

**FACT SHEET\***

**Toll Free Assignment Modernization**  
Report & Order – WC Docket No. 17-192

**Background:** Toll free calling is an important and expanding part of our nation’s communications system, and toll free numbers are in high demand. Traditionally, the Commission has allocated toll free numbers on a first-come, first-served basis. However, this approach fails to ensure those numbers are being put to their most efficient use, and it rewards wasteful investment in computer systems designed to more quickly obtain toll-free numbers under the first-come, first-served system. The Commission also has prohibited secondary markets for toll free numbers. In this proposed Report and Order, the Commission would modernize its approach to toll free number allocation by allowing the use of auctions and secondary markets, which will promote the efficient use of toll free numbers.

**What the Report & Order Would Do:**

- Give the Commission flexibility to assign toll free numbers via competitive bidding; on a first-come, first-served basis; by using an alternative assignment methodology; or by a combination of these approaches.
- Establish an auction of the over 17,000 “mutually exclusive” numbers in the recently-opened 833 toll free code—that is, numbers that more than one Responsible Organization requested before the code was opened in April 2017—to evaluate how competitive bidding can efficiently assign toll free numbers.
- Require the Wireline Competition Bureau to issue a report after completion of this 833 auction experiment from which the Commission can learn for future toll free number assignments.
- Revise Commission rules to allow a secondary market for toll free numbers assigned via auction.
- Make administrative revisions to our rules to allow for assignment of toll free numbers through competitive bidding.

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

In the Matter of )
Toll Free Assignment Modernization ) WC Docket No. 17-192
Toll Free Service Access Codes ) CC Docket No. 95-155

REPORT AND ORDER\*

Adopted: []

Released: []

By the Commission:

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\* This document has been circulated for tentative consideration by the Commission at its September 2018 open meeting. The issues referenced in this document and the Commission’s ultimate resolution of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public’s ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The FCC’s ex parte rules apply and presentations are subject to “permit-but-disclose” ex parte rules. See, e.g., 47 C.F.R. §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission’s ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR §§ 1.1200(a), 1.1203.

APPENDIX A – Final Rules

APPENDIX B – Final Regulatory Flexibility Analysis

## I. INTRODUCTION

1. Today, we demonstrate our continued commitment to modernize the way we assign toll free numbers by adopting an additional assignment methodology that is both market-based and equitable. Based on the Federal Communications Commission’s success using competitive bidding to assign spectrum licenses and award universal service support, we adopt new measures to explore the use of competitive bidding for the assignment of toll free numbers. To further evaluate this approach, as an experiment we establish the framework in this Report and Order for an auction of the rights to use certain numbers in the recently-opened 833 toll free code. After the release of this Report and Order, we will initiate the pre-auction phase of this proceeding to seek input on the procedures for the auction. This experiment will help us determine how best to use competitive bidding to most effectively assign toll free numbers, as well as provide experience in applying auction procedures to the toll-free numbering assignment process.

## II. BACKGROUND

2. Toll free calling and texting remains an important part of our communications system. Even as websites and smartphone apps have provided new avenues for public engagement, businesses, government entities, and non-profit organizations alike continue to make use of toll free services to keep an open line to the public, and enterprising subscribers put toll free numbers to use in creative new ways.<sup>1</sup> Toll free services rely on toll free numbers—a limited resource the Commission is charged by statute with making available “on an equitable basis.”<sup>2</sup>

3. Toll free calling began in 1967, with the introduction of the 800 toll free code.<sup>3</sup> Thirty years later, when the Commission opened the second toll free code—888—it addressed an age-old question for the first time in the context of toll free numbers: How can limited resources be most fairly and efficiently allocated when some of those resources are more desirable than others?<sup>4</sup> Whether they were desirable because they were easy to remember, because they could spell a name or common word, or because a subscriber had built up good will in that number in the 800 code, some 888 numbers were likely to be highly desirable while others might draw no interest at all.

4. Congress has given the Commission only one guideline regarding the allocation of toll-free numbers: Do so “on an equitable basis.”<sup>5</sup> Interpreting this guideline after opening the 888 code, the Commission understood “equitable” to include two prongs: “orderly and efficient” and “fair.”<sup>6</sup> After

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<sup>1</sup> See e.g., Somos Comments at 1-2.

<sup>2</sup> 47 U.S.C. § 251(e)(1).

<sup>3</sup> The 800 code was established by AT&T, and the Commission’s role in the toll free service market increased over the following 30 years. See *Toll Free Service Access Codes*, Notice of Proposed Rulemaking, 10 FCC Rcd 13692, 13693-95, paras. 3-10 (1995). In 1997, faced with the possibility of exhaust of the 800 code, the Commission concluded that the Communications Act of 1934, as amended, “require[s] the Commission to ensure the efficient, fair, and orderly allocation of toll free numbers.” *Toll Free Service Access Codes*, Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 11162, 11176, para. 18 (1997).

<sup>4</sup> *Toll Free Service Access Codes*, Fourth Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 9058 (1998) (*1998 Toll Free Order*).

<sup>5</sup> 47 U.S.C. § 251(e)(1).

<sup>6</sup> *1998 Toll Free Order*, 13 FCC Rcd at 9065, para. 12.

considering multiple methodologies to assign toll free numbers, the Commission settled on a first-come, first-served approach.<sup>7</sup> Inspired by its low cost and simplicity, the Commission found such an approach to be “orderly and efficient”; it also concluded that it was “fair” because it did not discriminate on its face against any potential subscribers.<sup>8</sup>

5. Among the alternate methodologies the Commission considered when it opened the 888 code was competitive bidding. The Commission observed the fairness of this approach, stating that it “would offer all participants an equal opportunity to obtain a particular . . . number”; it also described auctions as “generally efficient.”<sup>9</sup> Although the Commission had conducted spectrum auctions prior to the 888 code opening, the Commission concluded that an auction of toll free numbers presented “practical difficulties”—not only could it cost more than a first-come, first-served approach, but it could also require oversight to ensure that bidders met requirements and followed auction procedures.<sup>10</sup>

6. When the Commission decided how to assign certain 888 toll free numbers, the Commission’s auctions program was still in its relatively early stages.<sup>11</sup> In the 20 years since that decision, the Commission has conducted over 70 spectrum auctions, including those for commercial wireless licenses and broadcast construction permits, using various auction formats.<sup>12</sup> More recently, the Commission has begun using auctions as a mechanism for distributing universal service high-cost support.<sup>13</sup>

7. During this same period, the first-come, first-served approach to toll free number assignment—which was used with some modification for the 877, 866, 855, and 844 code openings<sup>14</sup>—has been subject to scrutiny by the Wireline Competition Bureau (Bureau) for falling short of

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<sup>7</sup> *Id.* at 9068-69, paras. 22-25. The Commission also offered a limited right of first refusal to subscribers of 800 numbers that expressed an interest in subscribing to that number in the 888 code. *Id.* at 9071-72, paras. 29-30.

<sup>8</sup> *1998 Toll Free Order*, 13 FCC Rcd at 9068-69, paras. 24-25.

<sup>9</sup> *Id.* at 9066, para. 16.

<sup>10</sup> *Id.*

<sup>11</sup> The Commission’s first spectrum auction was held in July 1994. The Notice of Proposed Rulemaking for the 888 toll free code was adopted in October 1995, *Toll Free Service Access Codes*, CC Docket No. 95-155, Notice of Proposed Rulemaking, 10 FCC Rcd 13692 (1995), and the *1998 Toll Free Order* was adopted in March 1998. *1998 Toll Free Order*, 13 FCC Rcd 9058.

<sup>12</sup> *See, e.g., Incentive Auction Closing and Channel Reassignment Public Notice: The Broadcast Television Incentive Auction Closes; Reverse Auction and Forward Auction Results Announced; Final Television Band Channel Assignments Announced; Post-Auction Deadlines Announced*, AU Docket Nos. 14-252 et al., Public Notice, 32 FCC Rcd 2786 (IA MB WTB 2017).

<sup>13</sup> *See Mobility Fund Phase I Auction Closes; Winning Bidders Announced for Auction 901*, Public Notice, 27 FCC Rcd 12031 (WTB 2012); *Tribal Mobility Fund Phase I Auction Closes; Winning Bidders Announced for Auction 902*, Public Notice, 29 FCC Rcd 1974 (WTB 2014); *Connect America Fund Phase II Auction Scheduled for July 24, 2018; Notice and Filing Requirements and Other Procedures for Auction 903*, Public Notice, 33 FCC Rcd 1428 (2018).

<sup>14</sup> *See* Fed. Comm’n’s Comm’n, Wireline Competition Bureau, Indus. Analysis & Tech. Div., *Numbering Utilization in the United States* at 11 (Aug. 2007), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-275830A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-275830A1.pdf) (explaining that, “[i]n March 1996, calling code 888 was placed into service. The third toll free calling code (877) went into effect April 4, 1998, and the fourth toll free calling code (866) went into effect July 29, 2000”); *see also generally Toll Free Service Access Codes*, CC Docket No. 95-155, Order, 25 FCC Rcd 13687 (WCB 2010) (*855 Code Opening Order*); *Toll Free Service Access Codes*, CC Docket No. 95-155, Order, 28 FCC Rcd 16139, (WCB 2013) (*844 Code Opening Order*).

expectations in several ways.<sup>15</sup> For example, first-come, first-served assignment has rewarded actors that have invested in systems to increase the chances that their choices are received first in the Service Management System Database (the Toll Free Database);<sup>16</sup> and, by assigning numbers at no cost, it has allowed accumulation of numbers without ensuring those numbers are being put to their most efficient use.<sup>17</sup>

8. *833 Code Opening*. In April 2017, the Bureau authorized Somos, Inc. (Somos), the Toll Free Numbering Administrator, to open the 833 toll free code.<sup>18</sup> To facilitate the exploration of alternative assignment methodologies, the Bureau took steps in the pre-code opening process to identify numbers that could be part of an experiment regarding the use of an alternative assignment process, such as an auction.<sup>19</sup> Specifically, the Bureau authorized Responsible Organizations (RespOrgs)<sup>20</sup> to identify up to 2,000 desired numbers in the 833 code and submit a request for those numbers to Somos.<sup>21</sup> The Bureau directed Somos to review these requests, identify numbers subject to multiple requests,<sup>22</sup> and place these “mutually exclusive” numbers in unavailable status<sup>23</sup> pending the outcome of this proceeding.<sup>24</sup>

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<sup>15</sup> See *Toll Free Service Access Codes*, CC Docket No. 95-155, Order, 31 FCC Rcd 6828, 6828-30, paras. 2-6 (WCB 2016) (*800 Number Release Order*); *844 Code Opening Order* 28 FCC Rcd at 16140-42, paras. 3, 6-7; *855 Code Opening Order*, 25 FCC Rcd at 13688-90, paras. 3-6.

<sup>16</sup> See *844 Code Opening Order*, 28 FCC Rcd at 16140-41 para. 3 (expressing concern that registrants “with enhanced connectivity to the [toll free] database would be able to quickly reserve sought-after . . . numbers”); *855 Code Opening Order*, 25 FCC Rcd at 13687, para. 3 (identifying same problem); *800 Number Release Order*, 31 FCC Rcd at 6829-30, paras. 3-6 (identifying same problem). The Toll Free Database is the “database system for toll free numbers,” in which entities reserve numbers and “enter and amend the data about toll free numbers within their control.” 47 CFR § 52.101(d).

<sup>17</sup> Cf. *855 Code Opening Order*, 25 FCC Rcd at 13687, para. 3 (“The Commission’s rules strictly prohibit warehousing of toll free numbers . . . Nevertheless, we are concerned that certain [entities] may still engage in this practice. [A] daily allocation scheme is necessary to help prevent this activity and ensure a fair allocation of 855 numbers.”); Petition for Waiver of Somos, Inc., WC Docket No. 95-155, at 3 (filed Mar. 21, 2016), <https://ecfsapi.fcc.gov/file/60001544143.pdf> (noting that in a limited release of 800 toll free numbers disconnected and returned to the spare pool, “two entities dominated the release, obtaining more than 70% of all available 800 numbers.”). The Bureau addressed this latter issue, and the issue of some registrants having enhanced connectivity to the toll free database, by limiting registrants to 100 numbers per day for a month after the opening of the last two codes, 844 and 855. See *844 Code Opening Order*, 28 FCC Rcd at 16140-41, para. 3, 16142, paras. 6-7; *855 Code Opening Order*, 25 FCC Rcd at 13688-90, paras. 3-6; see also *800 Number Release Order*, 31 FCC Rcd at 6828-30, paras. 2-6 (adopting same process for release of 800 numbers disconnected and returned to the spare pool).

<sup>18</sup> *Toll Free Service Access Codes*, CC Docket No. 95-155, Order, 32 FCC Rcd 3153 (WCB 2017) (*833 Code Opening Order*).

<sup>19</sup> *833 Code Opening Order*, 32 FCC Rcd at 3155, para. 7.

<sup>20</sup> A Responsible Organization, or “RespOrg,” is an “entity chosen by a toll free subscriber to manage and administer the appropriate records in the toll free Service Management System for the toll free subscriber.” 47 CFR § 52.101(b).

<sup>21</sup> *833 Code Opening Order*, 32 FCC Rcd at 3154-55, para. 6.

<sup>22</sup> *Id.* at 3155, para. 6.

<sup>23</sup> Unavailable status means “[t]he toll free number is not available for assignment due to an unusual condition.” 47 CFR § 52.103(a)(8).

<sup>24</sup> *833 Code Opening Order*, 32 FCC Rcd at 3155, para. 6. Numbers that were not requested by multiple RespOrgs were made available on a first-come, first-served basis. *Id.*

9. Nearly 150 RespOrgs participated in the 833 pre-code opening process, requesting over 72,000 numbers.<sup>25</sup> Somos identified over 17,000 mutually exclusive numbers—including “repeaters” (833-333-3333, 833-888-8888, 833-800-0000, etc.) and numbers that spell memorable words or phrases (833-DENTIST, 833-DOCTORS, 833-FLOWERS . . . etc.)<sup>26</sup>—and placed those numbers in unavailable status.<sup>27</sup> Ten or more RespOrgs requested over 1,800 mutually exclusive numbers, and 65 or more RespOrgs requested the ten most popular numbers.<sup>28</sup>

10. *Notice of Proposed Rulemaking*. In September 2017, the Commission released the *Toll Free Assignment NPRM*, which proposed and sought comment on steps to better promote the equitable and efficient assignment and use of toll free numbers.<sup>29</sup> Specifically, the Commission proposed expanding the existing toll free number assignment rule to include assignment by auction or other equitable assignment methodologies, and assigning the over 17,000 mutually exclusive numbers in the 833 toll free code through competitive bidding.<sup>30</sup> The Commission also sought comment on eliminating the brokering, warehousing, and hoarding prohibitions;<sup>31</sup> setting aside numbers for use for public interest purposes;<sup>32</sup> options to address abuse of toll free numbers;<sup>33</sup> and changes to overall toll free numbering administration.<sup>34</sup> The Commission received comments from various stakeholders including RespOrgs,<sup>35</sup> service providers,<sup>36</sup> and companies that have built their businesses around toll free calling.<sup>37</sup>

### III. DISCUSSION

11. Given the passage of time since adopting the first-come, first-served methodology, and experience gained in opening five toll free codes, we modify our toll free number assignment rule to give the Commission flexibility to implement alternative approaches to assigning numbers.<sup>38</sup> As an

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<sup>25</sup> Letter from Joel Bernstein, Vice President, Regulatory and Public Policy, Somos, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 95-155, at 1 (filed Aug. 31, 2017) (Somos Aug. 31, 2017 *Ex Parte* Letter).

<sup>26</sup> Letter from Joel Bernstein, Vice President, Regulatory and Public Policy, Somos, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 95-155, at 1 (filed Sept. 5, 2017).

<sup>27</sup> See Somos, Inc., Report of the Toll Free Neutral Administrator (TFNA) to the North American Numbering Council at 6 (2017), [http://www.nanc-chair.org/docs/mtg\\_docs/Jun17\\_TFNA\\_Report.pdf](http://www.nanc-chair.org/docs/mtg_docs/Jun17_TFNA_Report.pdf).

<sup>28</sup> Somos Aug. 31, 2017 *Ex Parte* Letter at 1.

<sup>29</sup> *Toll Free Assignment Modernization*, WC Docket 17-192, CC Docket No. 95-155, Notice of Proposed Rulemaking, 32 FCC Rcd 7885 (2017) (*Toll Free Assignment NPRM*).

<sup>30</sup> *Id.* at 7888, 7890, paras. 5, 12. The Commission also proposed and sought comment on various specific auction rules and mechanisms. *Id.* at 7890-93, paras. 12-23.

<sup>31</sup> *Id.* at 7895-97, paras. 30-33, 36-37. Brokering, under our rules, is the selling of numbers by a subscriber for a fee, 47 CFR § 52.107(a), (a)(2); hoarding is the acquisition of more numbers by a subscriber than it intends to use, 47 CFR § 52.107(a); and warehousing is the reservation of numbers by a RespOrg without an actual subscriber for whom the numbers are being reserved, 47 CFR § 52.105.

<sup>32</sup> *Toll Free Assignment NPRM*, 32 FCC Rcd at 7897-98, para. 39.

<sup>33</sup> *Id.* at 7898, para. 40.

<sup>34</sup> *Id.* at 7898-7899, paras. 41-43.

<sup>35</sup> See, e.g., Coalition of Canadian RespOrgs Comments; TollFreeNumbers.Com Comments.

<sup>36</sup> See, e.g., CenturyLink Comments; Verizon Comments.

<sup>37</sup> See, e.g., 1-800-CONTACTS Comments; 1-800-FLOWERS Comments; RingBoost.com Comments.

<sup>38</sup> See FCC, Wireline Competition Bureau, Indus. Analysis & Tech. Div., Numbering Utilization in the United States at 11 (2013), <https://docs.fcc.gov/public/attachments/DOC-319997A1.pdf> (explaining that, “[i]n March 1996, calling code 888 was placed into service. The third toll free calling code (877) went into effect April 4, 1998, and

(continued....)

experiment in using such an alternative approach, we establish an auction to assign the over 17,000 identified mutually exclusive numbers in the 833 code (the 833 Auction). We also designate Somos as the auctioneer. While this Report and Order provides Somos with the general framework for the 833 Auction, we also provide for a pre-auction process to establish detailed auction procedures after additional notice and comment, as is typical in all Commission auctions. We require Somos to implement the established procedures to conduct the auction and, after the bidding has ended, to provide the Commission with all data and information gained from the auction. Moreover, consistent with our goal of assigning numbers via a market mechanism, we create an exception to our brokering, warehousing, and hoarding prohibitions for numbers acquired through competitive bidding.

