010).

<sup>216</sup> 5 U.S.C. § 603.

<sup>217</sup> SBA 2005 NPRM IRFA Reply at 1, 3-4.

**STATEMENT OF  
CHAIRMAN JULIUS GENACHOWSKI**

Re: *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593

Competition is the lifeblood of our free market economy, driving private investment, innovation, and benefits to consumers. Today the Commission acts to promote competition in communications services by taking the next important step in the process of modernizing policies for access to dedicated business communications lines, known as “special access.” We issue a comprehensive data collection to assess today’s market, and lay the foundation for acting on this data expeditiously once it comes in, quickly removing regulation where it is no longer needed, and efficiently addressing anticompetitive practices where our analysis shows that targeted intervention is needed to ensure a robust competitive market.

Special access services – services that provide dedicated, high-quality data connections – are a vital input to our broadband economy. Mobile providers use these connections to link cell towers to wireline backbone networks. Banks, credit card companies, technology companies, insurance providers, and other large enterprises all use special access links to communicate among their branch offices. Small businesses rely on these services for Internet access and have made clear that promoting competition in the market for special access is essential to helping them grow and create new jobs. And our nation’s schools, libraries, and government institutions use special access connections every day to provide services to their constituents. Altogether, these services constitute a \$12-\$18 billion market annually.

As one group of businesses, including representatives from the financial services, automotive, manufacturing, insurance, aerospace, package delivery, information technology, and transportation industries, has told us, “special access services [are] the building blocks of their corporate networks.”

Yet, as we recognized this summer, the rules that have governed these services – rules that were adopted in good faith over a decade ago, but were based on the predictive judgment of the agency at the time – have not been working as intended and fail to reflect today’s market realities. Confirming the virtual unanimity among industry on this point, our staff conducted a thorough and careful analysis of the last decade of history and two voluntary data collections and found that our rules measure competition poorly. Based on this analysis, we temporarily suspended new grants of pricing flexibility under the current rules and launched a process to update the rules based on today’s market.

Today, we take the next step in that process, launching a detailed data collection to get a comprehensive nationwide picture of the competitive landscape for special access services, and I’m pleased that we’re able to move ahead unanimously. The core of today’s Order, a carefully crafted nationwide collection of facilities, pricing, and demand information, will give us an exceptionally robust data set to analyze the market for special access services.

The data collection will also allow us to test the question of whether “best efforts” services are significant participants in this market. Although this issue was raised quite late, I believe we’ve found a way to address it that provides us high quality data without dramatically increasing the burden on respondents, as some other proposed approaches could have done. I thank my colleagues of both parties for their work on this solution.

In addition, while providing appropriate Commission-level guidance about the categories of data

to be collected, today's Order preserves the critical flexibility for the Wireline Bureau to bring this process to an efficient conclusion. Specifically, we provide an initial version of the specific data collection with today's Order, while delegating to our expert staff the authority to adjust it as needed. And we ensure that if a part of the collection doesn't receive OMB approval, the remainder can go ahead. This approach ensures we can finish our work without unnecessary delay.

To the same end, today's Further Notice of Proposed Rulemaking initiates an open process to gather input on the comprehensive market analysis we'll undertake once the data come in, and the rules we should adopt based on that analysis. Here too, we are largely unanimous.

Two of my colleagues dissent, however, from a part of this notice and ask that it be delayed to a greater or lesser degree. I disagree. Just a few months ago, Commissioner McDowell lamented that the Commission "measure[s] the frequency of its actions on special access matters in geologic time" and asked that the Commission "act with alacrity" in this proceeding. And Commissioner Pai said, "We should bring this decade-old proceeding to a close soon so that special-access providers and purchasers will have the regulatory certainty they need to carry out their businesses and invest in high-capacity infrastructure."

