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

In the Matter of	)	
	)	
1998 Biennial Regulatory Review --	)	
Elimination of Part 41 Telegraph	)	CC Docket No. 98-119
and Telephone Franks	)	
	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: July 8, 1998 **Released:** July 21, 1998

Comments due: August 31, 1998
Reply Comments due: September 10, 1998

By the Commission: Commissioner Furchtgott-Roth issuing a separate statement.

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (Notice), we propose to eliminate, *in toto*, Part 41 (Telegraph and Telephone Franks) of the Commission's rules.[1] Part 41 governs the issuance of franks for interstate and foreign telegraph and telephone service by communications common carriers.[2] Part 41 also governs the issuance of "reports of positions of ships at sea furnished to newspapers of general circulation without charge, or at nominal charges, as authorized in section

[1] 47 C.F.R. §§ 41.1 *et seq.*

[2] *See* 47 C.F.R. § 41.11. Part 41 was adopted pursuant to section 210(a) of the Communications Act of 1934, as amended. 47 U.S.C. § 210(a). In pertinent part, section 210(a) provides:

> Nothing in this Act or in any other provision of law shall be construed to prohibit common carriers from issuing or giving franks to, exchanging franks with each other for the use of, their officers, agents, employees, and their families, or subject to such rules as the Commission may prescribe, from issuing, giving, or exchanging franks and passes to or with other common carriers not subject to the provisions of this Act, for the use of their officers, agents, employees, and their families.

Id. We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

201(b) of the Act."[3] Part 41 requires carriers, *inter alia*, to retain records of these activities.[4]

1. We undertake this examination of Part 41 of our rules pursuant to our 1998 biennial review of regulations as required by Section 11 of the Communications Act, as amended.[5] Section 11 requires us to review all of our regulations applicable to providers of telecommunications services and to determine whether any rule is no longer in the public interest as the result of meaningful economic competition between providers of telecommunications service. We seek, consistent with the Telecommunications Act of 1996,[6] to strike a reasonable balance between our goal of reducing and eliminating regulatory requirements as competition supplants the need for such requirements, and our recognition that, until full competition is realized, certain safeguards may still be necessary. In this case, we tentatively conclude that the development of competition among interstate and international telecommunications service providers renders Part 41 unnecessary and we propose to eliminate it.[7]

II. BACKGROUND

2. Part 41 of the Commission's rules[8] governs the provision of franks and certain reports by communications common carriers pursuant to sections 210(a)[9] and 201(b)[10] of the Act. Franks enable authorized persons to send "interstate or foreign telephone or telegraph" messages,

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[3] 47 C.F.R. § 41.31(c); 47 U.S.C. § 201(b).

[4] *See, e.g.*, 47 C.F.R. § 41.31.

[5] 47 U.S.C. § 161. *See also 1998 Biennial Review of FCC Regulations Begun Early*, FCC News Release (rel. Nov. 18, 1997); *FCC Staff Proposes 31 Proceedings as Part of 1998 Biennial Regulatory Review*, Report No. GN 98-1 (rel. Feb. 5, 1998).

[6] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.* *See* Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996) (Joint Explanatory Statement) (The 1996 Act was enacted "to promote competition and reduce regulation to secure lower prices and higher quality services for American telecommunications consumers . . . .").

[7] We note that SBC likewise has recommended elimination of the rules regarding telephone and telegraph franks. *See* Petition for Section 11 Biennial Review, filed by SBC Communications, Inc. *et al*., at 17 (May 8, 1998).

[8] 47 C.F.R. § 41.1 *et seq*.

[9] 47 U.S.C. § 210(a). We note that section 210(a) was part of the original Communications Act of 1934, as enacted. In 1940, subsection (b) was added to section 210 to permit communications common carriers to contribute free service to the national defense. 54 Stat. 570 (June 25, 1940). Regulations implementing section 210(b) were adopted and codified in Parts 1 and 2 of the Commission's rules. 47 C.F.R. §§ 1.814, 2.406. This rulemaking proceeding does not address or concern these regulations.

[10] 47 U.S.C. § 201(b) (concerning "reports of positions of ships at sea to newspapers of general circulation . . ." furnished by common carriers "either at a nominal charge or without charge"*)*.

free of charge or at reduced rates, over communications facilities.[11] Section 210 of the Act authorizes communications common carriers to issue franks and passes to other common carriers, including other communications common carriers, for the benefit of the officers, agents, and employees of the common carrier that receives the franks, and their families.[12] As such, section 210(a) authorizes a *per se* class of lawful preferences that otherwise might be prohibited as unlawful pursuant to the terms of section 202(a).[13]

3. Section 210(a) was adopted as part of the original Communications Act.[14] As such, its origin was the Interstate Commerce Act of 1887, as amended.[15] By its own terms, section 210(a) states that the Commission may regulate the issuance of franks by common carriers subject to the Communications Act (referred to here as "communications common carriers")[16] to common carriers not subject to the Communications Act.[17] In contrast, section 210(a) does not specifically grant the Commission the authority to regulate the issuance of franks from communications common carriers to other communications common carriers or to themselves.[18]

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[11] *See* 47 C.F.R. § 41.11.

[12] 47 U.S.C. § 210(a).

[13] 47 U.S.C. § 202(a). Section 202(a) states that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service . . . or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality . . . ." *See also Rules Governing the Issuance of Telegraph Franks*, Opinion and Rules, 1 FCC 291 (adopted Feb. 13, 1935) (*1935 Telegraph Franks Order*).

[14] Communications Act of 1934, 48 Stat. 1073.

[15] 49 U.S.C. §§ 10101 *et seq.*, 10722. In an explanatory statement entered in the Congressional Record, Representative Sam Rayburn indicated that section 210(a) is "based upon section 1(7) of the Interstate Commerce Act." 78 Cong. Rec. 10313-10314. Rayburn further explained that the provision "carries over existing law permitting communications companies to exchange franks for messages and to exchange such franks with railroads for passes." *Id*.