## A. The Toll Free Assignment Rule

### 1. Adopting a Revised Toll Free Assignment Rule

12. We adopt the toll free assignment revision of section 52.111 of our rules that the Commission proposed in the *Toll Free Assignment NPRM*.<sup>39</sup> Our revised rule allows the Commission to direct the assignment of toll free telephone numbers to RespOrgs and subscribers on an equitable basis by competitive bidding, on a first-come, first-served basis, by using an alternative assignment methodology, or by a combination of these approaches. We find that our experience assigning toll free numbers since the original rule's adoption 20 years ago—in which time certain entities have undertaken efforts to increase their chances that desirable numbers are assigned to them through the first-come, first-served system—supports the revised rule's flexible approach to number assignment and is supported by the record.<sup>40</sup>

13. With our revised rule, we increase our options to assign toll free numbers in a way that accounts for valuable social use. The revised rule provides us greater flexibility to explore alternative assignment mechanisms in addition to the current first-come, first-served methodology. By revising our rule to permit—but not obligate—the Commission to assign toll free numbers by auction, we add a valuable tool to our tool chest while maintaining the flexibility to craft assignment mechanisms suited to the nature of different inventories of numbers.<sup>41</sup> One commenter argues that, in so doing we “upend” the

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the fourth toll free calling code (866) went into effect July 29, 2000”); *see also 844 Code Opening Order*, 28 FCC Rcd at 16139, para. 1; *855 Code Opening Order*, 25 FCC Rcd at 13687, para 1.

<sup>39</sup> *See Toll Free Assignment NPRM*, 32 FCC Rcd at 7896, para. 35. We adopt the proposed rule revision with two minor changes. First, we make our rule consistent with the rules governing spectrum and universal service support competitive bidding, by using the phrase “competitive bidding” rather than “auction.” *See, e.g.*, 47 CFR §§ 1.2102, 54.315(a). Second, we improve the clarity of our rule by removing proposed language providing that the Commission will assign numbers through an assignment methodology “as circumstances require.” We further make administrative revisions to our toll free rules, consistent with the recommendations of the North American Numbering Council (NANC) Toll Free Assignment Modernization Working Group Report. *See* Letter from Travis Kavulla, Chairman, North American Numbering Council, to Kris Monteith, Chief, Wireline Competition Bureau, FCC, WC 17-912, CC Docket 95-155, Attach. NANC TFAM Working Group, Recommended Rule and Policy Changes: Toll free Number Assignment Modernization, Report to the FCC of the NANC Toll Free Assignment Modernization (TFAM) Working Group (filed Aug. 27, 2018), [https://ecfsapi.fcc.gov/file/10827446011359/Jun18\\_NANC\\_TFAM\\_Report\\_Final.pdf](https://ecfsapi.fcc.gov/file/10827446011359/Jun18_NANC_TFAM_Report_Final.pdf) (NANC Report); *see infra* Section III.D.

<sup>40</sup> *See, e.g.*, ATFP Comments at 4; Power Auctions at 2; Verizon Comments at 2, 5; *cf.* CSF Corp. Comments at 3-4.

<sup>41</sup> *See e.g.*, Comet Media Comments at 1 (understand need for auction for certain high value toll free numbers); CSF Corp. Comments at 4 (in favor of alternative methodology for code release for the numbers in high demand); Network Telephone Services, Inc. Comments at 1 (auction is not necessary for typical toll free number which usually only one party seeks); Verizon Comments at 2 (ensure auction only for numbers for which there is a genuine competitive demand by actual customers).

toll free market to address demand for a “statistically insignificant” amount of toll free numbers.<sup>42</sup> But the demand for those specific numbers is not insignificant and, in fact, demonstrates the need to reconcile the demand with the assignment mechanism. Our rule does not mandate the use of a new assignment mechanism, instead allowing for targeted modifications to the assignment process going forward as circumstances require.

## 2. Considerations of Assignment Methodologies

14. We find that revising our rules to allow alternative means of toll free number assignment is consistent with our statutory obligation to distribute numbers on an equitable basis. Section 251(e)(1) of the Communications Act of 1934, as amended (the Act), directs the Commission to make numbers available on an equitable basis.<sup>43</sup> We find that the revised rule adopted today facilitates assignment of numbers equitably, per the standards of our precedent. The flexibility of our rule, including the option to use competitive bidding to assign toll free numbers, increases the likelihood that, as limited resources, toll free numbers will be assigned to parties that value the numbers most.

15. In considering whether number distribution means are equitable under section 251(e)(1), we consider the principles of order, efficiency, and fairness.<sup>44</sup> In so doing, the Commission has allowed exceptions to the assignment of numbers by the first-come, first-served approach, with the intent to serve the broader public interest of *equitably* distributing the finite resource of toll free numbers.<sup>45</sup> When it established the first-come, first-served assignment method in the *1998 Toll Free Order*,<sup>46</sup> the Commission opined that pursuant to section 251(e)(1), the Commission must apply a two-part test to determine if any given assignment methods were “1) orderly and efficient, and 2) fair.”<sup>47</sup> When it first applied this test over twenty years ago, based on certain limitations and unknown factors with respect to number auctions,<sup>48</sup> the Commission found that “the use of a first-come, first-served assignment method is a more equitable method of allocating these numbers.”<sup>49</sup> With the benefit of some twenty years’ of additional experience in toll free number allocation, in addition to extensive use of the auction mechanism in various contexts, we now reassess this conclusion.

16. *Section 251(e)(1) Test for Assigning Toll Free Numbers.* We reapply the 251(e)(1) two-part test and conclude that the use of competitive bidding, like the other assignment methodologies in revised

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<sup>42</sup> See CSF Corp. Comments at 2 (observing that the 17,000 mutually exclusive numbers in the 833 code represent just 0.2% of all numbers in the code).

<sup>43</sup> 47 U.S.C. § 251(e)(1) (“The Commission ... shall make such numbers available on an equitable basis.”).

<sup>44</sup> See generally *1998 Toll Free Order*, 13 FCC Rcd 9058.

<sup>45</sup> For example, the Wireline Competition Bureau allowed a right of first refusal in 1997 for 800 number subscribers seeking corresponding 888 code numbers. *1998 Toll Free Order*, 13 FCC Rcd at 9065 para. 13. The Bureau has also rationed the release of disconnected 800 code numbers, and the release of 844 and 855 numbers upon opening of those codes. See *800 Number Release Order*, 31 FCC Rcd at 6828-30, paras. 2-6; *844 Code Opening Order*, Order, 28 FCC Rcd at 16140-41, para. 3; *855 Code Opening Order*, 25 FCC Rcd at 13688-90, paras. 3-6. Aside from modifications of first-come, first-served, assignment, the Bureau has also assigned numbers upon request for reasons of national defense and public safety. See, e.g., *Toll Free Service Access Codes*, Order, 32 FCC Rcd 7407, 7407, para. 1 (WCB 2017) (permanent assignment of 800-US-REWARD to U.S. State Department) (*US-Reward Reassignment Order*); *Toll Free Service Access Codes*, Order, 21 FCC Rcd 9925, 9925, para. 1 (WCB 2006) (*800-RED-CROSS Permanent Reassignment Order*) (permanent assignment of 800-RED-CROSS to the American Red Cross).

<sup>46</sup> See generally *1998 Toll Free Order*, 13 FCC Rcd 9058.

<sup>47</sup> *Id.* at 9065, para. 12.

<sup>48</sup> See *id.* at 9066, para. 16.

<sup>49</sup> *Id.* at 9065, para. 13.

rule section 52.111, will result in an orderly, efficient, and fair assignment of toll free resources. The Commission has explained that an *orderly* toll free number assignment mechanism “will simplify the administrative requirements necessary to assign toll free numbers and avoid the need to resolve competing claims among subscribers to particular numbers.”<sup>50</sup> Additionally, an *efficient* toll free number assignment mechanism will minimize exhaust of the toll free numbering resource.<sup>51</sup>

17. After reevaluating the criteria in the *1998 Toll Free Order*,<sup>52</sup> we conclude that assigning toll free numbers through the use of competitive bidding is orderly; any entity interested in a toll free number can, through an auction, express the value it places on a particular number, in a clear, transparent, and relatively simple manner. Moreover, assigning a number to the entity that places the highest bid is easy to understand and avoids the need to resolve competing claims among potential subscribers to particular numbers. Further, the first-come, first-served approach, has not always resulted in an orderly and efficient distribution of highly-valued—i.e., mutually exclusive—numbers. Since the Commission’s adoption of this approach in the *1998 Toll Free Order*, the Bureau has intervened to withhold or ration highly desired numbers in subsequent code openings due to concerns with the first-come, first-served assignment process. The Bureau, expressing concern that RespOrgs were inefficiently warehousing numbers, implemented conservation plans for four out of the seven presently available toll free number codes.<sup>53</sup>

18. Given the Commission’s considerable experience with auctions since 1998 and the ability of an entity to bid the value it places on a particular number in a clear, transparent, and relatively simple manner, we believe any administrative costs and “practical difficulties” in holding an auction would be significantly lower than previously believed, making it more likely that the efficiencies of competitive bidding will outweigh such costs. Therefore, we conclude that adding competitive bidding as one possible assignment method meets the first prong of our established test, namely, that an assignment mechanism be orderly and efficient.

19. We also find that the market-based assignment methodologies in revised rule 52.111 are fair, meeting the second part of the section 251(e)(1) test. The Commission has explained that a *fair* toll free number assignment mechanism is one that gives “[a]ll subscribers . . . an equal opportunity to reserve desirable toll free numbers as new codes are opened.”<sup>54</sup> Using a competitive bidding process to assign mutually exclusive toll free numbers can provide interested parties with a level playing field, on which everyone has the same ability to express their valuation for specific numbers in a clear, transparent manner, using an equally accessible method. Based on our experience with auctions in other contexts,<sup>55</sup> we find that we are more likely to achieve our stated objective of assigning mutually exclusive toll-free numbers on an equitable basis by allowing all qualified bidders the same opportunity to express their value for a number and assigning the numbers to the party that values it the most, than if we use a method

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<sup>50</sup> *Id.* at 9065, para. 12.

<sup>51</sup> *Id.*

<sup>52</sup> *See generally id.*

<sup>53</sup> *See Toll Free Service Access Codes*, CC Docket No 95-155, Report and Order, 11 FCC Rcd 2496, 2501, 2504, 2509, paras. 22, 38, 58 (CCB 1996) (*1996 Toll Free Order*); *855 Code Opening Order*, 25 FCC Rcd at 13688-90, paras. 3-6; *844 Code Opening Order*, 28 FCC Rcd at 16140-41, para. 3; *800 Number Release Order*, 31 FCC Rcd at 6830, para. 5; *Toll Free Service Access Codes*, Order, 32 FCC Rcd at 3154-55, para. 5.

<sup>54</sup> *1998 Toll Free Order*, 13 FCC Rcd at 9069, para. 25.

<sup>55</sup> We expect that the experimental use of an auction for mutually exclusive 833 toll free numbers (as adopted in this item) will yield additional insight into whether auctions are the best methodology for assigning toll free numbers and, if so, how best to use competitive bidding in the future.

by which a number is assigned to the party that employs the most advanced access system.<sup>56</sup>

20. While in its 1998 application of this test, the Commission stated that auctions “offer all participants an equal opportunity to obtain a particular . . . number,”<sup>57</sup> it also concluded that a first-come, first-served assignment mechanism was also fair and selected that approach due to its then perceived benefits of order and efficiency.<sup>58</sup> We find that the Commission’s prior conclusion has not borne out for highly desired toll free numbers; indeed, the Bureau has intervened in the last four toll free code openings, altering the first-come, first-served methodology *precisely* to ensure fairness in the toll free number assignment methodology.

21. Since the *1998 Toll Free Order* was adopted, the Commission has observed that the underlying numbering access technology has evolved: Certain automated systems now used to access the Toll Free Database have placed smaller RespOrgs at a competitive disadvantage because they do not have the capacity to quickly reserve sought-after vanity numbers.<sup>59</sup> Enhanced connectivity gives larger, more sophisticated entities the incentive to invest in these systems to increase the chances that their number requests are processed. This situation undermines a key rationale for the first-come, first-served approach: that all interested parties have an equal chance of getting a number.<sup>60</sup> And while it advances the separate goal of ensuring a number is quickly allocated to the party that values it most highly—a differential willingness to invest indicates an underlying differential in the value the investing party sees in numbers—it does so only loosely, since there is no direct mechanism that allows potential subscribers to bid in their valuation. In the absence of conservation controls, the Bureau has seen evidence of unfair access following new toll free code openings. For example, following the 877 and 866 code openings, the Commission received reports from RespOrgs suggesting that during database “timeouts,” only RespOrgs with more advanced access systems were able to reserve numbers, while RespOrgs not using those advanced systems were “locked out” and unable to reserve their desired numbers.<sup>61</sup> For the 855 and 844 toll free code openings, the Bureau directed the toll free database administrator to limit the quantity of toll free numbers a RespOrg may reserve to 100 per day for the first 30 days—“larger RespOrgs with enhanced connectivity to the [toll free] database” would otherwise be able to more quickly to reserve sought-after numbers than smaller RespOrgs without enhanced connectivity.<sup>62</sup>

22. We reject commenters’ arguments that an auction is unfair because it favors parties with deep

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<sup>56</sup> *Cf.*, CSF Corp. Comments at 3-4 (arguing that an auction assignment methodology is appropriate “for a small amount of numbers that [a]re in high demand”); Verizon Comments at 2 (“Any auction methodology . . . should ensure that auctions are used only for numbers for which there is a genuine competing demand by actual customers.”). Moreover, the current method leads to unnecessary expenditure on equipment to gain a timing advantage, whereas the proceeds from a toll free auction will go towards the administration of the toll free system.

<sup>57</sup> *See 1998 Toll Free Order*, 13 FCC Rcd at 9066, para. 16.

<sup>58</sup> *Id.* at 9069, para. 25.

<sup>59</sup> *800 Number Release Order*, 31 FCC Rcd at para. 4. *See also 844 Code Opening Order*, 28 FCC Rcd 16139, 16141, para. 3, n. 13 (quoting comments from SMS/800, Inc., which stated that RespOrgs with the financial wherewithal to connect to the toll free database using a technology known as Mechanized Generic Interface (MGI) have an advantage over other RespOrgs).

<sup>60</sup> *See, cf.*, ATIS SNAC Comments at 2-3 (“ATIS SNAC is opposed to the use of auctions to allocate toll free numbers given the success of the current allocation methodologies (e.g., limited allocation code openings for 844 and 855 and first-come, first-served allocations for all other assignments) and the significant and unknown impacts that this proposal could have on the toll free industry and on toll free subscribers.”).

<sup>61</sup> *See, e.g.*, Petition of Toll Free Number Coalition Petition for Emergency Relief and Expedited Action, CC Docket No. 95-155, at 9-10 (filed Nov. 9, 2000), <https://ecfsapi.fcc.gov/file/6512058797.pdf>.

<sup>62</sup> *855 Code Opening Order*, 25 FCC Rcd at 13687, para. 1, 13688, para 3; *844 Code Opening Order*, 28 FCC Rcd at 16139, para. 1, 16140-41, para. 3.

pockets.<sup>63</sup> An auction allocates the number to the bidder willing to pay the most, but that willingness may derive from expected future revenues from a profitable business case, rather than from the bidders' current finances. Moreover, auctions should reflect the value of the toll free number in the marketplace and a bidder may be able to obtain financing based on anticipated profitability. We anticipate that a first-come, first-served approach will continue to be an appropriate assignment methodology in some circumstances, however. For instance, first-come, first-served assignment may be appropriate for less desirable numbers, or in instances where numbers made available via an auction are not assigned thereby. We expect that our experience with the 833 Auction will provide us with insight we can use when determining the best mechanism for assignment of a given set of numbers.

23. *Effective Assignment of Toll Free Resources.* Our revised assignment rule gives us a new option for the assignment of numbers, without removing currently available options. The Commission has extensive experience in public outreach and education about the auction process, including online tutorials for the auction application and bidding processes.<sup>64</sup> Based on this experience, we disagree with the argument that providing adequate notice to the public about auction procedures will be unreasonably costly.<sup>65</sup> Nor do we agree with commenters who argue that preparing for and participating in the auction will be unduly burdensome to participants.<sup>66</sup> We recognize that individual subscribers or RespOrgs acquiring toll free numbers through an auction may incur some costs relating to the participation in the auction that they did not incur through the first-come, first-served process, but we believe those costs are outweighed by the benefits to the toll free system at large when toll free numbers are put to their highest-valued use. Many toll free numbers have a much greater value for certain subscribers.<sup>67</sup> Some 150 RespOrgs participated in the 833 pre-code opening process, requesting over 72,000 numbers.<sup>68</sup> This fact undermines the basic rationales on the effectiveness of first-come, first-served for mutually exclusive numbers—that first-come, first-served allocation requires less oversight,<sup>69</sup> and avoids “the need to resolve competing claims among subscribers to assignment of particular numbers.”<sup>70</sup> On the contrary, the Commission has been compelled to provide increased oversight by intervening multiple times to ensure new code openings are “orderly and efficient” and “fair,”<sup>71</sup> and adjudicated numbering conflicts in at

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<sup>63</sup> See e.g., 800 Response Reply at 3-4; ATIS SNAC Comments at 3; ACTIS Comments at 3, CenturyLink Comments at 3; Elizabeth White Comments at 1; see also Conduit Consulting Comments at 1; CSF Corp. Comments at 3.

<sup>64</sup> See, e.g., *Auction of Upper Microwave Flexible Use Licenses for Next-Generation Wireless Services, Comment Sought on Competitive Bidding Procedures for Auctions 101 (28 GHz) and 102 (24 GHz)*, AU Docket No. 18-85, Public Notice, FCC 18-43 (2018) (explaining the bidding process in a spectrum auction).

<sup>65</sup> See 800 Response Reply at 7.

<sup>66</sup> See, e.g., Conduit Consulting Comment at 1; Verizon Comments at 3.

<sup>67</sup> See *supra* para. 9 (indicating that certain 833 numbers are much more highly valued than others); cf. Verizon Comments at 1 (“Any auction methodology – including the initial designation of numbers subject to auction in the first place – should ensure that auctions are used only for numbers for which there is a genuine competing demand by actual customers.”).

<sup>68</sup> Somos Aug. 31, 2017 *Ex Parte* Letter at 1.

<sup>69</sup> Cf. *1998 Toll Free Order*, 13 FCC Rcd at 9066, para. 16 (stating “lotteries and auctions are more difficult to administer than a first-come, first-served reservation process because they require greater oversight and would likely result in delay in the issuance of numbers.”).

<sup>70</sup> *Id.* at 9068, para. 22.