They're right. Which is why waiting months to issue the full NPRM is the wrong approach. It would be a decision for delay, not alacrity, and it is completely unnecessary. The options before us are clearly defined and well known. We will run an open and data driven process over the coming months; parties will have ample opportunity to debate the specifics; we have not prejudged adoption of any rules, and final decisions will be made on the record that is developed. On behalf of the thousands of businesses and tens of millions of consumers whose access to broadband is affected by competition in special access, we should minimize the procedural steps, and not delay getting the process fully underway.

Finally, a particular thank you to the fantastic team in the Wireline Competition Bureau for their work on this item. Crafting this data collection was an exceptionally complicated task even by the standard of Commission work, requiring detailed economic and market analysis over many months, and an intense attention to detail. You have laid a strong and careful foundation for our action on this vital issue.

**STATEMENT OF  
COMMISSIONER ROBERT M. McDOWELL  
APPROVING IN PART AND DISSENTING IN PART**

Re: *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593

During my career in the private sector and my six and a half years at the Commission, I have spent an immeasurable amount of time working on the complex public policy questions surrounding “special access” services and facilities. I have reviewed competing, and often conflicting arguments, hypotheses and scenarios. To analyze this issue, in pursuit of a final resolution to the byzantine questions raised, the Commission conducted several data collections on a voluntary basis, but the collections only focused on a limited number of markets. Although those exercises were instructive, they did not produce an adequate record for this proceeding. Having to rely on a persistent lack of relevant information is why I have consistently called upon the FCC to seek detailed and up-to-date special access market data on a nationwide basis. Any potential changes to the special access rules must be transparent and legally-sustainable.<sup>218</sup> Accordingly, I am encouraged that the Commission is now taking the necessary step of conducting this comprehensive data collection, on a mandatory and largely nationwide<sup>219</sup> basis. This is a necessary step prior to the Commission attempting to approve any additional changes to the special access rules.<sup>220</sup> Also, I am pleased that this order seeks data that will specifically shine a light on market participants’ future plans to offer special access services.

Furthermore, I am encouraged that my colleagues have agreed to collect and analyze data regarding “best efforts” business broadband Internet access service. A thorough examination of “best efforts” services is a crucial part of the analysis. Technology has changed considerably since 1999 when the special access rules were adopted by the FCC. Today, many enterprise customers may not perceive the functional difference between services that have been traditionally defined as special access services and high speed Internet access services that are offered on a best efforts basis. I would have preferred that this critical information be gathered at the same granular level as the other data covered in this order. Nevertheless, the inclusion of this information, even at a less granular level, is probative. The Commission’s analysis should rely on a complete picture of all substitutable products and services as seen through the eyes of affected consumers.

Additionally, I support seeking comment regarding the analytical framework to be used upon receiving this data. The FCC’s analysis of the data received in response to this massive data request is

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<sup>218</sup> While such a comprehensive data collection may seem daunting, the Department of Justice was able to gather such valuable information during its review of the SBC/AT&T and Verizon/MCI mergers in the last decade.

<sup>219</sup> While I am pleased that most of the data will be collected on a nationwide basis for most aspects of this order, I would have preferred that the data regarding the historical evolution of competitive provider networks also be collected on a nationwide basis. If the Commission decides to change course from the reasoned deregulatory path paved under the leadership of then-FCC Chairman Bill Kennard, it should only do so with a full record of all of the competitive choices available to consumers.

<sup>220</sup> I note that any historical reference to the Commission’s decision to suspend the pricing flexibility rules this past August should not be construed as my endorsement of such decision. I dissented from that order because that decision was made without a complete record or adequate analysis. It is my hope that this mandatory data collection will lead to a full and complete record of which any future changes to the regulatory framework will be legally sustainable.

equally important to the comprehensive nature of this collection.

I dissent, however, from the sections<sup>221</sup> of the further notice that seek additional comment on proposed rules. Among other defects, finalizing a further notice before the record is filled with new evidence is premature. Instead, the Commission should collect the data, analyze it and *then* issue a further notice. I am concerned about the precedential value of this backwards arrangement. It has all the markings of an outcome-based proceeding.