[16] We note that section 3(11) of the Act defines "common carrier" to include "any person engaged . . . in . . . communication by wire *or radio* . . . ." 47 U.S.C. § 3(11) (emphasis added). Thus, it is our belief that common carriers providing wireless telecommunications services are authorized to issue franks pursuant to section 210, and, accordingly, we include a discussion of wireless carriers here. *See also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, FCC 94-31, GN Docket No. 93-252, 9 FCC Rcd 1411, ¶¶ 135-154 (rel. Mar. 7, 1994) (*CMRS Second Report and Order*) (declining to forbear from applying section 210 to wireless carriers).

[17] 47 U.S.C. § 210(a); *see 1935 Telegraph Franks Order*, 1 FCC 291, 294 ("[T]he permission to issue franks to the officers, agents, employees of other common carriers *not* subject to the Communications Act, and to their families, is specifically made subject to such rules as the Commission may prescribe.") (emphasis added).

[18] *1935 Telegraph Franks Order*, 1 FCC 291, 294 ("The privilege of issuing franks for the use of officers, agents, and employees of communication carriers subject to the Act, and their families, is not, in terms, subjected to any regulation by the Commission.").

In accordance with section 210(a), the Commission adopted rules, codified in Part 41 of the Code of Federal Regulations, that govern the issuance of franks to common carriers *not* subject to the Communications Act, such as railroads.[19] The rules were adopted and modified in a series of orders from the late 1930's and have been subject to only minor modifications since that time.[20] Pursuant to these rules the Commission has capped the value of individual franks at $50 per year and imposed certain recordkeeping requirements on carriers issuing franks.[21]

4. Section 41.31(c) of the Commission's rules implements section 201(b) of the Act allowing, but not requiring, common carriers to furnish reports of the positions of ships at sea to newspapers of general circulation.[22] Section 201(b) provides that "nothing in this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports."[23]

III. DISCUSSION

5. As noted above, section 11 directs the Commission to determine whether any regulation applicable to providers of telecommunications services "is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."[24] We seek comment as to whether our regulation of telephone and telegraph franking privileges and certain reports pursuant to Part 41 of the rules continues to be in the public interest. For the reasons set out in the following paragraphs of this NPRM, we tentatively conclude that it does not, and we seek comment on our analysis and tentative conclusion that we

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[19] 47 C.F.R. §§ 41.1 *et seq.*

[20] *See, e.g., 1935 Telegraph Franks Order*, 1 FCC 291; *Rules Governing Communications Services by Telegraph and Telephone Companies Rendered Free or at Less Than Established Charges*, 4 Fed. Reg. 3383-3384 (published July 20, 1939) (rules adopted July 12, 1939) (*1939 Franking Order*); *Amendment of Part 41 (Telegraph and Telephone Franks) of the Commission's Rules and Regulations*, Order, FCC 54-1192, 42 FCC Rcd 103, 19 Fed. Reg. 6266 (rel. Sept. 23, 1954) (eliminating the requirement in section 41.43 that carriers maintain records of personal telephone calls of officers, agents or employees and, instead, requiring carriers to be prepared to make studies which show such calls); *Free Communication Services to Official Participants in the IX Plenary Assembly of the International Radio Consultative Committee*, Order, FCC 54-281, 24 Fed. Reg. 2738 (published Apr. 9, 1959) (adopted Apr. 3, 1959) (providing for free service to participants in a communications conference, in accordance with Public Law 86-8); *Organization and Revision of Chapter*, Order, 28 Fed. Reg. 13002 (published Dec. 5, 1963) (revising Part 41, among other Parts, to make certain editorial changes).

[21] *See, e.g.*, 47 C.F.R. §§ 41.21, 41.31.

[22] 47 C.F.R. § 41.31(c); 47 U.S.C. § 201(b).

[23] 47 U.S.C. § 201(b).

[24] 47 U.S.C. § 161.

should eliminate Part 41 in its entirety.

6. Section 41.11 states that "franks valid for interstate and foreign telegraph or telephone service may be issued or used and free service may be rendered only in accordance with . . ." the provisions of Part 41.[25] Section 41.13 nevertheless goes on to exempt certain carriers, services, and persons from much of this regulation.[26] These exemptions reflect the limitations imposed on Commission regulation of common carrier-issued franks and passes by the terms of section 210 of the Act.[27] Thus, for example, section 210(a) does not, on its face, authorize the Commission to regulate the issuance of franks by communications common carriers regulated under the Communications Act to their own officers, agents, employees, and their families or to other communications common carriers.[28] Accordingly, section 41.13(c) of the rules generally exempts "free or concession service now or hereafter granted to officers, agents, or employees of common carriers subject to the Act, and to their families."[29]

7. Other sections of Part 41 impose specific limitations or requirements on carriers issuing franks to other carriers not regulated by the Act, and on persons receiving such franks.[30] Thus, sections 41.21 and 41.22, respectively, set a specific monetary limit or cap of $50 on the value of franks that can be issued to or used by any one person in a given year and prescribe particular requirements for issued franks.[31] Section 41.31, *inter alia*, requires common carriers issuing lawful franks to maintain records of issued franks. These records must be maintained in connection with franks regulated pursuant to Part 41 (section 41.31(a))[32] and other franks which

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[25] 47 C.F.R. § 41.11. *See also 1935 Telegraph Franks Order*, 1 FCC 294. Section 41.32 makes void all outstanding franks which do not conform to the rules in Part 41, as of a specified date. 47 C.F.R. § 41.32.

[26] 47 C.F.R. § 41.13. Section 41.13(a) exempts "services rendered pursuant to lawful contracts for exchange of services under section 201(b) of the Act . . . , any free services rendered by a cable company pursuant to its landing license, or any service rendered pursuant to any rule or order issued under the authority transferred by section 601 of the Act." Section 41.13(b) exempts "[e]xcept as provided in [Part 41], services rendered in connection with situations involving the safety of life and property . . . ." Section 41.13(c) exempts "free or concession service now or hereafter granted to officers, agents, or employees of common carriers subject to the Act, and to their families." Section 41.13(d) exempts "service rendered pursuant to the provisions of § 2.405 of this chapter." *Id.*

[27] 47 U.S.C. § 210(a).