<sup>71</sup> See *1996 Toll Free Order*, 11 FCC Rcd at 2501, 2504, 2509, paras. 22, 38, 58; *855 Code Opening Order*, 25 FCC Rcd at 13688-90, paras. 3-6; *844 Code Opening Order*, 28 FCC Rcd at 16140-41, para. 3; *800 Number Release Order*, 31 FCC Rcd at 6830, para. 5; *Toll Free Service Access Codes, Order*, 32 FCC Rcd at 3154-55, para. 5.

least two notable cases.<sup>72</sup> Our practice of resolving competing claims has previously been resolved inefficiently in favor of the party most privileged with access to the faster reservation system.<sup>73</sup> Instead of the number going to whichever entity happens to be first in the door (thereby preventing others, who may value it more, from getting it), use of competitive bidding will give all entities an equal opportunity to express the value they place on any particular number. By increasing the likelihood that mutually exclusive toll free numbers are assigned to parties that will use the resource in the most productive way, we in turn increase the efficiency and equity of our number assignment process.

24. Revising the Commission's rules to allow us to assign numbers by auction, on a first-come, first-served basis, an alternative assignment methodology, or by a combination of the forgoing as circumstances require, gives the Commission the flexibility to adapt our assignment procedures to the circumstances and characteristics of the specific toll free numbers to be assigned. In any future toll free code release, the revised rule will not require the Commission to use competitive bidding and, if it decides to use competitive bidding, the Commission will not be confined to a specific auction design. Instead, for new toll free code openings, the Commission can determine the best method to proceed for assigning numbers, armed with the data collected in the 833 Auction.

## **B. The 833 Auction**

### **1. The 833 Auction Established as an Experiment**

25. We establish the 833 Auction as an experiment to analyze the most efficient way to use competitive bidding as a toll free number assignment method. We agree with one commenter who argues that, as a first step, the Commission should assign toll free numbers by auction on a "limited, trial basis," which will allow us to "study the impact of this new allocation method and make any necessary changes to serve the public interest."<sup>74</sup> Thus, we will offer in this auction only the rights to use the 17,000 mutually exclusive numbers in the 833 toll free code that were identified pursuant to the *833 Code Opening Order*. Once the auction is complete, we direct Somos to assign those numbers to winning bidders based on the auction's results. We will continue to assign 833 numbers that are not part of the 833 Auction using our first-come, first-served approach.

26. After completion of the 833 Auction, and subsequent number assignments, the Bureau will issue a report outlining the outcomes of the 833 Auction, lessons learned, and future recommendations for toll free number assignment methodologies.

27. We intend to use this experiment as an opportunity to evaluate the contours of using competitive bidding for toll free assignments and to determine how to best use a market-based assignment to effectively assign toll free numbers. We also underscore the need to reform the current method of assigning highly desired toll free numbers. We envision that the experiment, as designed in this Report and Order and forthcoming Auction Procedures Public Notice, will meet our goals of equitable

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<sup>72</sup> See, e.g., *Toll Free Service Access Codes*, Order, 32 FCC Rcd 7407, 7407, para. 1 (WCB 2017) (permanent assignment of 800-US-REWARD to U.S. State Department) (*US-Reward Reassignment Order*); *Toll Free Service Access Codes*, Order, 21 FCC Rcd 9925, 9925, para. 1 (WCB 2006) (*800-RED-CROSS Permanent Reassignment Order*) (permanent assignment of 800-RED-CROSS to the American Red Cross).

<sup>73</sup> See *844 Code Opening Order*, 28 FCC Rcd 16139, 16141, para. 3, n. 13 (quoting comments from SMS/800, Inc., which stated that RespOrgs with the financial wherewithal to connect to the toll free database using a technology known as Mechanized Generic Interface (MGI) have an advantage over other RespOrgs).

<sup>74</sup> CenturyLink Comments at 1-2, 6-7. By adopting the 833 Auction as an experiment, the actions we take today are also consistent with the recommendation of the Administrative Conference of the United States (ACUS) that agencies adopt pilot programs and learn from regulatory experience. See Administrative Conference of the United States, Administrative Conference Recommendation 2017-6, Learning from Regulatory Experience (2017) (ACUS Report).

distribution and be used, as designed, for certain future toll free number assignments or be used for future assignments with refinements.

## 2. General Framework for the 833 Auction

28. In the *Toll Free Assignment NPRM*, the Commission “invite[d] parties to . . . offer further economic, legal, or logistical insights about . . . auction designs and procedures.”<sup>75</sup> Given the experimental nature of using competitive bidding as a mechanism for assigning toll free numbers, we outline here a general framework for the 833 Auction and require a pre-auction proceeding in which we will seek public input on the procedures for the auction after the release of this Report and Order.<sup>76</sup>

29. Specifically, we will issue an Auction Comment Public Notice after the release of this Report and Order and will solicit public input on proposed application and bidding procedures, including specific proposals for application requirements and bidding mechanisms, such as minimum opening bids, bid processing, and determining payments. Thereafter, we will release an Auction Procedures Public Notice, and will specify final auction procedures, including dates, deadlines, and other final details of the application and bidding processes. We require the auctioneer to implement the auction pursuant to the procedures specified in the Auction Procedures Public Notice. We conclude that, in addition to the general framework we provide here, the Commission’s practice of finalizing auction procedures in the pre-auction process will give interested participants sufficient time and opportunity both to comment on the final procedures and to develop business plans in advance of the auction.

### a. Auction Design

30. We adopt the proposal in the *Toll Free Assignment NPRM* to conduct the 833 Auction as a Vickrey single round, sealed-bid auction.<sup>77</sup> In this type of auction, a qualified bidder can submit a sealed-bid for each available toll free number that the bidder wants.<sup>78</sup> The 833 Auction will consist of only a single round of bidding, and the highest bidder for each toll free number will win the rights to that number, but will generally only pay the second-highest bid for them.<sup>79</sup>

31. A Vickrey auction can yield an equitable and efficient assignment of mutually exclusive toll free numbers as it incentivizes bidders to bid their true valuation.<sup>80</sup> In particular, the amount paid by the winner (i.e., the bidder with the highest bid) is determined by the second highest bid and does not depend on the exact amount of the winning bidder’s own bid. This payment rule results in the winning bidder essentially receiving what it might view as a “surplus,” i.e., the difference between its own bid and the second highest bid. A Vickrey auction thus encourages bidders to bid the true maximum they are willing to pay, while at the same time efficiently assigns the numbers to the bidders who have the highest

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<sup>75</sup> *Toll Free Assignment NPRM*, 32 FCC Rcd at 7892, para. 20.

<sup>76</sup> We expect that our approach to the 833 Auction will be modeled on the rules and procedures governing auctions for wireless spectrum licenses, broadcast permits, and universal service support, where appropriate, given the success and familiar nature of those auctions. *See generally* 47 CFR §§ 1.2101 *et seq.*

<sup>77</sup> *Toll Free Assignment NPRM*, 32 FCC Rcd at 7891, para. 15.

<sup>78</sup> *See generally* R. Preston McAfee & John McMillan, *Auctions and Bidding*, 25 J. Econ. Literature 699, 701-703 (1987), <http://vita.mcafee.cc/PDF/JEL.pdf>.

<sup>79</sup> In the case of tied bids, a winning bidder may end up paying the tied bid amount. For the 833 Auction, we defer to the pre-auction process, the detailed procedures for bid processing and payment determination, including, among other things, how winners and payments will be determined in the case of tied bids and what to do if a toll free number receives only one bid in the single round of bidding.

<sup>80</sup> *Toll Free Assignment NPRM*, 32 FCC Rcd at 7891, para. 16.

valuations for the numbers.<sup>81</sup>

32. We conclude that the 833 Auction should use a single round rather than multiple rounds to keep the auction process for this experiment as simple and cost-effective as possible. As the Commission observed in the *Toll Free Assignment NPRM*, a single round, sealed-bid auction is relatively easy for both the auctioneer (to implement) and participants (to participate in).<sup>82</sup> In addition, a single round auction will be completed more quickly than a multi-round auction,<sup>83</sup> and comes at a lower cost to the auctioneer and the participants. In fact, we do not believe that auction participants will be required to incur substantial time or expense to prepare for the auction. They have already determined which 833 numbers to reserve, thus spending some time and expense in reaching those determinations; the incremental effort on their part to participate in the auction is unlikely to impose an additional time or cost burden on them. And because of the lower cost of a single round Vickrey auction, we reject commenters' concerns that the costs to implement and run the auction will be excessive.<sup>84</sup>

33. We also reject the notion that a Vickrey single round, sealed-bid auction will result in a scenario where inexperienced bidders will overbid and be unwilling or unable to pay the winning bid.<sup>85</sup> A second-price auction encourages bidders to bid the true maximum that they are willing to pay, knowing they will not actually pay more than needed to outbid the second highest bidder. Also, we note that each bid is a binding commitment, so bidders know in advance that they should only submit bids that they are willing to pay.<sup>86</sup> In addition, as discussed further below, entities interested in participating in an auction generally have to submit some form of financial security in order to participate.<sup>87</sup> Further, consistent with the Commission's standard practice, we will ensure that prospective auction participants have an opportunity to become fully informed about the auction through public outreach and education, including online tutorials about the application and bidding processes.

34. *Alternative Auction Methodologies.* Although the Commission sought comment on alternative auction methodologies to consider for assigning the mutually exclusive 833 numbers, we decline to employ any such methodologies for the 833 Auction.<sup>88</sup> One commenter suggested that we use

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<sup>81</sup> *Id.* As a first approximation, it is likely that individual valuations for toll free numbers are not dependent on another's valuation, at least beyond a broker's desire to purchase for resale. *See id.* at 7903-04, Appx. A at paras. 2-4. Moreover, to the extent that this is not the case, auction theory does not provide unambiguous direction as to optimal auction design. Thus, for our opening experiment in assigning toll free numbers via competitive bidding, we adopt the simple and transparent Vickrey auction.

<sup>82</sup> *Id.* at 7890, para. 13. *See also* ATFP Comments at 4 (arguing that the single round, sealed-bid Vickrey auction is a suitable format, as it requires minimum involvement and can be tabulated by a trusted third party); Verizon Comments at 5 (Vickrey sealed-bid auction—more than an open or multiple round auction—would appear to enable RespOrgs and their customers to obtain numbers expeditiously and predictably).

<sup>83</sup> ATFP Comments at 4; Somos Comments at 5; Verizon Comments at 5.

<sup>84</sup> *See e.g.*, 800 Response Comments at 7 (costs to educate public will be costly); Conduit Consulting Comments at 1 (auction process is costly).

<sup>85</sup> CSF Corp. Comments at 4.

<sup>86</sup> This is true even in a Vickrey auction, where the winning bidder will only pay the second-highest bid, because the second highest bid price may be equal to (in case of a tie) or just slightly less than the winning bidder's submitted bid. As Power Auction notes, "[i]t is important for bids to be binding commitments, because the lack of binding commitments could cause the auction process to be manipulated or to unravel." Power Auctions Comments at 7-8.

<sup>87</sup> Power Auctions Comments at 7-8. *See infra* Section III.B.2.d.

<sup>88</sup> For example, the *Toll Free Assignment NPRM* sought comment on a pay-your-bid auction, whereby the highest bidder wins and pays its bid, and an open auction, such as a simultaneous multi-round auction used by the Commission for our spectrum auctions. *Toll Free Assignment NPRM*, 32 FCC Rcd at 7892, paras. 18-20.

what it calls an “open” auction, specifically “a simultaneous ascending clock auction with multiple independent clocks.”<sup>89</sup> While this type of auction can have certain advantages over a single round, sealed-bid, Vickrey auction,<sup>90</sup> we conclude that these advantages do not justify the additional complexity and expense of a multiple round auction at this time. The 833 Auction will be the Commission’s first auction of the rights to use toll free numbers, and our intent for this experiment is to gather data to help inform future toll free assignment decisions while minimizing the complexity and cost to the Commission, auctioneer, and participants during the experiment.<sup>91</sup> We also have limited information on which to base any estimate of the dollar amounts potential subscribers are willing to bid. Also, the relatively modest nature of the items to be auctioned—the rights to use toll free numbers, as opposed to spectrum licenses or Universal Service Fund support—seems at this juncture to warrant a less complex and costly type of auction. Thus, we do not want to create a more complex and costly auction than necessary at this early stage.

35. One commenter argues that a single round, sealed-bid Vickrey auction limits the ability of a bidder to develop a bidding strategy involving substitute numbers vis-à-vis an “open” auction.<sup>92</sup> That commenter does not, however, provide a basis for its position that bidders in the 833 Auction will have a need for such a complex auction, or how such a need outweighs the impact to cost and complexity for this experimental auction. Further, unlike other auctions the Commission has conducted, such as auctions for spectrum and Universal Service Fund support, where some items may be substitutable, this auction allocates items for which managing bids across substitutes is less important. Similarly, there are important complementarities in bids for spectrum and Universal Service Fund support which we have no reason to believe apply to the toll free number market.

36. In sum, because the Vickrey single round, sealed-bid auction should demand fewer resources from the Commission, the auctioneer, and the auction participants while still yielding an efficient allocation of toll free numbers, we believe it will help achieve our objectives for this experiment.<sup>93</sup> We note, however, that we are not intending to foreclose the use of an “open” auction—or another auction methodology—in any future toll free number auctions.<sup>94</sup> We expect that the Bureau’s report will address the success of the Vickrey single round, sealed-bid auction methodology, and compare it to alternative methodologies.

#### **b. Auction Eligibility**

37. Deciding which parties can participate in an auction is an integral part of the process. Although we generally require applicants for our auctions to demonstrate certain qualifications consistent with the regulatory objectives of a particular auction, it is also true that the broader the participation, the more likely it is that 833 numbers will be assigned to the highest-valuing bidders. For the 833 Auction,

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<sup>89</sup> Power Auctions Comments at 2-5.

<sup>90</sup> Power Auctions enumerates several advantages of an “open” auction, including (1) permitting bidders the opportunity of price discovery; (2) permitting bidders more control over the money spent on winning bids; (3) permitting bidders some ability to handle bids for numbers that may be viewed as substitutes; (4) maintaining privacy of auction participants’ bids; and (5) potentially resulting in higher auction revenues and more efficient results. Power Auctions Comments at 2-5.

<sup>91</sup> See, e.g., Daniel Lyons Comments, Attach. at 4 (“The single-round auction is much cheaper than a traditional multi-round auction, meaning the administrative costs of the auction are minimal.”).

<sup>92</sup> Power Auctions Comment at 3.

<sup>93</sup> *Id.*

<sup>94</sup> To the contrary, we recognize that there are cases where an open auction may perform better than a sealed-bid auction. See *Toll Free Assignment NPRM*, 32 FCC Rcd at 7892, para. 19, Appx. A at para. 4; see also Power Auctions Comments at 2-5.

we will allow any party interested in obtaining an 833 number (potential subscriber) to participate directly in the auction or indirectly through a RespOrg. We also will not limit the 833 Auction to only those RespOrgs that participated in the 833 pre-code opening; any RespOrg may participate. We believe allowing all interested parties to participate directly in the auction will provide them with greater flexibility and control to accurately express their level of interest and will allow the Commission to glean as much information from the experiment as possible to better inform future toll free code opening assignments.

38. *833 Auction Not Limited to RespOrgs.* We will permit any potential subscriber to participate directly in the 833 Auction or indirectly through a RespOrg.<sup>95</sup> In the *Toll Free Assignment NPRM*, the Commission proposed to permit only RespOrgs to participate in the proposed auction, based on RespOrgs' role as manager and administrator of toll free records in the Toll Free Database.<sup>96</sup> After reviewing the record, we conclude that allowing potential subscribers to directly participate will likely increase the efficiency of the auction while also addressing possible conflicts of interest between RespOrgs and potential subscribers. We agree with 800 Response, who argues that allowing potential subscribers to participate will minimize opportunities for participants to engage in undesirable and/or anticompetitive strategic behavior that could occur if a RespOrg and one or more of its subscribers were interested in the same 833 numbers.<sup>97</sup> Therefore, we find it appropriate to allow potential subscribers to act on their own behalf and represent their own interests in the auction.<sup>98</sup> We stress that if a potential subscriber directly participates in and is assigned a number via the 833 Auction, it must still work with a RespOrg after the auction to reserve the number in the Toll Free Database in accordance with our rules.<sup>99</sup>

39. We do not go so far as to remove RespOrgs from the process of acquiring toll free numbers in the 833 Auction, as one commenter suggests.<sup>100</sup> Because subscribers are familiar with working with RespOrgs to acquire toll free numbers and may prefer to continue to take advantage of RespOrg expertise here, we conclude that we should allow subscribers the choice of working with a RespOrg in the 833 Auction.

40. Some commenters oppose permitting potential subscribers to participate in the auction. For example, Somos claims that allowing subscribers to participate "would introduce unnecessary and potentially costly administrative problems"<sup>101</sup> and Power Auctions advocates allowing only RespOrgs to

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<sup>95</sup> A toll free "subscriber," per the rule revision we adopt today, is "The entity that has been assigned a toll free number." See *infra* Appx. A. Because we do not intend to limit auction participation to entities that already have been assigned numbers, we establish that "potential subscribers"—any parties interested in subscribing to a toll free number—may participate in the 833 Auction. As auction participants, these parties will be obligated to comply with the Auctions Procedures Public Notice in this proceeding.

<sup>96</sup> *Toll Free Assignment NPRM*, 32 FCC Rcd at 7892-93, para. 21. The Commission also recognized "the importance of RespOrgs as market makers" and noted that RespOrgs "may have strengths in maximizing the valuation of certain numbers, for example, by piecing together geographic coalitions of subscribers who may be unable to coordinate themselves." *Id.*

<sup>97</sup> See 800 Response Information Services LLC Reply Comments at 3-4. If a RespOrg and one or more of its subscribers do not have an interest in the same 833 numbers, permitting RespOrgs to participate in the auction gives subscribers to option to have their RespOrgs bid on their behalf.

<sup>98</sup> Potential subscribers also have the option to become a RespOrg by meeting various requirements for certification. By formally allowing potential subscribers the option to participate directly, non-RespOrg participants will not need to spend resources to become a RespOrg if they are concerned that current RespOrgs would not fully represent their interests.

<sup>99</sup> See 47 CFR § 52.101.

<sup>100</sup> See 800 Response Information Services LLC Reply Comments at 3-4.

<sup>101</sup> Somos Comments at 3.

participate since they can maximize valuations of certain numbers and including subscribers would increase the costs of running the auction.<sup>102</sup> On the other hand, one commenter advocates excluding RespOrgs completely, and allowing only end-user customers to participate.<sup>103</sup> We recognize the value added by RespOrgs as “market makers,”<sup>104</sup> but find that allowing potential subscribers to participate in the auction will likely increase the efficiency of the auction, by increasing competition and reducing the likelihood of tacit collusion and other undesirable strategic behavior that can occur when there are very few auction participants.<sup>105</sup> Although we recognize there may be additional cost in auction overhead by allowing more participants, we believe that the benefits to auction efficiency created by expanding the pool of potential participants identified above are worth the minimal expense in determining whether the additional participants are qualified to bid in the auction. And by allowing potential subscribers to bid on their own, we lower administrative costs for participants who choose not to place a bid through a RespOrg.