I thank the Chairman for his leadership and patience throughout this process. I also thank each of my colleagues for accommodating many of my priorities. Additionally, I acknowledge the critical part the dedicated expert staff members have played in this process. They have toiled on these issues for many years and will continue to be vital to this process. As we move to the next step, I look forward to working with all of my colleagues and the legions of stakeholders to ensure that we leave no stone unturned in this process so that we have the necessary evidence to make a sound decision.

For all of the reasons set forth above, I respectfully approve, in part, and dissent, in part.

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<sup>221</sup> Sections IV B and IV C.

**STATEMENT OF  
COMMISSIONER MIGNON L. CLYBURN**

Re: *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593

Today's Order and FNPRM are important next steps for analyzing the state of the marketplace for special access services. Based on the record to date, here is what we know so far from the record, including a voluntary data submission for a limited number of geographic markets: (1) the pricing flexibility rules we froze this summer were not good indicators for predicting where competition would materialize, thus we were unable to ensure that the rates would remain just and reasonable once they are deregulated; (2) we lack the data to properly assess when flexibility should be granted in the future and when we should reassert regulation where flexibility was granted prematurely; and (3) serious questions have been raised regarding whether the terms and conditions for special access services are harming the development of competitive alternatives.

This Commission has worked diligently to be data-driven under Chairman Genachowski, and such is the case with this proceeding. While this particular action has been under consideration for a number of months, I believe the finished product properly reflects the types of data each Commissioner believes is necessary to complete the agency's review of the special access services marketplace. There should be no doubt that this collection of data is sufficient for us to proceed to final analysis and conclusions. Industry and the consumers impacted have waited long enough. The agency has carefully balanced the request for information with the burden on industry to submit that data, and where possible, we are relying upon information the Commission already possesses.

The proposed analysis in the Further Notice observes the value of the antitrust agencies' horizontal merger guidelines, as well as our recent precedent using those guidelines and relying upon a market power analysis, that was upheld by the U.S. Court of Appeals for the 10th Circuit. I believe it is important that we fully consider and follow those guidelines, as we perform our analysis of the data we obtain in this Order. The proposal in the Further Notice is consistent with this. By obtaining the data we seek today, and performing the proposed regression analyses with such data, we will be able to observe what factors in the marketplace impact prices, terms, and conditions, entry and exit in the marketplace, as well as what services users of special access view as substitutes, among other issues. I believe these factors will be useful in our analysis of the special access marketplace, and I look forward to reviewing the comments in the Further Notice concerning our proposed analytical approach in this proceeding.

**STATEMENT OF  
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Special Access for Price Cap Local Exchange Carriers, WC Docket No. 05-25; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593*

I am pleased that today we begin the long-overdue process of collecting the data we need to reform our special access rules.

As I said in August when I supported suspending our pricing flexibility triggers, our special access rules would benefit from a fresh look. Large and small businesses and institutions rely on these high-capacity dedicated services to meet their voice and communications needs. But the pricing flexibility triggers we had in place for more than a decade were a poor proxy for competitive conditions in a geographic market. In some circumstances they were overinclusive, while in others they were underinclusive. This led a wide variety of interests, including the Small Business Administration, the Government Accountability Office, the American Petroleum Institute, and wireline and wireless carriers to call for reform of our special access rules.

Through the data collection and rulemaking we initiate today, it is my hope that we can lay the foundation for a new system that promotes competition, investment, and deployment of high-capacity services across the country.

**STATEMENT OF  
COMMISSIONER AJIT PAI  
APPROVING IN PART AND DISSENTING IN PART**

Re: *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593

The marketplace for enterprise data services—high-capacity data services targeted at businesses small and large—is vast and varied. Coffee shops and barbershops that accept credit cards, office parks, schools, retail outlets, high-rise buildings, online businesses, and factories are all likely to have some high-capacity data connection. Today, these enterprise customers have more options than ever before to meet their needs. Traditional time-division-multiplexing-based dedicated services (DS1s and DS3s) are one option. For a higher-capacity dedicated service, they can try Frame Relay service, Asynchronous Transfer Mode service, Multi-Protocol Label Switching service, or Ethernet service. A gas station in the middle of the desert can connect using a satellite-based solution. Companies willing to trade off dedicated service for lower costs and higher capacity can obtain broadband Internet access services (usually marketed as “business class” variants on residential service). Companies that need the security of a private line on that Internet access service can consider software-based virtual private networking solutions that rely on encryption rather than physically separated signals to provide security and privacy. Those seeking to do business on the go can rely on over-the-top providers like Square to turn a tablet or smartphone into a portable credit card reader.