[28] *1935 Telegraph Franks Order*, 1 FCC 291; *see supra*, ¶ 4.

[29] 47 C.F.R. § 41.13(c). We note that section 41.31(b) of the rules applies, *inter alia*, certain recordkeeping requirements for the issuance of franks between carriers subject to the Act or to themselves. 47 C.F.R. § 41.13(b).

[30] *See, e.g.*, 47 C.F.R. §§ 41.21, 41.22, 41.31, 41.32.

[31] 47 C.F.R. §§ 41.21, 41.22.

[32] 47 C.F.R. § 41.31(a).

are specifically exempted from regulation pursuant to section 41.13 (section 41.31(b)).[33] In other words, regardless of whether certain carrier-issued franks are subject to the substantive limitations imposed by Part 41, section 41.31 requires that communications common carriers maintain specified records for *all* issued franks, records which must be produced upon Commission demand.[34] Finally, section 41.31(c) imposes a recordkeeping requirement on carriers who provide "reports of positions of ships at sea to newspapers of general circulation, without charge, or at nominal charges" pursuant to section 201(b) of the Act.[35]

8. These rules, we tentatively conclude, reflect the regulation -- and, derivatively, the market structure and competitive realities -- of a bygone era and are long overdue for elimination. We believe they impose unnecessary burdens on competitive carriers operating in current interstate and international markets. We propose to eliminate these rules.

9. Early Commission decisions about carrier-issued franks reflect Commission concerns that franking privileges might be used for anticompetitive purposes and might be subject to "excessive use."[36] For example, following an investigation of the telegraph industry initiated in 1935, *i.e.*, within a year of the enactment of the Communications Act, the Commission discovered that some telegraph carriers were issuing franks valued at hundreds of thousands of dollars.[37] Assessing this practice, the Commission observed:

> [W]e are convinced, that the issuance of franks and the giving away of free service by telegraph companies is used as a competitive measure; and that, as a competitive measure, it is subject to great abuse.[38]

The genesis of Part 41 of the rules is this concern with carrier abuse of franking to achieve competitive advantage. This concern may very well have been valid in an era when telecommunications service markets were dominated by carrier monopolists and oligopolists. Indeed, in such an environment, anticompetitive abuses such as those described by the Commission in 1935 would eventually have ratepayer consequences as well. In other words, excessive issuance of franking privileges might have resulted in costs borne unfairly by ratepayers.

10. We need not, in this Notice, recite in great detail just how the Commission's

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[33] 47 C.F.R. § 41.31(b).

[34] *Compare* 47 C.F.R. §41.31(a) *with* 47 C.F.R. §41.31(b).

[35] 47 C.F.R. § 41.31(c) *and citing* 47 U.S.C. § 201(b).

[36] *1935 Telegraph Franks Order*, 1 FCC 291, 295-296.

[37] *1935 Telegraph Franks Order*, 1 FCC 291, 295-296.

[38] *1935 Telegraph Franks Order*, 1 FCC 291, 295.

regulation has altered as interstate and international service competition has developed in the decades since 1935. In summary form, and driven in large part by technological developments since the Second World War, the Commission embarked on a course of regulation that both stimulated and reflected the development of competitive markets.[39] For example, in a series of orders beginning in 1982, the Commission has sought to reduce or eliminate various regulatory burdens imposed on interexchange carriers who have been found to be nondominant.[40] Such nondominant status has even been awarded to AT&T, with the result that all domestic interexchange service markets have now been found to be subject to competition.[41] As a result, the Commission has stated its belief that market forces will generally ensure that the rates, practices, and classifications of nondominant interexchange carriers are just and reasonable and not unjustly or unreasonably discriminatory.[42] In point of fact, almost all of the "interstate and foreign telegraph or telephone" services that are the subject of Part 41 regulation per franks and reports are now provided in markets that the Commission has found to be competitive.

11. In the specific case of international services, there have been remarkable changes in the structure of international telecommunications markets over the past decade as the Commission engaged in substantial efforts to promote competition in global markets. As recently as 1985, AT&T controlled the overwhelming share of the international message telephone service market, had exclusive operating agreements with the carriers in most major foreign markets, and had few

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[39] *See generally, Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended,* Order, FCC 96-424, CC Docket No. 96-61, 11 FCC Rcd 20730, ¶¶ 8-13 (rel. Oct. 31, 1996) (*IXC Detariffing Order*) (including a detailed history of the Commission's deregulatory actions in the *Competitive Carrier* proceeding), *stayed pending review sub nom, MCI Telecommunications Corp. v. FCC,* Case No. 96-1459 (D.C. Cir., Feb. 19, 1997), *Order on Reconsideration,* FCC 97-293 (rel. Aug. 20, 1997).

[40] In *Competitive Carrier*, the Commission distinguished two kinds of carriers -- those with market power (dominant carriers) and those without market power (nondominant carriers). *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, 20-21 (1980) (*First Report and Order*); Second Report and Order, 91 FCC 2d 59 (1982), *recon. denied,* 93 FCC 2d 54 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1984), *vacated* AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI Telecommunications Corp. v. FCC,* 113 S.Ct. 3020 (1993); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985); *rev'd, MCI Telecommunications Corp. v. FCC,* 765 F.2d 1186 (D.C. Cir. 1985) (collectively, *Competitive Carrier*). *See also IXC Detariffing Order,* 11 FCC Rcd 20730 (rel. Oct. 31, 1996) *(IXC Detariffing Order*) (concluding that the Commission should no longer require or allow nondominant interexchange carriers to file tariffs pursuant to Section 203 for their interstate, domestic, interexchange services).

[41] *See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, FCC 95-427, 11 FCC Rcd 3271 (1995) (*AT&T Reclassification Order*), *Order on Reconsideration*, 12 FCC Rcd 20787 (1997).