41. *Maximizing Auction Participation.* We will not otherwise limit the number of participants in the auction, such as by limiting RespOrg eligibility to participate in the 833 Auction only to those RespOrgs that participated in the 833 pre-code opening process. Permitting the maximum number of eligible participants to bid in the 833 Auction ensures a robust auction and results in the bidders with the highest willingness to pay being assigned a number, which is in the public interest. The inclusion of all RespOrgs and potential subscribers in the pool of eligible participants will also provide the Commission with greater information about the value of toll free numbers, increasing the value of the experiment. In furtherance of this goal, the Commission, along with Somos in its role as auctioneer, will undertake outreach efforts to promote maximum participation among RespOrgs and potential subscribers.

### c. Application Process

42. In Commission auctions, interested parties must disclose certain information and make certain certifications in an application or series of applications.<sup>106</sup> This information helps promote auction transparency and integrity and assists us in monitoring compliance with our auction rules and procedures, including, for example, the prohibition against certain communications. We find it is necessary to qualify entities to participate in the auction, and therefore require interested entities to submit a short-form application to participate in the auction. The information and certification required in the short-form application, along with an upfront payment, will help determine if an applicant is qualified to bid in the 833 Auction. We will not require applicants to submit a long-form application after the conclusion of this auction, given the lack of need to verify winning bidders’ qualifications in this context and to limit the administrative burden on bidders, the auctioneer, and the Commission.

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<sup>102</sup> Power Auctions Comments at 6-7 (arguing that increased participation would result in increased “overhead in reviewing applications to participate in the auction, processing upfront payments, providing login credentials to the auction system, training bidders, collection payments from winning bidders after the auction, etc.”). *See also* ATFP Comments at 8 (arguing that only RespOrgs can vet bidders and minimize fraud, and will result in “uniform and efficient” bid collection since RespOrgs will consolidate and submit bids in one file).

<sup>103</sup> 800 Response Information Service LLC Reply Comments at 1-4.

<sup>104</sup> As the Commission recognized in the *Toll Free Assignment NPRM*, RespOrgs “may have strengths in maximizing the valuation of certain numbers, for example, by piecing together geographic coalitions of subscribers who may be unable to coordinate themselves.” *Toll Free Assignment NPRM*, 32 FCC Rcd at 7892-93, para. 21.

<sup>105</sup> 800 Response Reply at 2-3.

<sup>106</sup> In the Commission auctions, we typically have a two-stage application filing process. In the pre-auction “short-form” application, a potential bidder will need to establish its eligibility to participate, providing, among other things, basic ownership information. After the auction, the Commission conducts a more extensive review of the winning bidders’ qualifications to receive support through “long-form” applications.

(i) **Short-Form Application Requirements**

43. We establish here some basic requirements and limitations regarding applications to participate. We expect that each entity interested in bidding in the 833 Auction will be required to disclose certain information and make certain certifications to promote compliance with the framework we outline here and protect auction integrity. These submissions will promote the transparency and efficiency of the auction and reduce the instances of conflicts of interest and the likelihood of undesirable and/or anticompetitive strategic behavior by participants.

44. *A Potential Subscriber May Participate Through Only a Single Auction Applicant and Submit a Single Application.* Potential subscribers can participate in the 833 Auction through only a single auction applicant. In particular, a potential subscriber may not engage multiple applicants to bid for a particular number in which it is interested. This prohibition assures a level playing field for all bidders and prevents distortions in the information on bidder interests, by assuring that each auction participant has at most one bid per number in the single round.

45. We likewise prohibit a single party, or multiple parties with a controlling interest in common, from becoming qualified to bid based on multiple applications.<sup>107</sup> We employ this same prohibition in spectrum auctions to ensure that auction participants bid in a straightforward manner.<sup>108</sup> We believe that this type of restriction is warranted in the 833 Auction and will address concerns raised in the record regarding the potential for undesirable strategic bidding behavior, which could harm other bidders.<sup>109</sup>

46. *A RespOrg Can Apply on Behalf of Only a Single Potential Subscriber (Including Itself) Per Number.* We recognize that allowing RespOrgs to serve as bidders for potential subscribers of toll free numbers may present the opportunity for certain auction participants to have more information about the competition for certain numbers. Such asymmetric information could be used in ways that adversely affect some potential subscribers. To mitigate the potential anticompetitive effects of RespOrgs bidding for potential subscribers, we will limit a RespOrg to representing a single potential subscriber (including itself) for the rights to use a particular number.<sup>110</sup>

47. *Disclosures and Certifications.* To promote transparency as well as compliance with the limitations discussed above, we establish certain general requirements for applicant disclosures and certifications. Specifically, we expect that each auction participant—whether a potential subscriber or a RespOrg serving as a bidding agent—will be required to certify, as applicable, that it is not bidding on behalf of multiple interested parties (including itself) for the same toll free numbers or that it is only bidding through one entity for a given number.<sup>111</sup> To enforce this prohibition, we expect that applicants

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<sup>107</sup> While we will seek comment and decide how to define parties with common controlling interests in our pre-auction process, we anticipate utilizing the Commission's definitions adopted for similar purposes in our spectrum auctions. *See, e.g.*, 47 CFR § 1.2105(a)(4)(i).

<sup>108</sup> *Updating Part 1 Competitive Bidding Rules*, FCC 15-80, Report and Order, 30 FCC Rcd 7493, 7579-81, paras. 205-208 (2015).

<sup>109</sup> Verizon Comments at 4.

<sup>110</sup> We note that, under a different auction design (e.g., in a multiple round auction) or with different eligibility requirements, a different limitation may be appropriate to help ensure that RespOrgs fully represent subscriber interests, but, for the 833 Auction, we find this limitation to be appropriate.

<sup>111</sup> A RespOrg can bid on behalf of multiple subscribers, as long as the subscribers it represents, as well as itself, are not bidding on the rights to use the same number(s). We will also require the applicants that have overlapping non-controlling interests to certify, during the application process, that they have established internal control procedures to preclude any person acting on behalf of an applicant from possessing information about the bids or bidding strategies of more than one applicant or communicating such information with respect to either applicant to another person acting on behalf of and possessing such information regarding another applicant. *See Updating Part 1 Competitive Bidding Rules*, 30 FCC Rcd at 7580-81, para. 207.

will need to disclose the party on whose behalf it is bidding, for each toll free number that it selects. To enforce the prohibition, and to allow entities to comply with the prohibition on certain communications discussed below, we also expect that any entity wishing to participate in the 833 Auction will have to fully disclose information regarding the real party- or parties-in-interest in the applicant or application and the ownership structure of the applicant, including both direct and indirect ownership interests of 10 percent or more.<sup>112</sup> We also will require applicants to provide additional information and make additional certifications in the application, as may be found in the pre-auction process to be necessary to implement our decisions in this Report and Order. By requiring these certifications and disclosures, we guard against potential conflicts of interest between a RespOrg and its customer subscriber(s), between a RespOrg's customer subscribers, and between RespOrgs with overlapping controlling interests seeking the rights to use the same toll free numbers. Moreover, such actions will help implement our overriding principle that each entity should participate through only one bidder, thus encouraging sincere bidding and enhancing the integrity of the auction.

#### (ii) Procedures for Processing Pre-Auction Applications

48. For the 833 Auction, we expect that applications to participate in the auction will be processed in a manner similar to applications to participate in spectrum license auctions. Specifically, no application will be accepted if, by the initial deadline, the applicant has failed to make the required certifications, e.g., no additional applications will be accepted after the initial deadline.<sup>113</sup> Moreover, applicants will be afforded an opportunity to cure any identified minor defects after an initial review of the application.<sup>114</sup> Applications to which major modifications are made after the deadline for submitting applications shall be denied. Major modifications include, but are not limited to, any changes in the ownership of the applicant that constitute an assignment or change of control of the applicant,<sup>115</sup> or the certifications required in the application. If an applicant fails to make necessary corrections before a resubmission deadline, the applicant would be found not qualified to bid.<sup>116</sup>

#### d. Other Competitive Bidding Considerations for the 833 Auction

49. *Prohibition on Certain Communications.* For spectrum and universal service auctions, the Commission has adopted rules prohibiting an applicant from communicating certain auction-related information to another applicant from the auction application filing deadline until the post-auction deadline for winning bidders to file long-form applications.<sup>117</sup> This prohibition on certain communications is intended to reinforce existing antitrust laws, facilitate detection of collusive conduct,

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<sup>112</sup> See 47 CFR § 1.2112(a).

<sup>113</sup> See 47 CFR § 1.2105(a), (b)(1). Put differently, no additional applications will be accepted after the deadline.

<sup>114</sup> See 47 CFR § 1.2105(b)(2).

<sup>115</sup> Pro forma transfers and assignments have not generally been considered to be major modifications. See, e.g., *Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services*, Report and Order, WT Docket No. 98-20, 13 FCC Rcd 21027, 21060, para. 72 (1998).

<sup>116</sup> See 47 CFR § 1.2105(b)(3).

<sup>117</sup> See 47 CFR § 1.2105(c), 1.21002(b). In these rules, “applicant” is defined broadly to include “all controlling interest in the entity submitting a short-form application to participate in an auction . . . as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application, and all officers and directors of that entity.” *Id.* at §§ 1.2105(c)(5)(i), 1.21002(a).

and deter anticompetitive behavior.<sup>118</sup> While we believe the 833 Auction should have a similar prohibition on certain communications, we defer until the pre-auction process the details of the prohibition on certain communications, but absent unique factors that may be applicable to the 833 Auction we expect the prohibition to be generally consistent with our rule in spectrum auctions.<sup>119</sup>

50. *Availability of Auction-Related Information During and After the Auction Process.* It is our objective that the 833 Auction be transparent and objective. Consistent with that objective, we conclude that the procedures to be established in the pre-auction process should address what auction-related information will be available to bidders and to the public during the auction process, and when any information withheld during the auction will be made publicly available.

51. *Upfront Payments and Default Payments.* Entities that are interested in participating in the 833 Auction will be required to demonstrate an ability to pay for the rights to use the numbers for which they intend to bid by submitting an upfront payment.<sup>120</sup> Moreover, since bids are binding commitments, if a bidder fails to make full payment on its bid, or otherwise defaults, it should be subject to a default payment. We defer to the pre-auction process what the upfront payments and default payments for the 833 Auction should be, but we generally expect the approach to be modeled on those used in the Commission's spectrum auctions.<sup>121</sup>

52. *Bidding Credits.* We will not adopt bidding credits for the 833 Auction. We recognize that bidding credits can provide economic opportunity for a wide range of participants.<sup>122</sup> Given the experimental nature of this auction, however, we conclude bidding credits are not appropriate at this time. No commenters who advocate we incorporate bidding credits in the 833 Auction provide specifics about the size standards or size of the bidding credits that might be employed, and we have no prior basis for determining the appropriate amount of any such bidding credit. We further do not wish to confuse the lessons we take away from this experiment by including bidding credits, which would influence bidder behavior. Instead, we will consider all of the data collected from the 833 Auction to determine if bidding credits should be offered in any possible toll free number auctions in the future.

53. *Reserve Prices.* We also decline to establish reserve prices for the 833 Auction.<sup>123</sup> Most commenters oppose establishing reserve prices, arguing that reserves may discourage entities from bidding.<sup>124</sup> Our goal for this auction is to gain as much information as possible about the effectiveness of

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<sup>118</sup> See *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6736, para. 397 (2014) (citing *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2386-88, paras. 221, 225 (1994)).

<sup>119</sup> See 47 CFR § 1.2105(c). Regardless of the procedures ultimately decided upon for the 833 Auction, participants will be subject to antitrust laws, which are designed to prevent anticompetitive behavior in the marketplace. See *Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures*, Third Further Notice of Proposed Rulemaking, 14 FCC Rcd 21558, 21560-61, para. 4 & n.17 (1999); *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, Fourth Memorandum Opinion and Order, 9 FCC Rcd 6858, 6869, para. 64 n.134 (1994) (“[A]pplicants will also be subject to existing antitrust laws.”).

<sup>120</sup> See generally 47 CFR § 1.2106; see also Power Auctions Comments at 7-8.

<sup>121</sup> See 47 CFR § 1.2106.

<sup>122</sup> See ACTIS Comments at 3-5 (urging the Commission to adopt bidding credits so that smaller RespOrgs in the Caribbean region can compete better in any toll free auction); CenturyLink Comments at 4 (arguing that Commission should consider bidding credits to avoid disadvantaging smaller participants); 800 Response Information Services LLC Reply Comments at 5-6.

<sup>123</sup> See *Toll Free Assignment NPRM*, 32 FCC Rcd at 7891-92, para. 17. By “aggregate reserve price,” we refer to a minimum amount that must be reached in order for all of the numbers to be assigned after the auction closes.

<sup>124</sup> See CSF Corp. Comments at 4; Verizon Comments at 5 (asserting that small business customers in particular may be unwilling or unable to pay a reserve price); 800 Response Information Services LLC Reply Comments,

(continued....)

a market-based approach to toll free number assignment, and we are convinced by the record that a reserve price may discourage auction participation and, thereby, decrease the amount of information we gain from the auction.<sup>125</sup> And because this is our first time using competitive bidding to assign toll free numbers, we have a limited basis on which to establish a reasonable and efficient reserve price.

54. *Bidding on Multiple Numbers.* Consistent with our proposal in the *Toll Free Assignment NPRM*,<sup>126</sup> we will not limit the overall quantity of toll free numbers the rights to which can be acquired by an auction participant. Establishing such a limit could hamper the efficiency of the auction by constraining bidders who hold the highest valuations. Moreover, we wish to obtain as much information as possible from this experiment and believe any such constraint would limit the information derived from this experiment.

55. Similarly, we find it is unnecessary to permit package bidding (i.e., single bids for the rights to groups of numbers) in the experiment. As the Commission stated in the *Toll Free Assignment NPRM*,<sup>127</sup> though it is likely some bidders will demand the rights to multiple numbers, we do not believe valuation synergies warrant the additional complexity that package bidding brings. We desire to minimize the auctioneer's development costs for the auction interface and to simplify the bidding process for the auction participants.<sup>128</sup> We expect the Bureau's post-auction report to address the auction's effectiveness, and to recommend whether any of the measures we have declined to adopt in the Report and Order—including package bidding—could be useful in deciding on future toll free assignment methods.

56. *Post-Auction Winning Bidder Public Notice.* Once the auction has been completed, we will release a public notice identifying the winning bidders and establishing the deadline for making final payment for winning bids. This public notice will also explain how unsold inventory—numbers that received no bids—will be assigned after the 833 Auction. As we have explained, any potential subscriber that participates directly in the auction and wins the rights to a number must still work through a RespOrg after the auction to reserve the number in the Toll Free Database in accordance with our rules.<sup>129</sup>

### 3. Somos as Auctioneer for the 833 Auction

57. We establish Somos, the Toll Free Numbering Administrator, as the auctioneer for the 833 Auction. We believe this role is commensurate with its present statutory and regulatory duties and its responsibilities. The Commission established Somos as the Toll Free Numbering Administrator in the 2013 *Toll Free Governance Order*.<sup>130</sup> There, we determined that Somos met the impartiality requirement of section 251(e)(1) of the Act—codified in section 52.12 of our rules<sup>131</sup>—and was “eligible to serve as

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Attach. at 4. *But see* Power Auctions Comments at 5-6 (arguing that reserve prices may be useful since the level of interest in mutually exclusive toll free numbers varies widely among RespOrgs).

<sup>125</sup> See CSF Corp. Comments at 4.

<sup>126</sup> *Toll Free Assignment NPRM*, 32 FCC Rcd at 7893, para. 23.

<sup>127</sup> *Id.* at 7890-91, para. 14.

<sup>128</sup> See AFTP Comments at 7 (arguing that package bidding would disadvantage small businesses interested in only one number).

<sup>129</sup> See 47 CFR § 52.101.

<sup>130</sup> *Toll Free Service Access Codes*, Order, 28 FCC Rcd 15328, 15328, para. 1 (2013) (*Toll Free Governance Order*).

<sup>131</sup> See generally *Toll Free Governance Order*, 28 FCC Rcd at 15344-46, paras. 41-47 (applying 47 CFR § 52.12 criteria of “Affiliate Relationship,” “Debt or Revenues from a Provider,” “Commission Discretion to Consider Undue Influence”); 47 CFR § 52.12.

neutral SMS administrator.”<sup>132</sup> As the auctioneer for the 833 Auction, Somos shall continue to implement impartially toll free number assignments, consistent with the Act and our implementing rules.

58. In its role as auctioneer, we require Somos to provide the infrastructure and software for online bidding and carry out other activities necessary to implement the auction. These activities include performing bidder education and other outreach; accepting and reviewing applications to participate in the auction; accepting upfront payments; announcing qualified bidders and those not qualified to bid; accepting bids during a single round of bidding; accepting final payments for winning bids and distributing refunds for any upfront payments not applied to winning bids; activating in the toll free database the numbers won at auction and for which final payment has been made; and undertaking any other tasks in furtherance of the 833 Auction that the Commission deems appropriate and as elaborated in the Auction Procedures Public Notice. The Commission will maintain oversight of Somos’s implementation of the 833 Auction and will re-direct it as necessary to most effectively execute the 833 Auction.<sup>133</sup>

59. One commenter posits that the present Toll Free Numbering Administrator should not serve as the toll free number auctioneer because Somos “has no experience in conducting auctions” and it “would be called upon to develop entirely new [auction] processes.”<sup>134</sup> We disagree. Somos has asserted that it is fully capable of executing an auction,<sup>135</sup> we have no basis on which to question its assertion. Moreover, given the considerable expertise in number assignment and administration that Somos has gained since the Commission formally designated it as the Toll Free Numbering Administrator,<sup>136</sup> we are confident that Somos it will perform its auctioneer duties in accordance with the procedures established by the Auction Procedures Public Notice.<sup>137</sup>

60. We also agree with Somos that it is critical “to maintain continuity and stability in TFN [toll free number] administration.”<sup>138</sup> In contrast, were we to establish an independent auctioneer, the independent auctioneer would have to first coordinate with Somos to verify that the numbers available in the 833 Auction are indeed available.<sup>139</sup> The independent auctioneer would then have to direct Somos to assign the number to the winning bidder. We find this step in the process unnecessary as Somos is capable to serve as auctioneer in accord with the specific and direct instruction to be set forth in the Auction Procedures Public Notice.

61. While we appreciate the novelty of our experiment in using competitive bidding in the toll free context, the Commission itself has a vast amount of experience in conducting auctions in other

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<sup>132</sup> *Toll Free Governance Order*, 28 FCC Rcd at 15343, para. 41.

<sup>133</sup> To maintain oversight, the Commission will review tariff filings, *see infra* para. 71, issue specific instruction in the Auction Procedures Public Notice, and direct Somos under our broad authority over the Toll Free Numbering Administrator.

