

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

In the Matter of)	
)	
Petition to Establish Procedural)	
Requirements to Govern Proceedings for)	WC Docket No. 07-267
Forbearance Under Section 10 of the)	
Communications Act of 1934, as Amended)	

NOTICE OF PROPOSED RULEMAKING

Adopted: November 27, 2007

Released: November 30, 2007

Comment Date: [30 days after publication in the Federal Register]

Reply Comment Date: [45 days after publication in the Federal Register]

By the Commission: Commissioners Copps, Adelstein, Tate, and McDowell issuing separate statements.

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (Notice) we address the Petition filed by Covad Communications Group, NuVox Communications, XO Communications, LLC, Cavalier Telephone Corp., and McLeod USA Telecommunications Services, Inc. (Petitioners or Covad, *et al.*).¹ The Petition asks the Commission to consider the adoption of procedural rules to govern the Commission's consideration of petitions for forbearance pursuant to the Communications Act of 1934, as amended (Act).²

II. BACKGROUND

2. Pursuant to section 10 of the Act, the Commission is required to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that the telecommunications carrier's charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.³ In determining whether forbearance is consistent with the public interest, the Commission also must consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."⁴

3. In addition, section 332(c)(1)(A) of the Act authorizes the Commission to "forbear" from applying the provisions of Title II to commercial mobile radio service (CMRS) providers, except for sections 201, 202, and 208, if certain criteria are satisfied.⁵ In particular, the Commission may exercise its

¹ Covad, *et al.* Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended, WC Docket No. 07-267 (filed Sept. 19, 2007).

² 47 U.S.C. §§ 151 *et seq.*

³ 47 U.S.C. § 160(a).

⁴ 47 U.S.C. § 160(b).

⁵ 47 U.S.C. § 332(c)(1)(A). While section 332(c) does not expressly use the term "forbearance," the Commission has regularly characterized the regulatory relief in this manner. *See, e.g., Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd (continued...)

forbearance authority pursuant to section 332 if it determines that: (1) enforcement of the requirement is unnecessary to ensure that rates are just, reasonable, and non-discriminatory; (2) the requirement is not needed to protect consumers; and (3) forbearance is consistent with the public interest.⁶ The Commission also must consider whether any proposed forbearance from the requirements of Title II “will enhance competition among [CMRS] providers”⁷

4. On September 19, 2007, the Petitioners filed the Petition requesting that the Commission adopt procedural rules to govern its consideration of petitions for forbearance pursuant to section 10.⁸ While Petitioners claim that we can adopt procedural rules without conducting a rulemaking proceeding, we are seeking comment on the issues raised in their Petition, rather than immediately adopting rules, in order to receive the benefit of the public’s input on these critical issues. We acknowledge Petitioners’ argument that the pendency of numerous forbearance petitions creates an urgency to consider adoption of procedural rules, and we therefore are seeking comment on a relatively short pleading cycle.⁹

III. DISCUSSION

5. We seek comment in general on the need for procedural rules to govern the Commission’s consideration of petitions for forbearance pursuant to section 10 and/or section 332 (collectively, forbearance petitions), and with respect to the issues raised and rules proposed by the Petitioners in particular.¹⁰ For example, the Petitioners cite the need to apply Administrative Procedure Act (APA) notice-and-comment rules to forbearance petitions.¹¹ The Petitioners state that “[t]o date, the Commission’s practice has been to provide interested parties with the opportunity to comment on a forbearance petition.”¹² Petitioners argue, however, that “the Commission should institutionalize this practice to ensure that potentially-affected parties have a well-defined right to have their views taken into account.”¹³ We seek comment both on the Petitioners’ specific proposal and, more generally, on how the Commission should provide notice and an opportunity to comment in forbearance proceedings.

6. The Petitioners also request the adoption of “[r]ules governing the format and content of forbearance petitions, including . . . a complete-as-filed requirement.”¹⁴ In particular, the Petitioners contend that a “complete-as-filed” rule “would facilitate Commission review and would help ensure that all interested parties have a full and fair opportunity to present their views to the Commission.”¹⁵ The Petitioners note that the Commission has adopted similar requirements in other circumstances, such as

(...continued from previous page)

5901, 5915-16, para. 39 (2007) (“Section 332(c)(1)(A) requires that providers of commercial mobile service be treated as common carriers under Title II of the Act but also authorizes the Commission to forbear from applying most Title II provisions if it makes certain findings.”).