[42] *See IXC Detariffing Order*, ¶ 21; *see also AT&T Reclassification Order*, 11 FCC Rcd 3271.

rivals in the provision of international facilities.[43] Over the last decade, competitive conditions in international markets have changed significantly.[44] For example, AT&T's competitors now hold operating agreements for all major foreign markets and own or share facilities with AT&T for each of these markets.[45] Most recently, our *Foreign Participation Order*, adopted in response to the World Trade Organization (WTO) Basic Telecommunications Agreement, reduced barriers to entry by foreign firms eager to compete in the U.S. market for international services.[46]

12. Similarly, we note the Commission's unique regulatory treatment of wireless telecommunications services. Interstate and foreign telephone service may be provided through wireless technology in the form of commercial mobile radio service, including common carrier services such as cellular service, certain paging service, all mobile telephone service, personal communications service (PCS), and satellite service. Broadly speaking, the Commission has in the past found that most CMRS markets are either fully competitive or face sufficient competition that it is in the public interest to relax some Commission policies traditionally applied to non-competitive markets.[47] Indeed, we note that most wireless services are developing in the absence of federal and state rate or entry regulation.[48]

13. The passage and implementation of the Telecommunications Act of 1996 further

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[43] *Motion of AT&T to be Declared Non-dominant for International Service*, Order, FCC 96-209, 11 FCC Rcd 17963, ¶¶ 3-6 (rel. May 14, 1996) (*AT&T International Non-Dominance Order*) (declaring AT&T to be non-dominant in the market for international services).

[44] *AT&T International Non-Dominance Order*, 11 FCC Rcd 17963, ¶ 3. *See also Establishment of Satellite Systems Providing International Communications*, Report and Order, 101 FCC 2d 1046 (1985), *recon*., 61 Rad. Reg. 2d 649 (1986) (discussing the use of satellite systems to provide international telecommunications services).

[45] *AT&T International Non-Dominance Order*, 11 FCC Rcd 17963, ¶ 4. We note also that competition for domestic interexchange services now prevents AT&T from leveraging its control of domestic markets to foreclose competition in international markets. *Id*.

[46] The results of the WTO basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS, April 30, 1996, 36 I.L.M. 366 (1997). These results are known as the "WTO Basic Telecom Agreement." *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order, FCC 97-398, IB Docket 97-142, 12 FCC Rcd 23891 (rel. Nov. 26, 1997) (*Foreign Participation Order*). *See also Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the U.S.*, Report and Order, IB Docket No. 96-111, FCC 97-379 (rel. Nov. 26, 1997).

[47] *CMRS Second Report and Order*, 9 FCC Rcd 1411, ¶¶ 135-154.

[48] *See CMRS Second Report and Order*, 9 FCC Rcd 1411 (Commission forbearance from Sections 203, 204, 205, 211, 212 and 214 of Title II of the Communications Act to any service classified as CMRS); *Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service providers in the State of Connecticut*, Report and Order, 10 FCC Rcd 7025, 7028-40 (1995) (denying Connecticut petition to retain state regulation of CMRS), *aff'd sub nom.*, Connecticut Dept. of Public Utility Control v. FCC, 78 F.3d 842 (2d Cir. 1996).

reflects the efforts of Congress and the Commission to encourage the development of competitive markets by means of a pro-competitive, de-regulatory national policy framework.[49] For example, the 1996 Act allows the Bell Operating Companies (BOCs), under certain conditions, to enter markets from which they previously were restricted, including the market for interLATA telecommunications services -- actions that we expect to promote competition in those markets.[50] Further, the 1996 Act removes barriers to entry into the local telecommunications markets by creating opportunities for new entrants to compete by either constructing new facilities, leasing unbundled network elements, or reselling telecommunication services.[51] We expect that, cumulatively, these actions will result in the opening of all telecommunications markets to all providers and will unleash competitive market forces that lessen the need for government regulation.

14. Because our Part 41 rules were adopted at a very different time than the world of today, *i.e.*, a time when firms providing interstate and foreign services faced a vastly different set of statutory, regulatory, economic, and operational barriers, we believe that franking regulation is no longer necessary. We believe that the discipline of competitive markets exists to restrict almost any conceivable misuse of the franking privilege, a privilege that is, we note, guaranteed by statute. It is our belief that most communications franks issued today are, in fact, concessions issued to the communications carrier's own employees, officers, or other personnel or are franks issued to other carriers regulated by the Act. Such franks are not, pursuant to the language of section 210(a), subject to this Commission's regulation in any event.[52] We have, nevertheless, in section 41.31(b) of our rules, imposed carrier recordkeeping requirements in these cases.[53] Such records are, we tentatively conclude, unnecessary to prevent anticompetitive conduct which in most, if not all cases, will be most effectively prevented by the operation of free market mechanisms. In the event that investigations by this Commission ever become necessary in such cases, we believe that we have ample authority under the Act to compel the production of carrier accounting records to assist such investigations.[54] We further note that, for Class A and Class B telephone companies, such accounting records are kept pursuant to Commission rules and are subject at all times to the Commission's right of inspection.[55] Taking into account all these

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[49] *See* Joint Explanatory Statement, *supra* n. 6

[50] *See* 47 U.S.C. § 271.

[51] *See* 47 U.S.C. §§ 251, 252, 253.

[52] *See 1935 Telegraph Franks Order*, 1 FCC 291, 294; 47 C.F.R. § 41.13(c).

[53] 47 C.F.R. § 41.31(b).

[54] *See* 47 U.S.C. §§ 211, 218, 220.

[55] 47 U.S.C. § 220(c); 47 C.F.R. §§ 32.1 *et seq.* Class A companies are companies having annual revenues from regulated telecommunications operations that are equal to or above an indexed revenue threshold. Class B companies are companies having annual revenues from regulated telecommunications operations that are less than

considerations, we tentatively conclude that we may eliminate Part 41 requirements as they apply to franks for interstate and international services as issued by common carriers regulated by the Act to common carriers regulated by the Act. We seek comment on this tentative conclusion.