<sup>134</sup> 800 Response Comments at 8.

<sup>135</sup> Somos Comments at 2.

<sup>136</sup> *See generally, e.g., Toll Free Governance Order*, 28 FCC Rcd 15328 (establishing SMS/800, later known as Somos, Inc., as the toll free administrator, subject to tariff); *Toll Free Service Access Codes*, Order, 31 FCC Rcd 6828, 6829-30 paras. 4-5 (WCB 2016) (waiving first-come, first-served rule for 800 code numbers pursuant to Somos petition concerned with number exhaust).

<sup>137</sup> *See generally* Somos Comments at 2.

<sup>138</sup> *Id.*

<sup>139</sup> *See Toll Free Service Access Codes*, 12 FCC Rcd at 11168, para. 7.

contexts.<sup>140</sup> We will oversee Somos's implementation of the 833 Auction, along with our general oversight of numbering, to alleviate any concerns about auction execution. Moreover, a single-round, sealed-bid auction should not require complex software or administration.

62. For these reasons, we direct Somos to serve as the auctioneer of the 833 Auction. In the event Somos seeks to add outside personnel to assist with the auction in any way, it may do so provided that it retains the overall administrative responsibility and neutrality.<sup>141</sup>

63. *Auction Information.* To allow the Commission to make a fair and accurate assessment of the results and consequences of the 833 Auction, we require Somos to retain and make available to the Commission all data and information about the auction and its administration, gathered before, during, and after the auction. Such information includes, but is not limited to, information on the following: winning and losing bids, bidders, administrative costs (including detailed costs to design the auction user interface, auction platform, and software to evaluate the auction results), and post-auction secondary market transfers.<sup>142</sup> We also require Somos to make available to the Commission information on 833 numbers not included in the auction for comparison purposes. This data will enable us to get a complete picture of the viability of the 833 Auction and on competitive bidding as an assignment method for future toll free code openings.

#### 4. 833 Auction Proceeds

64. We will use any net positive proceeds from the 833 Auction to defray the costs of administering toll free numbering incurred by the Toll Free Numbering Administrator<sup>143</sup> (i.e., costs beyond conducting the auction) and, potentially, the North American Numbering Plan Administrator (NANPA).<sup>144</sup> By "net positive proceeds," we mean any amount by which revenues from the auction exceed the costs of conducting the auction.<sup>145</sup> Applying net positive proceeds in this manner is consistent with our authority in section 251(e) to administer numbering, and its requirement that the costs of

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<sup>140</sup> See generally, e.g., *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014); Fed. Comm'n's Comm'n, *Broadcast Incentive Auction and Post-Auction Transition*, <https://www.fcc.gov/about-fcc/fcc-initiatives/incentive-auctions>.

<sup>141</sup> Section 251(e) requires the Commission to "create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis." See 47 U.S.C. § 251(e)(1).

<sup>142</sup> Per the exception we establish today, the secondary market is limited to numbers assigned via competitive bidding. See *infra* section III.C. The mutually exclusive numbers in the 833 code assigned in the 833 Auction will therefore be eligible for secondary market transfers.

<sup>143</sup> Somos is a not-for-profit corporation that provides the Toll Free Numbering Administrator function pursuant to FCC tariff, subject to section 61.38 of the Commission's rules. 47 CFR § 61.38. Somos must file annual tariff revisions pursuant to the applicable part 61 rules for a dominant carrier, subject to the tariff requirements and enforcement of the Commission pursuant to the Act and the Commission's rules. *SMS/800 Order*, 28 FCC Rcd at 15342, paras. 37-38; see also generally Somos, Inc., Tariff F.C.C. No. 1 (2018), <https://s3.amazonaws.com/files-prod.somos.com/documents/SMS800FunctionsTariff.pdf> (Toll Free Tariff). Previous tariff information is available at <https://apps.fcc.gov/etfs/public/tariff.action?idTariff=787>. Tariff modifications must be filed each January 31 (following the close of its fiscal year, which is the calendar year) updating the rates for its services, effective during the next tariff year that begins in February. Each such filing must contain an updated cost of service study pursuant to section 61.38. *Id.* Based upon that cost study, Somos's rates and charges are adjusted to recover those forecasted costs over the ensuing tariff year.

<sup>144</sup> The NANPA is currently Neustar, Inc., <https://www.nationalnanpa.com/>.

<sup>145</sup> Because Somos will also be developing and conducting the auction, the administrator's costs for the auction will be paid first from auction revenues.

administration be borne by carriers on a competitively neutral basis.<sup>146</sup> As discussed in the *Toll Free Assignment NPRM*, it will benefit all toll free subscribers and RespOrgs, as well as potentially all stakeholders in the 20 countries that are members of the NANP.<sup>147</sup>

65. *Disbursement of 833 Auction Revenues That Exceed Somos's Auction Costs.* We conclude that net positive proceeds from the 833 Auction should be used to defray toll free numbering administration costs. We establish a methodology that will benefit Toll Free Numbering Administrator users while tempering resulting year-over-year change of administrative rates and charges. We therefore tie our disbursement to the ratio between net positive proceeds and Somos's revenue requirements. In the present tariff year, Somos's revenue requirement for toll free numbering administration services is \$56.9 million.<sup>148</sup> If net positive proceeds are less than five percent of Somos's then-current annual revenue requirement,<sup>149</sup> then the net positive proceeds should be used only to defray toll free numbering administration costs for the tariff period immediately following the close of the 833 Auction.<sup>150</sup> In the event that net positive proceeds exceed five percent of Somos's costs, then the net positive proceeds should be distributed evenly across five years for cost recovery under the tariff to minimize the impact on the administrative rates and charges. This approach avoids substantial year-over-year changes in administrative rates and charges, and allows RespOrgs and toll free subscribers to receive the cost reduction over an extended period if net positive proceeds are large enough to warrant.<sup>151</sup>

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<sup>146</sup> 47 U.S.C. § 251(e)(1)-(2) (“The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.”).

<sup>147</sup> *Toll Free Assignment NPRM*, 32 FCC Rcd at 7893-94, paras. 25-26. The NANP member countries are Anguilla, Antigua and Barbuda, Bahamas, Barbados, Bermuda, British Virgin Islands, Canada, Cayman Islands, Dominica, Dominican Republic, Grenada, Jamaica, Montserrat, Sint Maarten, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, Turks and Caicos Islands, and the United States (including American Samoa, Puerto Rico, U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands). 47 CFR § 52.5(d). NANP toll free numbers are allotted to all member countries. The Toll Free Numbering Administrator administers the pool of toll free number resources allotted to Canada, Sint Maarten, and the United States. Other NANP member countries administer toll free numbering outside of the Toll Free Numbering Administrator and its Toll Free Database.

<sup>148</sup> The revenue requirement to cover forecasted costs for toll free numbering administration (referenced in the Tariff as “SMS/800”) services in the current tariff period, covering February 15, 2018 – February 14, 2019, is \$56,933,855. Toll Free Tariff, Transmittal No. 4, Table 4, Table 6 (effective Feb. 15, 2018).

<sup>149</sup> Somos would make this determination based on its cost study for the ensuing tariff year, with and without cost reduction by offset of auction proceeds. Should there be any further auction proceeds received after such determination (e.g., delayed payments accepted by the Commission), those proceeds will be applied/remitted in accordance with the manner set forth herein based on the then-cumulative amount of all auction proceeds from that auction, inclusive of such further auction proceeds.

<sup>150</sup> Auction proceeds amounting to five percent or less of the current annual revenue requirement applied to that single tariff year would likely have a *de minimis* effect on administrative rates and charges.

<sup>151</sup> The Commission has long sought to “smooth” the impact of its actions on telephony rates and charges. See *8YY Access Charge Reform*, WC Docket No. 18-156, Further Notice of Proposed Rulemaking, FCC 18-76, at 16-19, paras. 51-59 (June 8, 2018), 2018 WL 2932190 (providing three-year transition period for changes to toll free access charges); *Connect America Fund et al.*, WC Docket Nos. 10-90 et al., Report and Order, Third Order on Reconsideration and Notice of Proposed Rulemaking, FCC 18-19, at 32-33, paras. 69-71 (Mar. 23, 2018), 2018 WL 1452720 (“minimize unpredictable fluctuations in consumers’ bills” by year-over-year carryover of excess funds “without causing a dramatic shift in the [USAC] quarterly contribution factor”); *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17932-38, paras. 799-810 (2011) (adopting a multi-year transition plan for reform of intercarrier compensation to avoid sharp changes in rates and charges impacting the marketplace).

66. If net positive proceeds from the 833 Auction are large enough that applying them to defray toll free numbering administration costs over five years would result in a greater than 25 percent decrease in the revenue requirement for the Toll Free Numbering Administrator, then the excess of net positive proceeds beyond that amount will be remitted to the Billing and Collection (B&C) Agent for the NANP<sup>152</sup> to be applied to defray the costs of NANP administration on behalf of its 20 member countries. We find that directing funds in excess of 25 percent for the benefit of the NANP strikes an appropriate balance, avoiding excessive fluctuations in the toll free tariff structure and benefitting both numbering administrations upon which toll free calling is dependent. The toll free numbers administered by the Toll Free Numbering Administrator are numbers within the NANP; it is therefore appropriate that such funds potentially go to defray the costs of the administering the NANP, which are borne by the countries served by the Toll Free Numbering Administrator and the other NANP member countries. In the event proceeds remitted to the B&C Agent exceed five percent of NANPA costs, then the net positive proceeds should be distributed evenly by the B&C Agent across five fiscal years of the NANPA, to minimize the impact on the NANPA rates and charges. If proceeds remitted to the B&C Agent are large enough that applying them to defray NANPA costs over five years would result in a greater than 25 percent decrease in the revenue requirement for the NANPA, then the excess of net positive proceeds beyond that amount will be distributed evenly by the B&C Agent across the next ten fiscal years of the NANPA.

67. *Recovery of 833 Auction Costs That Exceed Auction Revenues.* In the event the costs of the 833 Auction exceed its revenues, Somos may recover the resulting deficit in the same manner as other costs of toll free number administration: by incorporating them into the cost recovery mechanism in its tariff. These auction costs would be recovered along with all other allowable costs as part of the Toll Free Numbering Administrator's revenue requirement for the ensuing tariff year(s). This means that all RespOrgs and their underlying toll free subscribers will bear the auction's costs, just as they would share the benefit of any net auction proceeds. This approach is consistent with the cost-recovery system whereby all RespOrgs, and ultimately all toll free subscribers, bear the costs of numbering administration collectively.<sup>153</sup>

68. We anticipate that the 833 Auction will benefit the entire toll-free industry by potentially lowering the monthly fees associated with toll free reservations.<sup>154</sup> Accordingly, we reject the suggestion that equitable and efficient distribution of numbers requires that any costs of the 833 Auction exceeding auction revenues should be imposed only upon auction winners, or auction participants, under "competitively neutral" and "cost-causer" approaches.<sup>155</sup> The 833 Auction is open to all RespOrgs and all potential subscribers. Moreover, the sharing of any net auction proceeds—or any auction deficit—does not of itself distort the toll free market in any fashion or favor one competitor in that marketplace over any other. As one commenter notes, consumers benefit directly from the use of toll free numbers, and "reducing the input costs proportionally across RespOrgs will benefit all participants at their level of

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<sup>152</sup> The present B&C Agent is Welch LLP, <http://nanpfund.com/>. The B&C Agent will apply such funds prior to application of the various contribution factors and billing and collections processes.

<sup>153</sup> Toll free numbering administration costs are recovered via the Toll Free Numbering Administrator's rates and charges, in the form of both transaction-specific fees, and monthly and other charges that are not tied to any specific transaction of number acquisition or change. Toll Free Tariff, Transmittal Nos. 4 and 5, Base Document pages 64-71 (effective Feb. 20, 2018).

<sup>154</sup> See e.g., Toll Free Tariff, §4.2(b) (monthly charge for non-dedicated access is \$27.27); §4.2(c) (the current customer record administration monthly charge is \$.1130).

<sup>155</sup> Verizon Comments at 8-9, citing *Toll Free Service Access Codes et al.*, Fifth Report and Order, 15 FCC Rcd 11939, paras. 35-37 (2000); see also 47 U.S.C. § 251(e)(2).

participation, thereby not distorting the toll-free market. The method proposed by the FCC is an efficient and effective mechanism for achieving that goal.”<sup>156</sup>

69. Finally, for the reasons discussed above, if the deficit exceeds five percent of the forecasted cost of the Toll Free Numbering Administrator’s services for the next tariff year, we will require the recovery of any deficit over the ensuing five years of cost recovery under the tariff. Such a deficit will be divided equally among each of those five years, and incorporated into the administrator’s cost studies and revenue requirements for each of those years. By this approach, we seek to avoid or reduce any substantial increases or fluctuations in the Toll Free Number Administrator’s rates and charges due to any deficit.

70. *International Considerations.* One commenter notes the international nature of the NANP and asks “what right does US, or its agencies, have to unilaterally benefit from an auction?”<sup>157</sup> This concern is misplaced. The United States will not unilaterally benefit from the 833 Auction’s proceeds. Rather, as explained, net positive proceeds will be used to defray the costs of toll free number administration, benefitting all RespOrgs (and ultimately toll free subscribers) in those countries served by the Toll Free Numbering Administrator,<sup>158</sup> and may also be used to defray the cost of NANP administration, benefitting all of its member countries. Even if the 833 Auction does not meet the 25 percent threshold, RespOrgs from these countries will benefit from lowered charges from the Toll Free Numbering Administrator. We note that a coalition of 10 Canadian RespOrgs, including major Canadian telecommunications service providers, supports our proposal to apply net auction proceeds to the Toll Free Numbering Administrator’s administration costs.<sup>159</sup> Applying net auction proceeds as set forth herein is consistent with the way Somos applies RespOrg fee proceeds, and the NANPA collects fees, through the B&C Agent, from member countries and service providers.<sup>160</sup>

71. *Somos Tariff Implications.* We direct Somos to reflect any net positive proceeds or deficit related to the 833 Auction in the section 61.38 cost support filed with the Toll Free Tariff. We have previously said that Somos must support the costs of its Toll Free database administration as part of its tariff filing with the Commission.<sup>161</sup> The present Toll Free Tariff “contains regulations, rates and charges” applicable to administration of the Toll Free database.<sup>162</sup> As explained above, any auction proceeds will be applied to decrease Toll Free database administration costs.<sup>163</sup> This will allow Somos to

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<sup>156</sup> See Coalition of Canadian RespOrgs Comments at 2-3.

<sup>157</sup> Letter from Loren Stocker, Founder, ATPF, to Marlene H. Dortch, Secretary, FCC, CC Docket 95-155, at 2-3 (filed Sept. 1, 2017).

<sup>158</sup> The countries served by the Toll Free Numbering Administrator are Canada, Sint Maarten and the United States.

<sup>159</sup> See Coalition of Canadian RespOrgs Comments at 2 (“The Coalition of Canadian RespOrgs support the FCC’s recommendation that the proceeds of any toll-free number auction be used to offset the costs of toll-free number administration.”).

<sup>160</sup> See generally Toll Free Tariff, see also Somos Reply at 3 (describing generally Toll Free Numbering Administrator functions and cost recovery); *Wireline Competition Bureau Announces the Proposed North American Numbering Plan Administration Fund Size Estimate and Contribution Factor for October 2018 through September 2019*, CC Docket No. 92-237, Public Notice, DA 18-727 (WCB July 13, 2018), 2018 WL 3414790.; *2017 NANPA Annual Report* (Neustar, Inc.) available at [https://www.nationalnanpa.com/reports/reports\\_annual.html](https://www.nationalnanpa.com/reports/reports_annual.html) at 2-3, 7-11, 22, 32 (describing functions, funding, and international aspects of the NANPA).

<sup>161</sup> *Provision of Access for 800 Service*, Order, 8 FCC Rcd 1423, 1426-27, paras. 28-29 (1993) (*1993 CompTel Declaratory Ruling*); see also *Toll Free Governance Order*, 28 FCC Rcd at 15334-35, para. 1.

<sup>162</sup> Toll Free Tariff §1.1.

<sup>163</sup> See *supra* Section III.B.4 (discussing application of auction proceeds).

lower certain of its charges, such as the monthly customer record administration charge.<sup>164</sup> On the other hand, any auction deficit, i.e., auction costs that exceed revenues from the auction, will be recovered via the tariff's cost recovery mechanism along with any other costs associated with administering the database. Inclusion of auction-related costs in the tariff's cost justification is necessary to show the impact of the 833 Auction on the tariffed charges to RespOrgs for use of the Toll Free database.

## 5. Toll Free Numbers Used for Public Purposes

72. To ensure that the public interest is protected in the 833 Auction, we will set aside numbers in the 833 code that have been identified as mutually exclusive upon reasonable request by government entities.<sup>165</sup> In the *Toll Free Assignment NPRM*, the Commission sought comment on whether certain desirable toll free numbers should be set aside for use, without cost, by government agencies or by non-profit health, safety, education, or other non-profit public interest organizations.<sup>166</sup> After reviewing the record, we agree with commenters who argue that “[c]ertain desirable toll free numbers that promote health and safety should be set aside for use by government, without cost,”<sup>167</sup> and that numbers should not be set aside for non-profit entities.<sup>168</sup>

73. Government (federal, state, local and Tribal) entities have a unique relationship with toll free numbers. Not only do they use numbers to provide service to the public,<sup>169</sup> but they also face unique budgeting challenges that may place toll free numbers assigned at auction out of reach. Moreover, there is a practical ease of identifying government entities along with their role in promoting health and safety in the public interest. Commenters note that, by comparison, the public interest nature of non-profit organizations can be practically difficult to identify,<sup>170</sup> and that setting aside numbers for non-profits presents a greater possibility of fraud and abuse.<sup>171</sup> We agree with these commenters. It could be difficult for the Commission to determine the public interest nature of these organizations, and we are not well-positioned to make this determination.

74. We disagree with the arguments in the record that offering any public interest-related number set aside for governmental entities is inherently not “equitable” under section 251(e)(1) of the Act.<sup>172</sup> To the contrary, this set aside works to assuage concerns that some bidders—government entities—may be precluded from obtaining desired numbers by our auction experiment.<sup>173</sup> However, we are sympathetic to

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<sup>164</sup> See e.g., Toll Free Tariff, §4.2 (Rates and Charges).

<sup>165</sup> Government entities include federal, state, local, and Tribal governments.

<sup>166</sup> *Toll Free Assignment NPRM*, 32 FCC Rcd at 7897-98, para. 39.

<sup>167</sup> ACTIS Comments at 5; see also ATFP Comments at 9-10 (stating that only government agencies should have the privilege of bypassing normal assignment, and only then once the public has had an opportunity to object); cf. Network Telephone Services Comments at 1-2 (arguing that the Commission should protect numbers that have established public benefit resources in other codes, such as 833 equivalent of 1-800-Medicare).