It is not surprising that the majority of enterprise data services are left untouched by federal regulation. After all, incumbent local exchange carriers (LECs), competitive LECs, cable operators, and wireless providers—terrestrial or satellite-based, fixed or mobile—are all competing for a limited number of business opportunities. Many of these providers have deployed fiber, the gold standard, to particular enterprise customers and to downtown office districts, providing competitive alternatives to older infrastructure. And competitive alternatives abound even where there is no fiber: Ethernet over copper is now viable,<sup>1</sup> and dedicated services may be delivered over networks where coaxial cable is the last leg.<sup>2</sup> Indeed, we recognized earlier this year that “cable operators have expansive—and in some areas, ubiquitous—network facilities that can be upgraded to compete in telecommunications services markets at relatively low incremental cost.”<sup>3</sup>

What is surprising is that the Commission continues to regulate one small corner of this market: the traditional special access services offered by incumbent LECs. And this is not light-touch regulation, but an invasive structuring of the marketplace. Incumbent LECs must offer traditional special access services throughout their study areas at the same prices. They must construct new copper facilities upon demand by an enterprise customer or a competitor. In many areas, the rates they may charge for such

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<sup>1</sup> See, e.g., Letter from Jeff Reedy, Co-founder and Chief Strategy Officer, Overture Networks, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137, RM-11358 (filed Dec. 7, 2012); Letter from Tamar E. Finn, Counsel for MegaPath Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-188, Attach. at 5 (filed Aug. 15, 2012).

<sup>2</sup> See Letter from Glenn T. Reynolds, USTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (filed Dec. 3, 2012).

<sup>3</sup> *Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators; Conditional Petition for Forbearance from Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators*, WC Docket No. 11-118, Order, 27 FCC Rcd 11532, 11545, para. 28 (2012) (footnote omitted).

services are set by regulation, and they may not offer term or volume discounts to attract or retain customers. In other areas, incumbent LECs have more flexibility. But they must still tariff their contracts, offering the terms of each deal to all comers; individually negotiated arrangements between an incumbent and an enterprise customer are not even a possibility. And all this is just one part of the relevant regulations: Among other rules, incumbents must also offer their facilities up for competitor use on an unbundled basis.

It is against this background that I join today's order adopting a data collection on special access services and their economic substitutes and proposing a one-time, multi-faceted market analysis. The negotiations that led to this item were long and hard, and I thank Chairman Genachowski for his willingness to work with Commissioner McDowell and me to find common ground. Although the Chairman certainly could have moved forward with his original proposal on a party-line vote, he instead was willing to make substantial changes in order to secure unanimous support for this data collection. This may not have been the easy decision, but it was the right one. The collaboration among our offices produced a much better item.

The data collection incorporates many of my suggestions to ensure that we capture a fuller picture of the market for enterprise data services. For example, the data collection recognizes that we must incorporate not just existing competition but also potential competition into our analysis. It thus seeks information about facilities capable of providing dedicated service<sup>4</sup> as well as competitive offerings regardless of the facilities used.<sup>5</sup> The data collection recognizes that dedicated services are only one portion of the enterprise data services market. It thus seeks information about "best efforts" business broadband Internet access services, an increasingly important alternative for small- and medium-sized businesses.<sup>6</sup> And the data collection recognizes the need to ensure that all dedicated services are included. It thus specifically includes special access services offered via state-level contracts or tariffs within its scope.<sup>7</sup> Although we will not capture every enterprise data service in this collection (for example, best-efforts services offering point-to-point connection are excluded), I hope that the data we collect will be sufficient to analyze the marketplace fully and complete this proceeding.