15. Similarly, in the case of interstate and international service franks provided by regulated carriers to common carriers not regulated by the Act, we tentatively conclude that the reality of competition and the discipline of competitive markets for interstate and international services obviates the need for any special recordkeeping or other regulatory requirements. Thus, we tentatively conclude that we may eliminate Part 41 requirements as they apply to franks for interstate and international services as issued by common carriers regulated by the Act to common carriers not regulated by the Act. We seek comment on this tentative conclusion.

16. In light of its historically unique regulatory treatment, we point out, for special consideration, the case of any possible issuance and use of franks for interstate or international service by wireless carriers.[56] We tentatively conclude that, given the developing competition in wireless markets, Part 41 regulation is unnecessary. Thus, we tentatively conclude that we may eliminate Part 41 requirements as they might apply to franks for interstate and international services as issued by wireless common carriers regulated by the Act to common carriers not regulated by the Act and to others. This tentative conclusion is bolstered by the history of rapid development that these services have enjoyed in a largely de-regulatory environment. Though we are uncertain whether wireless carriers in fact utilize franks or concessions, we believe that our proposed actions in this proceeding would remove at least potential regulatory burdens imposed on such carriers. We seek comment on these tentative conclusions.

17. Notwithstanding that interstate services have been found to be competitive overall, there is one exception to this rule: interstate access service provided by monopoly local exchange carriers. We, therefore, ask commenters to comment specifically on whether elimination of franking regulation per the provision of interstate access service presents special problems. We tentatively conclude that it does not. Interstate access is a carrier service typically provided to other carriers. We believe it particularly unlikely that carriers would issue franks in connection with the provision of interstate access service given that the limited set of beneficiaries authorized under section 210(a) is comprised of end users (e.g., officers, agents, employees of common carriers, and their families). Nevertheless, because, currently most carriers providing interstate access service are classified as dominant, we seek comment on whether we need to address any particular concerns in this area. We tentatively conclude that -- given the limited nature of the franking privilege, the availability of our accounting rules and complaint processes, and the threat of competitive entry contemplated by the 1996 Act -- our Part 41 requirements are unnecessary to prevent any conceivable anticompetitive abuses. We seek comment on this tentative conclusion. We also ask commenters to bring to our attention any other discrete market segments for

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the indexed revenue threshold. 47 C.F.R. §§ 32.11(a), 32.9000.

[56] *See supra*, n. 48.

"interstate or foreign telephone or telegraph" services where the continued application of Part 41 may be necessary.

18. Concerning section 201(b)-authorized "reports of positions of ships at sea," we believe it unlikely that carriers would be able to gain an improper or unlawful competitive advantage were we to lift our section 43.31(c) recordkeeping requirement.[57] Carriers issuing such reports exist in markets subject to the same current and developing competitive pressures described *supra*. We see no reason to encumber these carriers -- carriers who provide a valuable service specifically authorized by the Act -- with special recordkeeping requirements and we find it unlikely that carriers are likely to abuse this provision. Accordingly, we tentatively conclude that we should eliminate section 43.31(c) of the rules, and we seek comment on this tentative conclusion.

19. In this Notice, we tentatively conclude that no Part 41 regulation is necessary and we accordingly propose to eliminate Part 41, *in toto*. If any commenters consider that some form of regulation is required to govern the provision of franks and certain section 201(b) reports, we encourage them to suggest alternatives that are less burdensome than those currently set out in Part 41. Such commenters, to the extent that they wish to retain Part 41 regulation, should present a cost-benefit analysis addressing the costs of compliance, including direct costs and burdens on companies, regulators, customers and taxpayers, as well as any indirect costs. The statute affords the Commission wide discretion in determining the contours of the public interest. We also note that many costs and benefits of regulation may be difficult, if not impossible to quantify. As a general matter, however, we will not maintain a regulation pursuant to the section 11 public interest analysis where we determine that the costs of the regulation exceed the benefits. We seek comment on this approach. Overall, we seek comment on any and all analysis and conclusions contained in this Notice.

IV. CONCLUSION

20. Section 11 of the Communications Act, as amended, directs the Commission to review its regulations applicable to providers of telecommunications services and determine whether any of these regulations are "no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."[58] Pursuant to this review, we have identified Part 41 of the Commission's rules and believe that these rules may no longer be necessary to protect consumers and competitors. We propose to eliminate Part 41 and believe that this proposal would reduce regulatory burdens on communications common carriers consistent with Congressional intent in section 11 and the Telecommunications Act of 1996.

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[57] 47 U.S.C. § 201(b); 47 C.F.R. § 43.31(c).

[58] 47 U.S.C. § 161.

V. PROCEDURAL MATTERS

A. Initial Paperwork Reduction Act Analysis

21. This *Notice of Proposed Rulemaking* contains a proposal to reduce existing information collections. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the proposals contained in this *Notice of Proposed Rulemaking*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Notice of Proposed Rulemaking*; OMB comments are due 60 days from the date of the publication of this *Notice of Proposed Rulemaking* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

B. Initial Regulatory Flexibility Act Analysis

22. As required by the Regulatory Flexibility Act (RFA),[59] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this NPRM. 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 this NPRM provided above on the first page. The Commission will send a copy of this NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[60] In addition, this NPRM and IRFA (or summaries thereof) will be published in the Federal Register.[61]

23. *Need for, and Objectives of, the Proposed Action*. The Commission undertakes this examination of Part 41[62] of its rules as a part of its 1998 biennial review of regulations as required by section 11 of the Communications Act, as amended.[63] Our objective is to reduce or

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

60 *See* 5 U.S.C. § 603(a).

61 *See id.*

62 47 C.F.R. § 41.1 *et seq.*

63 47 U.S.C. § 161.

eliminate unnecessary or duplicative regulatory requirements as competition supplants the need for such requirements, consistent with section 11 of the Communications Act, as amended,[64] and the Telecommunications Act of 1996.[65] This NPRM seeks comment as to whether the Commission's regulation of telephone and telegraph franking privileges and certain reports concerning "ships at sea" pursuant to Part 41 of the rules continues to be in the public interest. The NPRM tentatively concludes that the development of competition among interstate and international telecommunications service providers renders Part 41 unnecessary and proposes to eliminate it, *in toto*.