<sup>168</sup> See ATFP Comments at 11-12 (comparing set asides to eminent domain and arguing that an exercise of eminent domain should never be used to favor private non-profits over general assignment); 800 Response Information Services LLC Comments at 12 (arguing that there are substantial practical difficulties to offering preference to non-profit entities).

<sup>169</sup> See Network Telephone Services Comments at 1-2 (discussing 1-800-Medicare and the IRS's toll free number).

<sup>170</sup> See 800 Response Comments at 12; NANC Report Appx. C at 5. *But see* Network Telephone Services Comments at 1.

<sup>171</sup> See ATFP Comments at 10 (suggesting that setting aside numbers for non-profits would cause “all kinds of [f] non-profits [to] suddenly spring up solely to secure numbers”).

<sup>172</sup> Elizabeth White Comment at 3.

<sup>173</sup> Cf. Network Telephone Services Comments at 1-2; ACTIS Comments at 5.

the argument that the public should have an opportunity to object to requests that numbers be set aside.<sup>174</sup> For this reason, while we will consider requests from government entities to set aside numbers in the 833 code that are already considered mutually exclusive, in order for a request to be considered, the government entity must file a “Petition for an 833 Toll Free Number” with the Bureau in accordance with the Auction Procedures Public Notice. The Bureau will then solicit public comment prior to making its decision on the number request based on the public interest.<sup>175</sup> We intend to maintain our standard for review consistent with the unusual and compelling public health and safety standards in Commission precedent<sup>176</sup> and direct the Bureau to consider each government application individually, on a case-by-case basis, as it is filed with the Commission. We note that while being a government entity is a necessary condition for a set aside, it is not in and of itself a sufficient condition and the Bureau must apply the unusual and compelling public health and safety standards discussed above. If, however, multiple government entities file petitions requesting the same number for public health and safety purposes, we direct Somos to conduct a lottery for the number among the requesting applicants. We believe a lottery is both an equitable and expedient way to resolve competing requests for the same number. The Commission will use the information obtained from this number set aside process to determine whether we should continue to use it in future code openings.

## 6. Treatment of Trademark Holders

75. We decline to adopt proposals in the record to provide special treatment for trademark-holders. Specifically, commenters have suggested that we provide trademark-holders a right of first refusal<sup>177</sup> or adopt new “procedures” to address instances of abuse of a number desired by a trademark-holder.<sup>178</sup> We find that, as under the first-come, first-served methodology, “concerns regarding trademark infringement and unfair competition . . . should be addressed by the courts under the trademark protection and unfair competition laws, rather than by the Commission.”<sup>179</sup>

76. We disagree with commenters who argue that failing to provide special treatment for trademark-holders is contrary to the public interest.<sup>180</sup> As 1-800-CONTACTS admits, the Lanham Act

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<sup>174</sup> ATFP Comments at 9.

<sup>175</sup> Petitions must be filed in ECFS in Docket No. WC 17-192 and CC Docket No. 95-155. Filing the petition does not guarantee the request will be granted. *See* Somos Comments at 7.

<sup>176</sup> *See US-Reward Reassignment Order*, 32 FCC Rcd at 7409, paras. 6-7; *see also Toll Free Service Access Codes*, 32 FCC Rcd at 7408-09, paras. 6-8; *Toll Free Service Access Codes*, Order, 27 FCC Rcd 2965, 2965, 2968, paras. 1, 6 (WCB 2012); *800-RED-CROSS Permanent Reassignment Order*, 21 FCC Rcd at, 9925, 9927, paras. 1, 5; *Toll Free Service Access Codes*, Order, 20 FCC Rcd 15089, 15090, para. 3 (2005); ACTIS Comments at 5.

<sup>177</sup> 1-800-CONTACTS Comments at 10-12; December 12, 2017 Letter of 1-800-Flowers to Marlene H. Dortch at 2 (1-800-FLOWERS Dec. 12, 2017 *Ex Parte*); M&S Telecom Services Comments at 1 (recommending a right of first refusal if trademark-holders meet certain qualifications); *cf.* Conduit Consulting Comments at 1-4 (offering alternative process for assignment with priority given to trademark-holders).

<sup>178</sup> ACTIS Comments at 6.

<sup>179</sup> *1998 Toll Free Order* at 9068, para. 22; *see also* Network Telephone Services Comments at 2 (“The FCC should consider in their analysis that there are courts to resolve conflicts involving an established number assigned to a party in the private sector . . . Under current FCC rules, a company may reserve the equivalent to its assigned vanity number by being the first in line to acquire the similar telephone number when a new toll-free code is introduced. However, if they are not the first to reserve the telephone number, they may still have legal recourse if a competitor starts using a confusingly similar mark or telephone number.”).

<sup>180</sup> *See* 1-800-CONTACTS Comments at 6 (“Where a particular number is protected by trademark law . . . there is only one possible auction result that would favor the public interest: acquisition by the trademark holder.”); 1-800-FLOWERS Dec. 12, 2017 *Ex Parte* at 2 (arguing that special protection for trademark-holders is necessary in order “to protect the public at large from unnecessary confusion and deception”).

already serves to “protect consumers by preventing confusion and unfair competition,”<sup>181</sup> and 1-800-FLOWERS has acknowledged its success policing use that infringes on its trademarks under the first-come, first-served methodology.<sup>182</sup> Some commenters argue that a market-based approach to number assignment will encourage “extortion” of trademark-holders by bad actors,<sup>183</sup> but we see no reason to diverge from our position that number assignment should be trademark-agnostic.<sup>184</sup> An auction mechanism assigns numbers to those who value them most highly, and a secondary market—which we adopt on a limited basis below—only facilitates this assignment.<sup>185</sup> Subscribers remain bound by trademark law once a number has been assigned.<sup>186</sup> We also disagree with the argument of 1-800-CONTACTS that auctioning numbers without special protection for trademark holders “would conflict with the statutory requirements of the Lanham Act.”<sup>187</sup> 1-800-CONTACTS does not identify with specificity which requirements the Commission would violate, or provide support for its argument.<sup>188</sup>

### C. Secondary Markets for Toll Free Numbers

77. To fully realize the effectiveness of assigning numbers via competitive bidding, we allow for a secondary market of toll free numbers won at auction. In the *Toll Free Assignment NPRM*, the Commission sought comment on revising our rules to promote development of a secondary market for toll free numbers.<sup>189</sup> We have reviewed the record, and we agree with commenters who argue that our current rules may have a “chilling impact . . . on private enterprise.”<sup>190</sup> Consistent with our goal of making the rights to use numbers available on an equitable basis by assigning them to those who can put

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<sup>181</sup> 1-800-CONTACTS Comments at 4.

<sup>182</sup> 1-800-FLOWERS Dec. 12, 2017 *Ex Parte* at 1-2 (stating it has “actively policed it [*sic*] trademarks against those seeking to poach on the goodwill that has been built in the 1-800-FLOWERS brand”).

<sup>183</sup> See 1-800-CONTACTS Comments at 8-10 (“bad actors are likely to increase their efforts to extort excessive payments from trademark holders”); 1-800-FLOWERS Dec. 12, 2017 *Ex Parte* at 2 (arguing that bidders “will seize upon the opportunity to acquire a vanity number confusingly similar to a brand and then seek to demand a large ransom from the trademark owners”); ACTIS Comments at 6 (arguing that bidders could “subject[] a brand holder . . . to some form of number ransom”).

<sup>184</sup> 1998 *Toll Free Order*, 13 FCC Rcd at 9070, para. 27 (“We recognize that many commenters may have invested in their numbers by, for example, advertising and developing name recognition, and that a right of first refusal would arguably protect that investment. We disagree, however, that a right of first refusal is the only way subscribers can protect these investments. Some toll free subscribers may have recourse to the trademark protection laws. Public education campaigns, too, can minimize confusion and thus protect subscribers’ investments.”)

<sup>185</sup> See *infra* Section III.C.

<sup>186</sup> See Network Telephone Services Comments at 3 (“A successful auction bidder would still not be entitled to infringe on another’s [*sic*] party’s trademark or to unfairly compete with a competitor in the marketplace simply because they were the highest bidder in an FCC auction.”).

<sup>187</sup> 1-800-CONTACTS Reply Comments at 1.

<sup>188</sup> The United States Court of Appeals for the Sixth Circuit has found, in the context of an Internet domain name registrar, that assigning an item to a third party is not “use” for purposes of a trademark infringement claim. *Bird v. Parsons*, 289 F. 3d 865, 878 (6th Cir. 2002) (“The fact that [a] registrant can then use [a] domain name to infringe on the rights of a registered trademark owner does not subject the registrar to liability for trademark infringement or unfair competition.”).

<sup>189</sup> *Toll Free Assignment NPRM*, 32 FCC Rcd at 7895-96, paras. 30-33.

<sup>190</sup> ATFP Reply at 12; see also Gary Smith Comments at 1-3 (arguing “in support of the proposed FCC rule of eliminating all warehousing/brokering/hoarding rules” and describing chilling effect on small businesses who have sought to procure desirable toll free numbers).

the numbers to their best use, and with the record,<sup>191</sup> we now allow for the development of a secondary market for numbers assigned via competitive bidding.

78. The Commission's current rules prevent three types of conduct that limit or preclude the development of a secondary market. First, the rules prevent brokering—"the selling of a toll free number by a private entity for a fee."<sup>192</sup> Second, the rules prevent hoarding, which is the "acquisition by a toll free subscriber . . . of more toll free numbers than the toll free subscriber intends to use for the provision of toll free service."<sup>193</sup> Third, the rules prevent warehousing, a practice in which a RespOrg reserves toll free numbers "without having an actual toll free subscriber for whom the numbers are being reserved."<sup>194</sup> These rules not only preclude the sale of the rights to use toll free numbers—central to a secondary market—but also frustrate number sales by placing obligations on potential sellers.

79. As the Commission explained in the *Toll Free Assignment NPRM*, a secondary market appears to be "an efficient and productive use of numbers" because it "permit[s] subscribers to legally obtain numbers which they value."<sup>195</sup> It also promotes the efficient operation of an auction: Permitting the free acquisition and transfer of the rights to use numbers allows subscribers to purchase or sell numbers in response to the outcome of the auction, and limits pre-auction costs associated with estimating which—and how many—numbers a bidder may win. It further encourages value-creating entities to promote efficiency by procuring rights to numbers with an intent to sell those rights to other interested subscribers. The secondary market thus ensures that numbers are assigned to those parties who can most efficiently use them.<sup>196</sup> Under our current system, by contrast, a party that desires a number most cannot ensure that it is assigned that number; and if it fails to be assigned that number, it has no mechanism to procure it after the initial assignment. An auction mechanism with a robust secondary market not only ensures that numbers are assigned to the bidder that values them most at the time of assignment, but also allows the rights to numbers to be reassigned when valuations change.<sup>197</sup>

80. We disagree with commenters who claim that permitting a robust secondary market will lead to undesirable conduct<sup>198</sup> and extortion.<sup>199</sup> With an auction and secondary market, the rights to numbers

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<sup>191</sup> ATFP Comments at 4 ("The commission must remove any suggestion that Direct Transfers are prohibited, as outlined in the ATIS petition."); CSF Corp Comments at 4 (stating that "generally we would be in favor of a secondary market"); Power Auctions Comments at 8-9 (expressing support for proposal "to allow a secondary market for toll free numbers to develop"); RingBoost.com Comments at 2 ("The prohibition on selling numbers . . . is outdated and should be revoked in favor of a free market approach."); cf. ATIS SNAC Comments at 5-6 ("[T]here are specific situations (such as the sale of a business, correction of errors, etc.) in which transfers between Subscribers should be allowed[.]"); Verizon Comments at 2 ("Brokering restrictions are not required where the toll free number is incidental to other legitimate transactions, or to remedy administrative errors that sometimes arise.").

<sup>192</sup> 47 CFR § 52.107(a).

<sup>193</sup> *Id.*

<sup>194</sup> 47 CFR § 52.105(a).

<sup>195</sup> *Toll Free Assignment NPRM*, 32 FCC Rcd at 7895, para. 31.

<sup>196</sup> Daniel A. Lyons, The Free State Foundation, *Toll-Free Assignment Modernization and the Triumph of Coase* at 6 (2017), [http://www.freestatefoundation.org/images/Toll-Free\\_Assignment\\_Modernization\\_and\\_the\\_Triumph\\_of\\_Coase\\_091817.pdf](http://www.freestatefoundation.org/images/Toll-Free_Assignment_Modernization_and_the_Triumph_of_Coase_091817.pdf) ("[A]llowing resale provides incentives for existing toll-free number holders to transfer the asset to someone who values it more.").

<sup>197</sup> Power Auctions Comments at 8 ("A subscriber's needs for a toll free number may change over time because of various reasons. A secondary market would allow a subscriber who has been assigned a toll free number that it no longer values to reassign that number to another subscriber who now values that number more.").

<sup>198</sup> See CenturyLink Comments at 4 ("A secondary numbering market stands to incent number hoarding and trafficking and encourage speculation[.]"); cf. 800 Response Comments at 11 ("[W]arehousing and hoarding . . . [allow parties] to usurp for themselves the value inherent in highly desirable toll free numbers.").

will be assigned to those entities who value them most; differences in valuation do not reflect undesirable conduct or extortion. To the extent there is genuine misconduct, trademark and competition law serves to protect parties from bad actors.<sup>200</sup> Further, the argument that allowing a secondary market will “lead to premature exhaust”<sup>201</sup> is minimized by our decision to allow a secondary market only for those numbers assigned by auction. In the present experiment, the 833 Auction includes approximately 17,000 numbers—under one percent of all 833 numbers.<sup>202</sup> To the extent our rules preventing a secondary market were adopted to limit exhaust,<sup>203</sup> we do not believe this limited exception will significantly affect the exhaust of the entire pool of 833 numbers. Because creating this limited secondary market will not lead to premature exhaust, we see no need to adopt the proposal in the record that we “assess[] a fixed monthly direct contribution from all toll-free number holders [to] discourage hoarding and warehousing” in order to combat exhaust.<sup>204</sup> Further, we disagree with CenturyLink’s argument that we should not combine a secondary market with the 833 Auction experiment so that an auction “may be adequately evaluated without the influence of other variables.”<sup>205</sup> As we have explained, a secondary market is an important component to a successful auction, because it allows auction participants to later transfer numbers in response to information learned at the auction. And exploring these two changes simultaneously will allow us to see how they work in conjunction with one another.

81. We also disagree with the argument that “abandoning the brokering rule . . . violates the statutory mandate of equitable distribution of numbers.”<sup>206</sup> The secondary market is both “orderly and efficient” and “fair.”<sup>207</sup> The secondary market is “orderly”<sup>208</sup> because it is simple: Competing claims are resolved by assigning rights to a number to the party who values it most. The secondary market is “efficient,” as that term is interpreted under our precedent in this context, in that it will minimize number exhaust by allowing rights to numbers to be obtained without requiring the opening of a new code.<sup>209</sup>

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<sup>199</sup> 1-800-CONTACTS Comments at 8-9 (“In the environment of an FCC-approved secondary market, bad actors are likely to increase their efforts to extort excessive payments from trademark-holders”); *cf.* Verizon Comments at 3 (“Allowing speculative brokering transactions, and marketplace behavior that risks severing the connection between toll free numbers and bona fide customers, risks increasing the frequency of—and costs of resolving—such disputes to legitimate brand and trademark holders[.]”).

<sup>200</sup> *See also supra* Section III.B.6.

<sup>201</sup> 800 Response Comments at 11; *see also* 1-800-CONTACTS Reply at 5 (“[L]ifting the restrictions on brokering, warehousing, and hoarding “will strain the available numbers in the spare pool – which, in turn, would expedite the exhaust of available numbers[.]”); Verizon Comments at 7 (arguing that brokering, warehousing, and hoarding rules “ensur[e] that toll free numbers are efficiently and actually utilized by and tied to individual customers”); NANC Report Appx. B at 2-3.

<sup>202</sup> *See* CSF Corp. Comments at 2 (“There are 8M numbers available when a code opening occurs, so having 17,000 that are mutually exclusive represents .2% of those available numbers.”)

<sup>203</sup> *See Toll Free Service Access Codes*, CC Docket 95-155, Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 11162, 11189, para. 38 (1997); *see also* NANC Report Appx. B at 2.

<sup>204</sup> Interisle Consulting Comments at 2; *see also* NANC Report Appx. B at 8-9 (suggesting that “administrative fees . . . be increased on RespOrgs to decrease the amount of time a number is held” and limit hoarding and warehousing).

<sup>205</sup> CenturyLink Comments at 6.

<sup>206</sup> Elizabeth White Comments at 3.

<sup>207</sup> *See 1998 Toll Free Order*, 13 FCC Rcd at 9065, para. 12.

<sup>208</sup> *Id.* (an orderly toll free number allocation “will simplify the administrative requirements necessary to assign toll free numbers and avoid the need to resolve competing claims among subscribers to particular numbers”).

<sup>209</sup> *Id.* (an efficient toll free number allocation “will minimize exhaustion of the toll free numbering resource”).

Finally, the secondary market is “fair” because no potential subscribers are discriminated against; there is equal opportunity to participate in the secondary market.<sup>210</sup>

82. To allow for a secondary market to develop, we adopt exceptions to the Commission’s rules prohibiting the brokering, hoarding, and warehousing of toll free numbers for numbers acquired in an auction.<sup>211</sup> Because, as explained, a secondary market can promote the efficiency of an auction, we find that it is appropriate that we apply our exceptions to numbers assigned via competitive bidding. Numbers which are eligible for this exception by virtue of having been assigned via competitive bidding do not lose their eligibility if they are sold or otherwise transferred to another subscriber. Numbers which are returned to the spare pool, however, do not retain eligibility for the exception simply because they were once assigned in an auction.

83. We decline, at this time, to mandate that fees associated with the sale of numbers on the secondary market go to the cost of toll free numbering administration borne by Somos.<sup>212</sup> We are convinced by the record that our rules should not “increase the costs to subscribers.”<sup>213</sup> However, as we have explained previously,<sup>214</sup> in order to evaluate the operation of the secondary market, we direct Somos to maintain data on secondary market transactions and make that data available to the Commission. To facilitate the collection of data, RespOrgs will be required to provide subscriber information to Somos, including the new subscriber’s name and contact information, and other limited information Somos deems necessary.

#### **D. Other Toll Free Rule Revisions**

84. To further modernize our decades-old toll free numbering rules, we adopt several definitional and technical updates to improve clarity and flexibility in toll free number assignment. We also incorporate recommendations of the North American Numbering Council (NANC)<sup>215</sup> to revise our definitions and lag time rules to be consistent with our new market-based toll free assignment rule.