I am also pleased that today's order rejects the call to conduct a simple market share analysis<sup>8</sup> and goes beyond even the traditional market-power analysis used to determine whether a carrier is dominant in a market.<sup>9</sup> Instead, we propose a one-time, multi-faceted market analysis that will take into account actual and potential competition, the effect of regulation on investment as well as prices, and the substitution by enterprise customers of one service for another.<sup>10</sup> This analysis, in line with the antitrust principle that regulation should focus on anticompetitive conduct, not mere dominance, should inform us of the "efficacy of various forms of regulations, including their effects on both prices and investment"<sup>11</sup> as well as the "steps the Commission could take to remove such barriers to promote a robust competitive

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<sup>4</sup> See *supra* note 38.

<sup>5</sup> See *supra* para. 42.

<sup>6</sup> See *supra* para. 18.

<sup>7</sup> See *supra* para. 19.

<sup>8</sup> See *supra* para. 67.

<sup>9</sup> See *supra* note 162.

<sup>10</sup> See *supra* para. 67.

<sup>11</sup> See *supra* note 162.

market and permit the competitive determination of price levels.”<sup>12</sup>

The essence of compromise is that you don’t always get everything you want. This compromise is no different. My primary concern with the data collection is the substantial burden it is likely to place on industry at a time when everyone is looking for ways to cut costs. For example, I believe that a nationwide data collection—seeking information about every cell tower, office building, factory, farm, and other enterprise facility in the country—is substantially overbroad at this time. I would have preferred that we follow the approach taken in the voluntary data requests: Start with a sample of markets granted different levels of pricing flexibility. The chief flaw of the voluntary data requests, after all, was not their limited geographic scope; the flaw was that they were purely voluntary.

Similarly, I wish the data collection took more steps to protect the confidentiality of respondents and reduce the burden of compliance. For example, I had proposed a staged approach to collecting data—collecting the most public data first (such as requests for proposal, which are by their nature shared with third parties), reviewing it, and then moving on to collect more data only if necessary—and adopting a particularly stringent protective order. And I had proposed putting the burden of geocoding street addresses on the Commission rather than private industry. Each of these proposals survives in some form in today’s order. For instance, my colleagues accepted a staged approach with strict limitations on bureau authority before any company is required to turn over documents and internal emails<sup>13</sup> and the Wireline Competition Bureau agreed “to facilitate whenever possible the conversion of street addresses to geocoded coordinates for small providers and purchasers.”<sup>14</sup> But we should have done more.

Finally, I dissent from the portion of today’s order that purports to propose rules to amend our special access regulations.<sup>15</sup> Although it makes sense to seek comment on the one-time, multi-faceted market analysis we propose to use to analyze the data we collect, I hardly see the sense in proposing rules when we have not even collected the data yet, let alone reviewed it. The sensible course would be to collect the data, review it to ensure that we have what we need, and then propose new, specific rules that the public can comment on with full access to the data. Instead, we seek comment without any concrete proposals and set a deadline for such comment without any regard to how long the data collection (which still requires approval from the Office of Management and Budget) actually takes. Additionally, the further notice discards the notion that the data we collect (including data on terms and conditions) is relevant to our rules (*i.e.*, rules about terms and conditions) by setting a comment deadline *before* the data is even collected. The only plausible reason for putting this cart before the horse is a desire to regulate—to decide even before the data is in that we need more regulation of the copper-based services of yesteryear. I hope that I am wrong, that we will review the data with fresh eyes, and that we will refocus our rules on incentivizing deployment of the next-generation infrastructure that will lead us to an all-Internet Protocol future.

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<sup>12</sup> See *supra* para. 67.

<sup>13</sup> See *supra* para. 43.

<sup>14</sup> See *supra* para. 53.

<sup>15</sup> See *supra* sections IV.B, IV.C.