24. *Legal Basis*. The legal basis for the action as proposed for this rulemaking is contained in sections 1, 4(i) and (j), 11, 201-205, 210, 218 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 161, 201-205, 210, 218, and 403.

25. *Description and Estimate of the Number of Small Entities to Which the Proposed Action May Apply*. Part 41 governs the issuance of franks (authorized pursuant to section 210 of the Act) and certain reports of ships at sea (authorized pursuant to section 201(b)) by all common carriers subject to the Communications Act of 1934, as amended. This NPRM asks commenters to address the extent to which communications common carriers currently utilize these statutory privileges -- the issuance of franks and reduced cost reports on the positions of ships at sea -- so that the Commission may determine the actual burden imposed by Part 41 on these common carriers. In the absence of a more complete record, we note that the proposals set forth in this proceeding may have an economic impact on a substantial number of small telephone companies, *i.e.* all common carriers subject to the Act. The economic impact of these proposals would, of course, be a positive and beneficial impact, in the form of reduced regulatory burdens and recordkeeping requirements, for these common carriers.

26. To estimate the number of small entities that would benefit from this positive economic impact, we first consider the statutory definition of "small entity" under the RFA. The RFA generally defines "small entity" as having the same meaning as the term "small business," "small organization," and "small governmental jurisdiction."[66] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its

64 *Id.*

65 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.* *See* Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996) (Joint Explanatory Statement).

66 5 U.S.C. § 601(6).

activities.[67] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).[68] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1,500 employees.[69] We first discuss the number of small telephone companies falling within these SIC categories, then attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

27. We expect that the rules in Part 41 -- and the privileges regulated therein -- have only been utilized by a limited class of entities, specifically the Bell Operating Companies and certain other providers of local exchange and interexchange telecommunications services. Nevertheless, given that the language of sections 201(b) and 210(a) speaks broadly of "common carriers" we analyze a wide range of categories in an effort to identify the greatest number of small entities possible that could be effected by the proposals in this NPRM. Thus, in some cases below, we expect that not all of the entities within a given category offer common carrier services, let alone issue franks or reports of ships at sea pursuant to Part 41. In all cases, of course, entities affected by this proposal would not lose any of their statutorily-granted rights under sections 201(b) or 210(a) and would enjoy a positive economic impact from reduced regulation of those privileges.

28. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS).[70] According to data in

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67 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition in the Federal Register."

68 15 U.S.C. § 632. *See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc.*, 176 B.R. 82 (N.D. Ga. 1994).

69 13 C.F.R. § 121.201.

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

the most recent report, there are 3,459 interstate carriers.[71] These carriers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone toll service, providers of telephone exchange service, and resellers.

29. Although some affected incumbent local exchange carriers (ILECs) may have 1,500 or fewer employees, we do not believe that such entities should be considered small entities within the meaning of the RFA because they are either dominant in their field of operations or are not independently owned and operated, and therefore by definition not "small entities" or "small business concerns" under the RFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small ILECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately consider small ILECs within this analysis and use the term "small ILECs" to refer to any ILECs that arguably might be defined by the SBA as "small business concerns."[72]

30. *Total Number of Telephone Companies Affected.* The United States Bureau of the Census ("the Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[73] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."[74] For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this NPRM.

31. *Wireline Carriers and Service Providers.* SBA has developed a definition of

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71 *Id.*

72 *See* 13 C.F.R. § 121.201, SIC code 4813. Since the time of the Commission's 1996 decision, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 16144-45 (1996), 61 FR 45476 (August 29, 1996), the Commission has consistently addressed in its regulatory flexibility analyses the impact of its rules on such ILECs.

73 United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation*, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) ("1992 Census").

74 15 U.S.C. § 632(a)(1).

small entities for telephone communications companies other than radiotelephone companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[75] According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.[76] All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions and rules recommended for adoption in this NPRM.

32. *Local Exchange Carriers*. Neither the Commission nor SBA has developed a definition of small providers of local exchange services (LECs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).[77] According to our most recent data, 1,371 companies reported that they were engaged in the provision of local exchange services.[78] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,371 small entity LECs or small incumbent LECs that may be affected by the decisions and rules recommended for adoption in this NPRM.

33. *Interexchange Carriers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone companies.[79] The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 143 companies reported that they

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75 1992 Census, *supra*, at Firm Size 1-123.

76 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4813.

77 *See* 47 C.F.R. § 64.601 *et seq.*

78 *Telecommunications Industry Revenue* at Fig. 2.

79 13 C.F.R. § 121.210, SIC Code 4813.

were engaged in the provision of interexchange services.[80] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 143 small entity IXCs that may be affected by the decisions and rules recommended for adoption in this NPRM.

34. *Competitive Access Providers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 109 companies reported that they were engaged in the provision of competitive access services.[81] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 109 small entity CAPs that may be affected by the decisions and rules recommended for adoption in this NPRM.

35. *Operator Service Providers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone companies. The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 27 companies reported that they were engaged in the provision of operator services.[82] Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 27 small entity operator service providers that may be affected by the decisions and rules recommended for adoption in this NPRM.

36. *Resellers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for

80 *Telecommunications Industry Revenue* at Fig. 2.

81 *Telecommunications Industry Revenue* at Fig. 2.

82 *Telecommunications Industry Revenue* at Fig. 2.

all telephone communications companies.[83] The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 339 companies reported that they were engaged in the resale of telephone services.[84] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 339 small entity resellers that may be affected by the decisions and rules recommended for adoption in this NPRM.

37. *Wireless (Radiotelephone) Carriers.* SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.[85] According to SBA's definition, a small business radiotelephone company is one employing no more than 1,500 persons.[86] The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned are operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the decisions and rules recommended for adoption in this NPRM.

38. *Cellular and Mobile Service Carriers.* In an effort to further refine our calculation of the number of radiotelephone companies affected by the rules adopted herein, we consider the categories of radiotelephone carriers, Cellular Service Carriers and Mobile Service Carriers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to Cellular Service Carriers and to Mobile Service Carriers. The closest applicable definition under SBA rules for both services is for telephone companies other than radiotelephone (wireless) companies.[87] The most reliable source of information regarding the number of Cellular

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83 13 C.F.R. § 121.210, SIC Code 4813.