85. *NANC Report.* In the *Toll Free Assignment NPRM*, the Commission sought comment on whether to “eliminate or revise any other toll free rules” and specifically suggested sections 52.101(d) and 52.103 as potential targets for revision.<sup>216</sup> After the release of the *NPRM*, the Bureau directed the NANC to recommend possible rule changes to promote a market-based approach to the assignment of toll free numbers.<sup>217</sup> In response to this direction, the NANC Toll Free Number Assignment Modernization Working Group recommended revisions to sections 52.101 and 52.103 of our rules regarding general definitions and lag times.<sup>218</sup>

86. *General Definitions.* We revise section 52.101(a) to replace the term “Number

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<sup>210</sup> *Id.* at 9069, para. 25 (stating that first-come, first-served assignment “best serves” the fairness standard, as it “does not discriminate against new subscribers,” because that assignment method provides “[a]ll subscribers . . . equal opportunity to reserve desirable toll free numbers as new codes are opened”).

<sup>211</sup> 47 CFR §§ 52.105, 52.107. We also modify our rule limiting how long a number may remain in “reserved” status in order to harmonize that rule with the exceptions we adopt today. 47 CFR § 52.103(b).

<sup>212</sup> *Toll Free Assignment NPRM*, 32 FCC Rcd at 7896, para. 32.

<sup>213</sup> ATIS SNAC Comments at 6; *see also* 800 Response Information Services at 9; NANC Report Appx. B at 3-4.

<sup>214</sup> *See supra* para. 63.

<sup>215</sup> The NANC is the Commission’s Federal Advisory Committee on numbering matters.

<sup>216</sup> *Toll Free Assignment NPRM*, 32 FCC Rcd at 7897, para. 38.

<sup>217</sup> Letter from Kris Anne Monteith, Chief, WCB, FCC, to Travis Kavulla, Chair, NANC at 1 (Dec. 7, 2017) [http://www.nanc-chair.org/docs/mtg\\_docs/Dec17\\_NANC\\_Referral\\_TFAM.pdf](http://www.nanc-chair.org/docs/mtg_docs/Dec17_NANC_Referral_TFAM.pdf) (Monteith Letter).

<sup>218</sup> *See* NANC Report Appx. A at 4-12.

Administration and Service Center” (NASC) with the term “Toll Free Numbering Administrator.”<sup>219</sup> Despite the fact that the Commission has used the term Toll Free Numbering Administrator for several years, our rules have not reflected that terminology. Our rules’ reference to the NASC is now outdated, and this revision will update the Commission’s rules to reflect current industry terminology. We further modify our definition, consistent with the NANC’s recommendation,<sup>220</sup> to reflect that the Toll Free Numbering Administrator role is filled by an entity appointed under our authority pursuant to section 251(e)(1) of the Act. Because the Toll Free Numbering Administrator serves the same purpose as the former NASC, however, we otherwise retain the same definition as to the role of the toll free administrator.

87. We further revise section 52.101(e) to expand the definition of “Toll Free Subscriber.” The Commission’s rules currently define a Toll Free Subscriber as “[T]he entity that requests a Responsible Organization to reserve a toll free number from the SMS database.”<sup>221</sup> Our revised rule establishes that a Toll Free Subscriber is “The entity that has been assigned a toll free number.”<sup>222</sup> This change will make our definition consistent with our revised rule section 52.111, which allows for assignment via a market-based methodology, by making clear that a subscriber is not limited to requesting a toll free number be reserved in the toll free database.<sup>223</sup>

88. *Lag Times*. We make multiple revisions to section 52.103, which sets forth the various statuses of toll free numbers in the Toll Free Database.<sup>224</sup> First, we adopt a new section 52.103(a)(10) to create a “Transitional Status” category for numbers that have been disconnected for less than four months, but for which no service provider intercept recording (also known as Exchange Carrier Intercept Recording) is being provided.<sup>225</sup> The NANC comments, and we agree, that adding this Transitional Status will better align the Commission’s rules with current industry practice.<sup>226</sup>

89. Second, we modify section 52.103(d) to make the existing Disconnect Status rule compatible with a market-based number assignment approach. Section 52.103(d) requires disconnected numbers to stay in Disconnect Status for a period of four months, and then go to Spare Status at the end of that period.<sup>227</sup> The NANC Report recommends amending the rule to allow numbers that have been in Disconnect Status for four months to go directly to Unavailable *or* Spare Status.<sup>228</sup> We conclude, and the NANC agrees, that allowing numbers to go from Disconnect Status to Unavailable—rather than directly

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<sup>219</sup> NANC Report Appx. A at 4. Section 52.101(a) currently defines “Number Administration and Service Center” as “The entity that provides user support for the Service Management System and administers the Service Management System database on a day-to-day basis.” 47 CFR § 52.101(a).

<sup>220</sup> NANC Report Appx. A at 4.

<sup>221</sup> 47 CFR § 52.101(e).

<sup>222</sup> *See, e.g.*, NANC Report Appx. A at 6.

<sup>223</sup> For example, a subscriber can be assigned a number through the competitive bidding process.

<sup>224</sup> 47 CFR §52.103(a)(3) (definition of lag times).

<sup>225</sup> NANC Report Appx. A at 8. Transitional Status is thus distinct from Disconnect Status, where a service provider intercept recording (i.e., a recording explaining that a number has been disconnected) is being provided.

<sup>226</sup> *Id.*

<sup>227</sup> 47 C.F.R § 52.103(d) (definition of Disconnect Status).

<sup>228</sup> NANC Report Appx. A at 9. We note that numbers set-aside for a market-based assignment are placed in unavailable status. *See 833 Code Opening Order*, 32 FCC Rcd at 3154-55, para. 6 (directing Somos to place the mutually exclusive toll free numbers in unavailable status); 47 C.F.R §52.103(a)(6) (definition of Spare Status) and 47 C.F.R § 52.103(f) (definition of Unavailable Status).

to Spare Status—will ensure that any number can be assigned by a market-based mechanism.<sup>229</sup> This change will allow the Toll Free Numbering Administrator to send numbers that have been selected for market-based assignment directly into Unavailable rather than into Spare Status. We thus adopt this change, which will allow greater flexibility and further modernize the toll free assignment process.

90. Finally, we also adopt a change to section 52.103(f), “Unavailable Status.” The description of “Unavailable Status” in that section references DSMI, which has since been replaced by Somos as the Toll Free Numbering Administrator. The definition should be updated to refer to the Toll Free Numbering Administrator.<sup>230</sup> This revision will ensure that the Commission’s rules reflect current industry terminology. We also revise rule section 52.109(c) to change spare “poll” to spare “pool,” thus correcting a typographical error in this rule.

91. The ministerial revisions we adopt today are a logical outgrowth of the proposals in the *Toll Free Assignment NPRM*. As the Commission has previously explained, “[a]n NPRM satisfies the logical outgrowth test if it ‘expressly ask[s] for comment on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change.’”<sup>231</sup> That test is satisfied here. The *Toll Free Assignment NPRM* expressly proposed a revision to the rules governing toll free number assignment to allow for assignment via competitive bidding.<sup>232</sup> It further sought comment on whether to “eliminate or revise any other toll free rules,” with specific reference to sections 52.101(d) and 52.103 of the rules.<sup>233</sup> Our ministerial revisions, with one minor exception, apply to sections 52.101 and 52.103.<sup>234</sup> Further, the revisions operate to harmonize those rules with the competitive bidding assignment methodology expressly noticed in the *Toll Free Assignment NPRM*. We find that “parties should have anticipated that the rule [revisions] ultimately adopted [were] possible.”<sup>235</sup>

#### E. Legal Authority

92. The Commission has found section 251(e)(1)<sup>236</sup> of the Act “to empower the Commission to ensure that toll free numbers, which are a scarce and valuable national public resource, are allocated in an

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 11; *see also Toll Free Governance Order*, 28 FCC Rcd 15328.

<sup>231</sup> *Revitalization of the AM Radio Service*, 2018 WL 2387497 at \*2, para. 7 (May 22, 2018) (quoting [CSX Transportation, Inc. v. Surface Transportation Board](#), 584 F.3d 1076, 1081 (D.C. Cir. 2009)).

<sup>232</sup> *Toll Free Assignment NPRM*, 32 FCC Rcd at 7888-89, paras. 5-9.

<sup>233</sup> *Id.* at 7897, para. 38.

<sup>234</sup> The exception is our revision to section 52.109(c), correcting a typographical error in that rule. *See infra* Appx. A.

<sup>235</sup> *Revitalization of the AM Radio Service*, 2018 WL 2387497 at \*2, para. 7 (May 22, 2018). We also find good cause, to the extent necessary, to adopt these ministerial changes. 5 U.S.C. § 553(d)(3). These revisions are insignificant and inconsequential to the industry and the public. *See Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001); *see also Texaco, Inc. v. FPC*, 412 F.2d 740, 743 (3d Cir. 1969); *South Carolina v. Block*, 558 F. Supp. 1004, 1016 (D. S.C. 1983). Our revisions to sections 52.101(a), 52.103(a)(10), 52.103(f), and 52.109(c) either correct typographical errors or bring our rules into line with contemporary practice and do not increase or otherwise modify any entities’ regulatory burden. *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001). Our revisions to sections 52.101(e) and 52.103(d) similarly do not impact any entities’ regulatory burden, and only harmonize our rules to allow for the successful operation of the competitive bidding assignment methodology we adopt today.

<sup>236</sup> 47 U.S.C. § 251(e)(1) (ordering the Commission to make “numbers available on an equitable basis,” and providing the Commission with “exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States”).

equitable and orderly manner that serves the public interest.”<sup>237</sup> Pursuant to these statutory mandates, the Commission has the “authority to set policy with respect to all facets of numbering administration in the United States,”<sup>238</sup> and a “require[ment] . . . to ensure the efficient, fair, and orderly allocation of toll free numbers.”<sup>239</sup> The actions we take today meet the statutory requirement that numbers be made “available on an equitable basis”<sup>240</sup>—an auction and secondary market are both efficient and orderly, and fair.<sup>241</sup> We also have clear authority to require Somos to serve as the auctioneer for 833 numbers and to comply with requirements adopted in this order. Section 251(e)(1) obligates the Commission to ensure its Toll Free Numbering Administrator administers “telecommunications numbering and to make such numbers available on an equitable basis.”<sup>242</sup> And section 201(b) authorizes the Commission to adopt regulations to carry out the provisions of the Act.<sup>243</sup>

93. CenturyLink argues that we do not have authority to assign toll free numbers through competitive bidding because, unlike in the context of spectrum auctions, Congress did not specifically task the Commission with using competitive bidding for toll free numbers.<sup>244</sup> Since the Act was adopted in 1934, however, Congress has stated with particularity the various means for assignment of spectrum licenses; the specific addition of an assignment via competitive bidding supplemented the previous Congressional direction to make licenses available via an application process or random assignment.<sup>245</sup> By contrast, Congress has used much more general language in section 251 and thus given us broad discretion to administer numbering. In Congress’s grant of “exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States” in section 251(e)(1),<sup>246</sup> we find authority to employ any number assignment mechanisms which meet the statute’s “equitable basis” requirement, including competitive bidding.

#### IV. PROCEDURAL MATTERS

94. *Congressional Review Act.* The Commission will send a copy of this Report and Order, including a copy of the Final Regulatory Flexibility Certification, in a report to Congress and the

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<sup>237</sup> *Toll Free Service Access Codes*, 12 FCC Rcd at 11179, para. 22.

<sup>238</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Area Code Relief Plan for Dallas and Houston, Ordered by the Public Utility Commission of Texas, Administration of the North American Numbering Plan, Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois*, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392, 19512, para. 271 (1996); *see also* 47 U.S.C. § 251(e)(1) (“The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States.”).

<sup>239</sup> *Toll Free Service Access Codes*, 12 FCC Rcd at 11176, para. 18 (citing “§ 1 and Title II of the . . . Act” and section 251(e)(1)).

<sup>240</sup> 47 U.S.C. § 251(e)(1).

<sup>241</sup> *See supra* Sections III.A.2, III.C.

<sup>242</sup> 47 U.S.C. § 251(e)(1). *See also Toll Free Governance Order*, 28 FCC Rcd at 15330-31, para. 10; *Toll Free Service Access, et. al*, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 11162 (1997) (seeking comment on who should administer the SMS in light of the requirement of section 251(e) that the Commission create or designate one or more “impartial” entities to administer telecommunications numbering).

<sup>243</sup> 47 U.S.C. § 201(b).

<sup>244</sup> Century Link Comments at 3-4 n.8.

<sup>245</sup> *See* Nicholas W. Allard, *The New Spectrum Auction Law*, 18 Seton Hall Legis. J. 13, 23-30 (1993) (describing history of authority to assign spectrum licenses via specific mechanisms).

<sup>246</sup> 47 U.S.C. § 251(e)(1).

Government Accountability Office pursuant to the Congressional Review Act.<sup>247</sup> In addition, the Report and Order and this final certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration (SBA) and will be published in the Federal Register.<sup>248</sup>

95. *Paperwork Reduction Act of 1995 Analysis.* This Order contains new or modified information collection requirements 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(d) of the PRA, 44 U.S.C. § 3507. OMB, the general public, and other Federal agencies are invited to comment on the revised information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

96. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, *see* 5 U.S.C. § 604, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities of the policies and rules, as proposed, addressed in this Order. The FRFA is set forth in Appendix B. The Commission will send a copy of this Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

## V. ORDERING CLAUSES

97. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 201(b), and 251(e)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201(b), and 251(e)(1), this Order IS ADOPTED.

98. IT IS FURTHER ORDERED that Part 52 of the Commission's rules ARE AMENDED as set forth in Appendix A, and such rule amendments shall be effective thirty (30) days after publication of the rule amendments in the Federal Register.

99. IT IS FURTHER ORDERED that, pursuant to sections 1, 4(i), 5(c), and 251(e)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 251(e)(1), Somos, Inc., the Toll Free Numbering Administrator, IS DIRECTED to retain and make available to the Commission all data and information about the auction and its administration gathered before, during, and after the auction.

100. IT IS FURTHER ORDERED that, pursuant to section 251(e)(1) of the Communications Act of 1934, as amended, the Wireline Competition Bureau IS DIRECTED to review specific petitions and, as necessary and after a notice and comment period, grant toll free numbers to governmental entities where such grant is consistent with the public health and safety standards in Commission precedent.

101. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

102. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the SBA.

FEDERAL COMMUNICATIONS COMMISSION

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<sup>247</sup> *See* 5 U.S.C. § 801(a)(1)(A).

<sup>248</sup> *See* 5 U.S.C. § 605(b).

Marlene H. Dortch  
Secretary

APPENDIX A

Final Rules

For the reasons set forth above, Part 52 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 52 – NUMBERING

\* \* \* \* \*

Subpart D—Toll Free Numbers

1. Amend sections 52.101(a) and (e) by revising to read as follows:

§ 52.101 General definitions.

(a) *Toll Free Numbering Administrator (TFNA)*. The entity appointed by the Commission under its authority pursuant to 47 C.F.R. § 251(e)(1) that provides user support for the Service Management System database and administers the Service Management System database on a day-to-day basis.

\* \* \* \* \*

(e) *Toll Free Subscriber*. The entity that has been assigned a toll free number.

\* \* \* \* \*

2. Add new section 52.103(a)(10), and; amend sections 52.103 (f), 52.301(d) by revising read as follows:

§ 52.103 Lag Times.

\* \* \* \* \*

(a) \* \* \*

(10) *Transitional Status*. Toll free numbers that have been disconnected for less than four months, but for which no Exchange Carrier Intercept Recording is being provided.

\* \* \* \* \*

(b) \* \* \*

(1) Toll free numbers assigned via competitive bidding may remain in reserved status for a period of unlimited duration.

(f) *Unavailable Status*.

(1) Written requests to make a specific toll free number unavailable must be submitted to the *Toll Free Numbering Administrator (TFNA)* by the Responsible Organization managing the records of the toll free number. The request shall include the appropriate documentation of the reason for the request. The *Toll Free Numbering Administrator (TFNA)* is the only entity that can assign this status to or remove this

status from a number. Responsible Organizations that have a *Toll Free Subscriber* with special circumstances requiring that a toll free number be designated for that particular subscriber far in advance of its actual usage may request that the *Toll Free Numbering Administrator (TFNA)* place such a number in unavailable status.

(2) Seasonal numbers shall be placed in unavailable status. The Responsible Organization for a *Toll Free Subscriber* who does not have a year round need for a toll free number shall follow the procedures outlined in § 52.103(f)(1) of these rules if it wants the *Toll Free Numbering Administrator (TFNA)* to place a particular toll free number in unavailable status.

3. Add new section 52.105(f) to read as follows:

**§ 52.105 Warehousing.**

\* \* \* \* \*

(f) *Toll Free Numbers Assigned via Competitive Bidding.* The provisions of this section shall not apply to toll free numbers assigned via competitive bidding or to numbers transferred under this exception.

4. Add new section 52.107(c) to read as follows:

**§ 52.107 Hoarding.**

\* \* \* \* \*

(c) *Toll Free Numbers Assigned via Competitive Bidding.* The provisions of this section shall not apply to toll free numbers assigned via competitive bidding or to numbers transferred under the exception to § 52.105 contained in subpart (f) of that section.

5. Amend section 52.109(c) by revising to read as follows:

**§ 52.109 Permanent cap on number reservations.**

\* \* \* \* \*

(c) The Wireline Competition Bureau shall modify the quantity of numbers a Responsible Organization may have in reserve status or the percentage of numbers in the spare pool that a Responsible Organization may reserve when exigent circumstances make such action necessary. The Wireline Competition Bureau shall establish, modify, and monitor toll free number conservation plans when exigent circumstances necessitate such action.

6. Amend section 52.111 to read as follows:

**§ 52.111 Toll free number assignment.**

Toll free telephone numbers must be made available to Responsible Organizations and subscribers on an equitable basis. The Commission will assign toll free numbers by competitive bidding, on a first-come,

first-served basis, by an alternative assignment methodology, or by a combination of the foregoing options.

\* \* \* \* \*

## APPENDIX B

### Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>249</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Notice of Proposed Rulemaking (Toll Free Assignment NPRM)* for the Toll Free Assignment Modernization proceeding.<sup>250</sup> The Commission sought written public comment on the proposals in the *Toll Free Assignment NPRM*, including comment on the IRFA. The Commission received no comments on the IRFA. Because the Commission amends its rules in this Order, the Commission has included this Final Regulatory Flexibility Analysis (FRFA). This present FRFA conforms to the RFA.<sup>251</sup>

#### **F. Need for, and Objectives of, the Rules**

2. In the *Toll Free Assignment NPRM*, the Commission reconsidered how to best meet the statutory mandate that it make toll free numbers “available on an equitable basis.”<sup>252</sup> To this end, the Commission proposed and sought comment on numerous regulatory reforms to existing rules regarding toll free number assignment.<sup>253</sup>

3. Pursuant to the objectives set forth in the *Toll Free Assignment NPRM*, this *Report and Order (Order)* adopts changes to Commission rules regarding toll free number assignment. Specifically, the *Order* (1) revises the Commission’s toll free assignment rule to allow for the use of competitive bidding for toll free numbers;<sup>254</sup> (2) establishes the use of competitive bidding to assign the over 17,000 mutually exclusive numbers in the 833 toll free code, identified pursuant to the *833 Code Opening Order*;<sup>255</sup> (3) exempts numbers assigned via competitive bidding from the rules preventing the development of a secondary market;<sup>256</sup> and (4) makes ministerial changes to our toll free number assignment rules.<sup>257</sup> These modifications to our toll free number assignment rules will create a more efficient method of toll free number assignment, consistent with our statutory mandate.<sup>258</sup> Ultimately, these reforms will ensure the equitable and efficient assignment of toll free numbers.