⁶ 47 U.S.C. § 332(c)(1)(A).

⁷ 47 U.S.C. § 332(c)(1)(C).

⁸ While the Petitioners seek procedural rules governing petitions for forbearance pursuant to section 10 specifically, we also seek comment in the Notice with respect to petitions for forbearance pursuant to section 332.

⁹ Petition at 6.

¹⁰ See generally Petition; see also, e.g., Petition, Attachs. A, B.

¹¹ See Petition at 11-12 (citing 5 U.S.C. § 553(c)).

¹² *Id.* at 12.

¹³ *Id.*

¹⁴ *Id.* at 1, 13-18.

¹⁵ *Id.* at 14.

section 271 proceedings and formal complaint proceedings subject to statutory deadlines.¹⁶ We seek comment on the Petitioners' specific proposal for "complete-as-filed" requirements, including whether the Commission should specify certain information necessary for a *prima facie* showing that forbearance is warranted as the Petitioners recommend.¹⁷ We also seek comment on the Petitioners' proposal for a rule specifying that the forbearance petitioner has the burden of proof.¹⁸ We also seek comment on whether there are other particular rules governing the form and content of forbearance petitions that the Commission should consider.

7. In addition, the Petitioners propose that the Commission require "a petitioner to separately demonstrate how it has satisfied each component of the forbearance standard."¹⁹ They assert that such a requirement "is consistent with the Commission's pleading requirements in other contexts."²⁰ The Petitioners contend that "[i]n past practice, petitioners have failed to address each element of the Section 10 standard individually, instead generally asserting that the forbearance criteria are satisfied with respect to all of the regulations and statutory provisions from which they are seeking forbearance."²¹ We seek comment on the Petitioners' specific proposal, including its relationship to the section 10 or section 332 forbearance standard and the Commission's forbearance analysis set forth in prior orders.

8. We also seek comment on the Petitioners' request that the Commission adopt particular rules addressing the scope and interpretation of protective orders in forbearance proceedings.²² The Petitioners suggest rules governing the timing of adoption of protective orders and the terms of access to, and use of, documents and information submitted pursuant to those protective orders.²³ For example, the Petitioners suggest that all interested parties should be permitted to obtain copies of confidential and highly confidential documents. In addition, the Petitioners recommend that parties be allowed to use information submitted pursuant to protective order in one forbearance proceeding "in other Commission forbearance proceedings in which a petitioning party seeks relief from the same rules and/or statutory provisions" and that states be "permitted to use documents designated as Confidential and Highly Confidential in related state proceedings."²⁴ We seek comment on the Petitioners' specific proposals, as well as any other comments regarding the submission of, access to, and use of documents and information covered by protective orders in forbearance proceedings. We also seek comment specifically on the relationship between the rules proposed by Petitioners or other commenters and the Commission's rules and precedent regarding information withheld from public inspection.²⁵

9. The Petitioners further seek rules establishing a timetable for Commission proceedings addressing forbearance petitions, which, among other things, "incorporates a limited period for a petitioning party to cure minor defects in its petition without having to re-start the statutory clock, provides a specific vehicle for state commission input in the forbearance process, addresses motions to dismiss, and establishes a standard comment cycle," as well as "a time limit on substantive *ex parte* submissions" and

¹⁶ *Id.* (citing sections 208 and 271 of the Act, 47 U.S.C. §§ 208, 271).

¹⁷ *Id.* at 13-18.

¹⁸ *Id.* at 12-13.

¹⁹ *Id.* at 19.

²⁰ Petition at 18-20.

²¹ *Id.* at 19.

²² *Id.* at 20-23.

²³ *See id.*

²⁴ *Id.* at 22-23.

²⁵ *See generally* 47 C.F.R. §§ 0.451 *et seq.*

other requirements.²⁶ We seek comment on each of the proposals suggested by the Petitioners, as well as their general recommendation for the adoption of specific timetables for the Commission's review of forbearance petitions. We also seek comment on other proposals for steps the Commission could take to facilitate the participation of state commissions, as well as other parties, in forbearance proceedings.

10. The Petitioners propose that the Commission adopt additional requirements for petitions seeking forbearance from sections 251 and/or 271 of the Act.²⁷ For example, the Petitioners propose that petitioners seeking forbearance from sections 251 or 271 must provide supporting data at the wire center level.²⁸ The Petitioners further propose that the Commission "adopt [] a rule inviting states to report to the Commission on the potential effects of Sections 251 and/or 271 forbearance in their states."²⁹ To what extent is such an approach warranted and consistent with the statutory framework and Commission precedent?