84 *Telecommunications Industry Revenue* at Fig. 2.

85 United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation,* Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) ("1992 Census").

86 13 C.F.R. § 121.201, SIC Code 4812.

87 *Id.*

Service Carriers and Mobile Service Carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 804 companies reported that they are engaged in the provision of cellular services and 117 companies reported that they are engaged in the provision of mobile services.[88] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of Cellular Service Carriers and Mobile Service Carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 804 small entity Cellular Service Carriers and fewer than 138 small entity Mobile Service Carriers that might be affected by the decisions and rules recommended for adoption in this NPRM.

39. *Broadband PCS Licensees.* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[89] 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.[90] These regulations defining "small entity" in the context of broadband PCS auctions have been approved by SBA.[91] No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F. However, licenses for Blocks C through F have not been awarded fully, therefore there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of small broadband PCS licenses will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small PCS providers as defined by the SBA and the Commissioner's auction rules.

40. *SMR Licensees.* Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than $15 million in the three previous calendar

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88 *Telecommunications Industry Revenue* at Fig. 2.

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

90 *Id.*, at ¶ 60.

91 *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

years. The definition of a "small entity" in the context of 800 MHz SMR has been approved by the SBA,[92] and approval for the 900 MHz SMR definition has been sought. The rules proposed in this NPRM may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. We assume, for purposes of this IRFA, that all of the extended implementation authorizations may be held by small entities, that may be affected by the decisions and rules recommended for adoption in this NPRM.

41. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees that may be affected by the decisions and rules proposed in this NPRM includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. The Commission, however, has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this IRFA, that all of the licenses may be awarded to small entities who may be affected by the decisions recommended for adoption in this NPRM.

42. *220 MHz Radio Services*. Because the Commission has not yet defined a small business with respect to 220 MHz services, we will utilize the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[93] With respect to 220 MHz services, the Commission has proposed a two-tiered definition of small business for purposes of auctions: (1) for Economic Area (EA) licensees, a firm with average annual gross revenues of not more than $6 million for the preceding three years and (2) for regional and nationwide licensees, a firm with average annual gross revenues of not more than $15 million for

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92 *See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool*, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

93 13 C.F.R. § 121.201, SIC Code 4812.

the preceding three years. Given that nearly all radiotelephone companies under the SBA definition employ no more than 1,500 employees (as noted *supra*), we will consider the approximately 1,500 incumbent licensees in this service as small businesses under the SBA definition.

43. *Private and Common Carrier Paging*. The Commission has proposed a two-tier definition of small businesses in the context of auctioning licenses in the Common Carrier Paging and exclusive Private Carrier Paging services.[94] Under the proposal, a small business will be defined as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than $3 million, or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than $15 million. Because the SBA has not yet approved this definition for paging services, we will utilize the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[95] At present, there are approximately 24,000 Private Paging licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Telecommunications Industry Revenue* data, 172 carriers reported that they were engaged in the provision of either paging or "other mobile" services, which are placed together in the data.[96] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of paging carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 172 small paging carriers that may be affected by the proposed rules, if adopted. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

44. *Narrowband PCS*. The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. At present, there have been no auctions held for the major trading area (MTA) and basic trading area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licenses and 2,958 BTA licenses will be awarded by auction. Such auctions have not yet been scheduled, however. Given that nearly all radiotelephone companies have no more than 1,500 employees and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume, for purposes of this IRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

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94 *See* 47 C.F.R. § 20.9(a)(1) (noting that private paging services may be treated as common carriage services).

95 13 C.F.R. § 121.201, SIC Code 4812.

96 *Telecommunications Industry Revenue* at Figure 2.

45. *Rural Radiotelephone Service*. The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.[97] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).[98] We will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[99] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

46. *Air-Ground Radiotelephone Service*. The Commission has not adopted a definition of small entity specific to the Air-Ground Radiotelephone Service.[100] Accordingly, we will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[101] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA definition.

47. *Private Land Mobile Radio (PLMR)*. PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities.[102] These radios are used by companies of all sizes operating in all U.S. business categories. The Commission has not developed a definition of small entity specifically applicable to PLMR licensees due to the vast array of PLMR users. For the purpose of determining whether a licensee is a small business as defined by the SBA, each licensee would need to be evaluated within its own business area.

48. The Commission is unable at this time to estimate the number of, if any, small businesses which could be impacted by the rules. However, the Commission's 1994 Annual Report on PLMRs[103] indicates that at the end of fiscal year 1994 there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Because any entity engaged in a commercial activity is eligible to hold a PLMR license, the proposed rules in this

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97 The service is defined in section 22.99 of the Commission's rules, 47 C.F.R. § 22.99.

98 BETRS is defined in sections 22.757 and 22.759 of the Commission's rules, 47 C.F.R. §§ 22.757, 22.759.

99 13 C.F.R. § 121.201, SIC Code 4812.

100 The service is defined in section 22.99 of the Commission's rules, 47 C.F.R. § 22.99.

101 13 C.F.R. § 121.201, SIC Code 4812.

102 *See* 47 C.F.R. § 20.9(a)(2) (noting that certain Industrial/Business Pool service may be treated as common carriage service).

103 Federal Communications Commission, *60th Annual Report, Fiscal Year 1994*, at 116.

context could potentially impact every small business in the United States.

49. *Fixed Microwave Services*. Microwave services include common carrier,[104] private-operational fixed,[105] and broadcast auxiliary radio services.[106] At present, there are approximately 22,015 common carrier fixed licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, we will utilize the SBA's definition applicable to radiotelephone companies -- *i.e.*, an entity with no more than 1,500 persons.[107] We estimate, for this purpose, that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone companies.

50. *Offshore Radiotelephone Service*. This service operates on several UHF TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico.[108] At present, there are approximately 55 licensees in this service. We are unable at this time to estimate the number of licensees that would qualify as small entities under the SBA's definition for radiotelephone communications.