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

4. The Commission did not receive comments addressing the rules and policies proposed in the IRFAs in the *Toll Free Assignment NPRM*.

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<sup>249</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996).

<sup>250</sup> *Toll Free Assignment Modernization*, CC Docket No. 95-155, Notice of Proposed Rulemaking, 32 FCC Rcd 7885 (2017) (*Toll Free Assignment NPRM*).

<sup>251</sup> See 5 U.S.C. § 604.

<sup>252</sup> 47 U.S.C. § 251(e)(1).

<sup>253</sup> *Toll Free Assignment NPRM*, 32 FCC Rcd at 7885.

<sup>254</sup> See *supra* section III.A.

<sup>255</sup> *Toll Free Service Access Codes*, CC Docket No. 95-155, Order, 32 FCC Rcd 3153 (WCB 2017) (*833 Code Opening Order*); see *supra* section III.B.

<sup>256</sup> See *supra* section III.C.

<sup>257</sup> See *supra* section III.D.

<sup>258</sup> See 47 U.S.C. § 251(e)(1).

## H. Response to Comments by the Chief Counsel for Advocacy of the SBA

5. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.<sup>259</sup>

6. The Chief Counsel did not file any comments in response to this proceeding.

## I. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

7. The RFA directs agencies to provide a description and, where feasible, an estimate of the number of small entities that may be affected by the final rules adopted pursuant to the *Order*.<sup>260</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>261</sup> In addition, the term “small business” has the same meaning as the term “small-business concern” under the Small Business Act.<sup>262</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>263</sup>

8. The changes to our toll free number assignment rules affect obligations on wired and wireless telecommunications carriers, local exchange and interexchange carriers, local and toll resellers, prepaid calling card providers, and cable operators.

9. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive small entity size standards that could be directly affected herein.<sup>264</sup> First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA’s Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.<sup>265</sup> These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.<sup>266</sup> Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>267</sup> Nationwide, as of 2007, there were approximately 1,621,215 small organizations.<sup>268</sup> Finally, the small entity described as a “small

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<sup>259</sup> 5 U.S.C. § 604 (a)(3)

<sup>260</sup> See 5 U.S.C. § 604(a)(4).

<sup>261</sup> See 5 U.S.C. § 601(6).

<sup>262</sup> See 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>263</sup> See 15 U.S.C. § 632.

<sup>264</sup> See 5 U.S.C. § 601(3)-(6).

<sup>265</sup> See SBA, Office of Advocacy, “Frequently Asked Questions, Question 1 – What is a small business?” [https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016\\_WEB.pdf](https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf) (June 2016).

<sup>266</sup> See SBA, Office of Advocacy, “Frequently Asked Questions, Question 2- How many small businesses are there in the U.S.?” [https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016\\_WEB.pdf](https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf) (June 2016).

<sup>267</sup> 5 U.S.C. § 601(4).

<sup>268</sup> Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2010).

governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>269</sup> U.S. Census Bureau data published in 2012 indicate that there were 89,476 local governmental jurisdictions in the United States.<sup>270</sup> We estimate that, of this total, as many as 88,761 entities may qualify as “small governmental jurisdictions.”<sup>271</sup> Thus, we estimate that most governmental jurisdictions are small.

10. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as “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 communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”<sup>272</sup> 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>273</sup> Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small.

11. *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 NAICS Code category is Wired Telecommunications Carriers as defined above. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>274</sup> According to Commission data, census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.<sup>275</sup> The Commission therefore estimates that most providers of local exchange carrier service are small entities that may be affected by the rules adopted.

12. *Incumbent LECs.* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers as defined above. Under that size standard, such a

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<sup>269</sup> 5 U.S.C. § 601(5).

<sup>270</sup> U.S. Census Bureau, Statistical Abstract of the United States: 2012 at 267, Table 428 (2011), <http://www2.census.gov/library/publications/2011/compendia/statab/131ed/2012-statab.pdf> (citing data from 2007).

<sup>271</sup> The 2012 U.S. Census Bureau data for small governmental organizations are not presented based on the size of the population in each organization. There were 89,476 local governmental organizations in the Census Bureau data for 2012, which is based on 2007 data. As a basis of estimating how many of these 89,476 local government organizations were small, we note that there were a total of 715 cities and towns (incorporated places and minor civil divisions) with populations over 50,000 in 2011. See U.S. Census Bureau, City and Town Totals Vintage: 2011, <http://www.census.gov/popest/data/cities/totals/2011/index.html>. If we subtract the 715 cities and towns that meet or exceed the 50,000 population threshold, we conclude that approximately 88,761 are small.

<sup>272</sup> U.S. Census Bureau, *NAICS Search*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited June 21, 2017).

<sup>273</sup> 13 CFR § 121.201 (NAICS Code 517110).

<sup>274</sup> 13 CFR § 121.201 (NAICS Code 517110).

<sup>275</sup> See U.S. Census Bureau, *American Fact Finder* (Jan. 08, 2016) [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodT ype=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodT ype=table).

business is small if it has 1,500 or fewer employees.<sup>276</sup> According to Commission data, 3,117 firms operated in that year. Of this total, 3,083 operated with fewer than 1,000 employees.<sup>277</sup> Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted. Three hundred and seven (307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers.<sup>278</sup> Of this total, an estimated 1,006 have 1,500 or fewer employees.<sup>279</sup>

13. *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 NAICS Code category is Wired Telecommunications Carriers, as defined above. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>280</sup> U.S. Census data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees.<sup>281</sup> Based on this data, the Commission concludes that the majority of Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. 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. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. 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. Also, 72 carriers have reported that they are Other Local Service Providers. Of this total, 70 have 1,500 or fewer employees. Consequently, based on internally researched FCC data, 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.

14. 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>282</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>283</sup> We have therefore included small incumbent LECs in this RFA analysis, although we

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<sup>276</sup> 13 CFR § 121.201 (NAICS Code 517110).

<sup>277</sup> See U.S. Census Bureau, *American Fact Finder* (Jan. 08, 2016) [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table).

<sup>278</sup> See Fed. Commc’ns Comm’n, *Trends in Telephone Service*, 5-5, tbl. 5.3 (Sept. 2010) (*Trends in Telephone Service*), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>279</sup> Fed. Commc’ns Comm’n, *Trends in Telephone Service*, 5-5, tbl. 5.3 (Sept. 2010) (*Trends in Telephone Service*), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>280</sup> 13 CFR § 121.201 (NAICS Code 517110).

<sup>281</sup> See U.S. Census Bureau, *American Fact Finder* (Jan. 08, 2016) [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table).

<sup>282</sup> 5 U.S.C. § 601(3).

<sup>283</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (filed 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.” 15 U.S.C. § 632(a); 5 U.S.C. § 601(3). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. 13 CFR § 121.102(b).

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

15. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a definition for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers as defined above. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>284</sup> U.S. Census data for 2012 indicates that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees.<sup>285</sup> According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.<sup>286</sup> Of this total, an estimated 317 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed rules.

16. *Local Resellers*. The SBA has developed a small business size standard for the category of Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry.<sup>287</sup> Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>288</sup> Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, all operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these prepaid calling card providers can be considered small entities.

17. *Toll Resellers*. The Commission has not developed a definition for Toll Resellers. The closest NAICS Code Category is Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry.<sup>289</sup> The SBA has developed a small business size standard for the category of Telecommunications Resellers.<sup>290</sup> Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>291</sup> Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, 1,341 operated with fewer than 1,000

<sup>284</sup> 13 CFR § 121.201 (NAICS Code 517110).

<sup>285</sup> See U.S. Census Bureau, *American Fact Finder* (Jan. 08, 2016), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodTpe=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodTpe=table).

<sup>286</sup> See *Trends in Telephone Service*, at tbl. 5.3.

<sup>287</sup> U.S. Census Bureau, *2012 NAICS Definition*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517911&search=2012+NAICS+Search&search=2012> (last visited June 20, 2017).

<sup>288</sup> 13 CFR § 121.201 (NAICS code 517911).

<sup>289</sup> U.S. Census Bureau, *2012 NAICS Definition*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517911&search=2012+NAICS+Search&search=2012> (last visited June 20, 2017) (NAICS 517911 Telecommunications Resellers).

<sup>290</sup> 13 CFR § 121.201 (NAICS code 517911).

<sup>291</sup> See U.S. Census Bureau, *American Fact Finder* (Jan. 08, 2016), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodTpe=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodTpe=table).

employees. Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services. Of this total, an estimated 857 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of toll resellers are small entities.

18. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a definition 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 NAICS Code category is for Wired Telecommunications Carriers as defined above. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>292</sup> Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.<sup>293</sup> Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to internally developed Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.<sup>294</sup> Of these, an estimated 279 have 1,500 or fewer employees. Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by rules adopted pursuant to the *Report and Order*.

19. *Prepaid Calling Card Providers.* The SBA has developed a definition for small businesses within the category of Telecommunications Resellers. Under that SBA definition, such a business is small if it has 1,500 or fewer employees.<sup>295</sup> According to the Commission's Form 499 Filer Database, 500 companies reported that they were engaged in the provision of prepaid calling cards.<sup>296</sup> The Commission does not have data regarding how many of these 500 companies have 1,500 or fewer employees. Consequently, the Commission estimates that there are 500 or fewer prepaid calling card providers that may be affected by the rules.

20. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services.<sup>297</sup> The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>298</sup> For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.<sup>299</sup> Of this total, 955 firms had employment of 999 or fewer

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<sup>292</sup> 13 CFR § 121.201 (NAICS code 517110).

<sup>293</sup> See U.S. Census Bureau, *American Fact Finder* (Jan. 08, 2016), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table).

<sup>294</sup> *Trends in Telephone Service*, at tbl. 5.3.

<sup>295</sup> 13 CFR § 121.201 (NAICS code 517110).

<sup>296</sup> See Fed. Comm'n Comm'n, *FCC Form 499 Filer Database*, <http://apps.fcc.gov/cgb/form499/499a.cfm> (last visited June 20, 2017).

<sup>297</sup> NAICS Code 517210. See U.S. Census Bureau, *American Fact Finder—About the Data*, <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS2012.517210>.

<sup>298</sup> 13 CFR § 121.201 (NAICS code 517210).

<sup>299</sup> U.S. Census Bureau, *American Fact Finder* (Jan 08, 2016), [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prod](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prod)

(continued...)

employees and 12 had employment of 1000 employees or more.<sup>300</sup> Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

21. The Commission's own data—available in its Universal Licensing System—indicate that, as of October 25, 2016, there are 280 Cellular licensees that will be affected by our actions today.<sup>301</sup> The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service, and Specialized Mobile Radio Telephony services.<sup>302</sup> Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

22. *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>303</sup> The SBA has approved these definitions.<sup>304</sup>

23. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).<sup>305</sup> Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.<sup>306</sup> According to Commission data, 413 carriers reported that they were engaged in wireless telephony.<sup>307</sup> Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Therefore, a little less than one third of these entities can be considered small.

24. *Cable and Other Subscription Programming.* This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. The broadcast programming is typically narrowcast in nature (e.g. limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered

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<sup>300</sup> 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 “1000 employees or more.”

<sup>301</sup> See Fed. Comm'n Comm'n, *Universal Licensing System*, <http://wireless.fcc.gov/uls> (last visited June 20, 2017). For the purposes of this FRFA, consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.

<sup>302</sup> *Trends in Telephone Service*, at tbl. 5.3

<sup>303</sup> *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS)*, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

<sup>304</sup> See Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (filed Dec. 2, 1998).

<sup>305</sup> 13 CFR § 121.201 (NAICS code 517210).

<sup>306</sup> *Id.*

<sup>307</sup> *Trends in Telephone Service*, at tbl. 5.3.

to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.<sup>308</sup> The SBA has established a size standard for this industry stating that a business in this industry is small if it has 1,500 or fewer employees.<sup>309</sup> The 2012 Economic Census indicates that 367 firms were operational for that entire year. Of this total, 357 operated with less than 1,000 employees.<sup>310</sup> Accordingly we conclude that a substantial majority of firms in this industry are small under the applicable SBA size standard.

25. *Cable Companies and Systems (Rate Regulation)*. 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>311</sup> Industry data indicate that there are currently 4,600 active cable systems in the United States.<sup>312</sup> Of this total, all but eleven cable operators nationwide are small under the 400,000-subscriber size standard.<sup>313</sup> In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>314</sup> Current Commission records show 4,600 cable systems nationwide. Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records.<sup>315</sup> Thus, under this standard as well, we estimate that most cable systems are small entities.

26. *Cable System Operators (Telecom Act Standard)*. The Communications 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 fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>316</sup> There are approximately 52,403,705 cable video subscribers in the United States today.<sup>317</sup> Accordingly, an operator serving fewer than 524,037 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>318</sup> Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard.<sup>319</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose

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<sup>308</sup> See U.S. Census Bureau, 2012 NAIC Definition, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515210&search=2012+NAICS+Search&search=2012> (last visited June 20, 2017) (2012 NAICS code, "515210 Cable and Other Subscription Programming").

<sup>309</sup> 13 CFR § 121.201 (NAICSs Code 515210).

<sup>310</sup> See U.S. Census Bureau, *American Fact Finder* (Jan 08, 2016), [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table) (NAICS code 51510, "Estab & Firm Size: Employment Size of Establishments for the U.S.>").

<sup>311</sup> 47 CFR § 76.901(e).

<sup>312</sup> This figure was derived from a August 15, 2015 report from the FCC Media Bureau, based on data contained in the Commission's Cable Operations and Licensing System (COALS). See <http://www.fcc.gov/coals>.

<sup>313</sup> Data obtained from SNL Kagan database on April 19, 2017.

<sup>314</sup> 47 CFR § 76.901(c).

<sup>315</sup> August 5, 2015 report from the FCC Media Bureau based on its research in COALS. See <http://www.fcc.gov/coals>.

<sup>316</sup> See 47 CFR § 76.901(f) & nn.1-3.

<sup>317</sup> See SNL Kagan at <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (subscription required).

<sup>318</sup> 47 CFR § 76.901(f) & nn.1-3.

<sup>319</sup> See SNL Kagan at <http://www.snl.com/interactivex/TopCableMSOs.aspx> (subscription required).

gross annual revenues exceed \$250 million.<sup>320</sup> Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

27. *All Other Telecommunications.* The “All Other Telecommunications” industry is comprised of establishments that are 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>321</sup> The SBA has developed a small business size standard for “All Other Telecommunications,” which consists of all such firms with gross annual receipts of \$32.5 million or less.<sup>322</sup> For this category, U.S. Census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than \$25 million.<sup>323</sup> Thus a majority of “All Other Telecommunications” firms potentially affected by our action can be considered small.

#### **J. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities**

28. *Auction Applications and Certifications.* The *Order* establishes the use competitive bidding to assign the over 17,000 mutually exclusive numbers in the 833 toll free code, identified pursuant to the *833 Code Opening Order*.<sup>324</sup> In order to participate in the competitive bidding process, a potential participant will be obligated to submit an application including information regarding, but not limited to, ownership information.<sup>325</sup> Potential participants will also be required to submit certifications stating that they will follow certain auction rules and requirements, including the limitation that each auction participant bid on behalf of only one interested party (including itself) for the same toll free numbers.<sup>326</sup>

29. *Secondary Market Transfers.* The *Order* exempts numbers assigned via competitive bidding from the rules preventing the development of a secondary market.<sup>327</sup> We require Somos, Inc., the Toll Free Numbering Administrator, to maintain information regarding post-auction secondary market

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<sup>320</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 section 76.901(f) of the Commission’s rules. See 47 CFR § 76.901(f).

<sup>321</sup> U.S. Census Bureau, *NAICS Search*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited June 21, 2017) (enter 2012 NAICS code 517919).

<sup>322</sup> 13 CFR § 121.201 (NAICS Code 517919).

<sup>323</sup> U.S. Census Bureau, *American Fact Finder* (Jan. 08, 2016), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ4&prodT\\_ye=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodT_ye=table) (2012 NAICS Code 517919, “Estab & Firm Size: Receipts Size of Firms for the U.S.”).

<sup>324</sup> *833 Code Opening Order*, 32 FCC Rcd 3153; see *supra* section III.B.

<sup>325</sup> See *supra* section III.B.2.c.

<sup>326</sup> See *supra* section III.B.2.c.

<sup>327</sup> See *supra* section III.C.

transfers.<sup>328</sup> Entities will be required to provide transaction information to Somos, including the new subscriber's name and contact information and other limited information as necessary.<sup>329</sup>

**K. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

30. In this *Order*, the Commission modifies its toll free number assignment rules to promote the efficient and equitable assignment of toll free numbers. Overall, we believe the actions in this document will reduce burdens on toll free number subscribers, potential subscribers, and Responsible Organizations, including any small entities.

31. In the *Order*, we find that revising our rule to allow for an auction-based assignment methodology will benefit smaller entities.<sup>330</sup> Our first-come, first-served assignment methodology has allowed larger, more sophisticated entities to invest in systems that provided enhanced connectivity to the Toll Free Database, allowing these entities to be assigned desirable numbers before smaller competitors.<sup>331</sup> An auction-based assignment methodology, by contrast, does not allow sophisticated entities this advantage.

32. In the *Order*, we also establish the use of a Vickrey single round, sealed-bid auction to assign the over 17,000 mutually exclusive numbers in the 833 toll free code, identified pursuant to the *833 Code Opening Order*.<sup>332</sup> We conclude that the use of this type of auction is appropriate because it is simple to participate in, addressing concerns that an auction-based assignment methodology is more complicated than the first-come, first-served approach.<sup>333</sup>

**L. Report to Congress**

33. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.<sup>334</sup> In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>335</sup>

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<sup>328</sup> See *supra* para. 63.

<sup>329</sup> See *supra* para. 84.

<sup>330</sup> See *supra* para. 21.

<sup>331</sup> See *supra* para. 21.

<sup>332</sup> *833 Code Opening Order*, 32 FCC Rcd 3153; see *supra* section III.B.

<sup>333</sup> See *supra* section III.B.2.a.

<sup>334</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>335</sup> See 5 U.S.C. § 604(b).