51. *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. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were

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104 47 C.F.R. § 101 *et seq.* (formerly, Part 21 of the Commission's Rules).

105 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.

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

107 13 C.F.R. § 121.201, SIC Code 4812.

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

seven winning bidders that qualified as very small business entities, and one that qualified as a small business entity. We conclude that the number of geographic area WCS licensees affected includes these eight entities.

52. *Description of Proposed Reporting, Recordkeeping, and Other Compliance Requirements.* The proposals under consideration in this NPRM would reduce the reporting and recordkeeping requirements on common carriers regulated under the Communications Act. Part 41 imposes specific limitations or requirements on carriers issuing franks to other carriers not regulated by the Act, and on persons receiving such franks.[109] For example, subsections 41.31(a) and (b), *inter alia*, require common carriers issuing lawful franks to maintain records of issued franks. Similarly, subsection 41.31(c) imposes a recordkeeping requirement on carriers who provide "reports of positions of ships at sea to newspapers of general circulation, without charge, or at nominal charges" pursuant to section 201(b) of the Act.[110] The NPRM proposes to eliminate Part 41 which should provide a positive economic impact on affected companies, including small entities.

53. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered*. The impact of this proceeding should be beneficial to small businesses because the proposals set out in this NPRM would reduce the reporting or recordkeeping requirements on all communications common carriers. As noted above in the NPRM,[111] we seek comment on whether any level of regulation currently within Part 41 should be retained.

54. *Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule*. None.

C. *Ex Parte* Presentations

55. This proceeding will be treated as a "permit-but-disclose" proceedings subject to the "permit-but-disclose" requirements under section 1.1206 of the Commission's rules, as revised.[112] Additional rules pertaining to oral and written presentations are set forth in section 1.1206.[113]

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109 *See, e.g.,* 47 C.F.R. §§ 41.21, 41.22, 41.31, 41.32.

110 47 C.F.R. § 41.31(c) *and citing* 47 U.S.C. § 201(b).

111 *See supra,* ¶ 20.

112 47 C.F.R. § 1.1206.

113 *Id.*

D. Comment Filing Procedures

56. *General.* 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 shall file comments not later than August 31, 1998, and reply comments not later than September 10, 1998. To file formally in this proceeding, you must file an original and six copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and twelve copies. Comments and reply comments should be sent to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, with copies to: Thomas J. Beers, Common Carrier Bureau, Industry Analysis Division, 2033 M Street, N.W., Room 500, Washington, D.C. 20554; Scott K. Bergmann, Common Carrier Bureau, Industry Analysis Division, 2033 M Street, N.W., Room 500, Washington, D.C. 20554. Parties should file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 1231 20th St., NW, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

57. *Other requirements.* Comments and reply comments must also comply with Section 1.49 and all other applicable sections of the Commission's rules.[114] We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments.

58. Commenters may also file informal comments or an exact copy of formal comments electronically via the Internet at: <http://dettifoss.fcc.gov:8080/cgi-bin/ws.exe/beta/ecfs/upload.hts>. Only one copy of electronically filed comments must be submitted. Commenters must note on the subject line whether an electronic submission is an exact copy of formal comments. Commenters also must include their full name and U.S. Postal Service mailing address in their submissions. Further information on the process of submitting comments electronically is available at that location and at <http://www.fcc.gov/e-file>.

59. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to and not a substitute for the formal filing requirements addressed above. Parties submitting diskettes should submit them to: Ms. Terry Conway, Common Carrier Bureau, Industry Analysis Division, 2033 M Street, N.W., Room 500, Washington, D.C. 20554. Such diskettes should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows software. The diskette should be submitted in "read only" mode. The diskette should be clearly labeled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

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114 *See* 47 C.F.R. § 1.49.

V. ORDERING CLAUSES

60. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i) and (j), 11, 201-205, 210, 218 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 161, 201-205, 210, 218, and 403, that a NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED and that COMMENT IS SOUGHT on these issues.

61. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this NOTICE OF PROPOSED RULEMAKING, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX - Proposed Rules

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

PART 41 - TELEGRAPH AND TELEPHONE FRANKS

Part 41 of Title 47 of the Code of Federal Regulations (C.F.R.) is eliminated by deleting §§ 41.1 through 41.32 in their entirety.

Separate Statement of Commissioner Harold W. Furchtgott-Roth

In re: Notice of Proposed Rulemaking

1998 Biennial Regulatory Review -- Elimination of Part 41
Telegraph and Telephone Franks

I support adoption of this NPRM. In my view, any reduction of unnecessary regulatory burdens is beneficial. To that extent, this item is good and I am all for it. This item should not, however, be mistaken for complete compliance with Section 11 of the Communications Act.

As I have explained previously, the FCC is not planning to "review *all* regulations issued under this Act . . . that apply to the operations or activities of any provider of telecommunications service," as required under Subsection 11(a) in 1998 (emphasis added). *See generally 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements*, 13 FCC Rcd 6040 (released Jan. 30, 1998). Nor has the Commission issued general principles to guide our "public interest" analysis and decision-making process across the wide range of FCC regulations.

In one important respect, however, the FCC's current efforts are more ambitious and difficult than I believe are required by the Communications Act. Subsection 11(a) -- "Biennial Review" -- requires only that the Commission "*determine* whether any such regulation is no longer necessary in the public interest" (emphasis added). It is pursuant to Subsection 11(b) -- "Effect of Determination" -- that regulations determined to be no longer in the public interest must be repealed or modified. Thus, the repeal or modification of our rules, which requires notice and comment rule making proceedings, need not be accomplished during the year of the biennial review. Yet the Commission plans to complete roughly thirty such proceedings this year.

I encourage parties to participate in these thirty rule making proceedings. I also suggest that parties submit to the Commission -- either informally or as a formal filing -- specific suggestions of rules we might determine this year to be no longer necessary in the public interest as well as ideas for a thorough review of all our rules pursuant to Subsection 11(a).

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