11. The Petitioners also suggest certain procedural requirements governing the resolution of forbearance petitions, including a proposal that the Commission adopt a rule "requir[ing] the issuance of a written order on all forbearance petitions, including those petitions that previously have been 'deemed granted.'"³⁰ We seek comment on that proposal.

12. To the extent that the Commission adopts procedural rules to govern forbearance petitions, the Petitioners request that those rules apply both to forbearance petitions filed in the future, as well as forbearance petitions already pending before the Commission.³¹ We seek comment on the extent of the Commission's authority to adopt procedural rules governing both future forbearance petitions as well as those that already are pending before the Commission, particularly with respect to the procedural rules proposed by the Petitioners. We also seek comment on the propriety, as a policy matter, of extending particular procedural rules in such manner.

13. In recent years, the Commission has witnessed a significant increase in the number of petitions seeking forbearance submitted by telecommunications carriers that the Commission oversees. These petitions have had different results, such as petitions being approved, denied, withdrawn or deemed granted. In the course of Congressional oversight, some Members of Congress have raised concerns with how forbearance is used. Some companies have indicated serious concerns with the forbearance process, while others argue that it is an important tool for the Commission to eliminate rules, consistent with the public interest. The Commission therefore seeks comment on whether forbearance is an effective means for the Commission to make changes to its regulations. We also seek comment on whether forbearance is being utilized for the purposes intended by Congress. Are there unintended consequences of forbearance, such as a focus on these petitions at the expense of other industry-wide proceedings? What are the burdens on stakeholders from forbearance proceedings, including administrative and financial costs? Are there additional burdens placed on stakeholders due to the fact that there is a statutory deadline on the completion of forbearance petitions? What are the effects of having a company-specific petition drive agency decisions, rather than the Commission deciding to take industry-wide actions?

14. Finally, we seek comment on any other aspects of the Petition, as well as any other comments regarding the need for any other procedural rules to govern the Commission's consideration of forbearance

²⁶ Petition at 24-29.

²⁷ *Id.* at 29-32 (citing 47 U.S.C. §§ 251, 271).

²⁸ *Id.* at 31.

²⁹ *Id.* at 30-32.

³⁰ *Id.* at 32-33.

³¹ *Id.* at 1.

petitions. We also invite comment on the possible effect on small entities from adopting any of the Petitioners' proposed rules, or variations of those proposals set forth above. To the extent that the Commission were to adopt any procedural rules governing forbearance petitions proposed by the Petitioners or otherwise justified in the record, what is the appropriate remedy for a violation of those rules?³²

IV. PROCEDURAL MATTERS

A. *Ex Parte* Presentations

15. The rulemaking this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.³³ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required.³⁴ Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.³⁵

B. Comment Filing Procedures

16. Pursuant to sections 1.415 and 1.419 of the Commission's rules,³⁶ interested parties may file comments and reply comments regarding the Notice on or before the dates indicated on the first page of this document. **All filings related to this Notice of Proposed Rulemaking should refer to WC Docket No. 07-267.** Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
- ECFS filers must transmit one electronic copy of the comments for WC Docket No. 07-267. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the

³² *See, e.g.*, Petition at 19-20 (proposing that if a forbearance petitioner fails to identify how its request satisfies each element of the forbearance standard, its petition should be dismissed without prejudice).

³³ 47 C.F.R. §§ 1.200 *et seq.*

³⁴ *See* 47 C.F.R. § 1.1206(b)(2).

³⁵ 47 C.F.R. § 1.1206(b).

³⁶ 47 C.F.R. §§ 1.415, 1.419.

Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, S.W., Washington D.C. 20554.

17. Parties should send a copy of their filings to the Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5-C140, 445 12th Street, S.W., Washington, D.C. 20554, or by e-mail to CPDCopies@fcc.gov. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

18. Documents in WC Docket No. 07-267 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street S.W., Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

C. Initial Regulatory Flexibility Analysis

19. As required by the Regulatory Flexibility Act of 1980, see 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth in the Appendix. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided below in the Appendix.

D. Paperwork Reduction Act

20. This document contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

E. Accessible Formats

21. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov; phone: 202-418-0530 or TTY: 202-418-0432.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that pursuant to sections 1, 4(i), 4(j), 10, 303, 332 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 160, 303, 332, 403, this Notice of Proposed Rulemaking in WC Docket No. 07-267 IS ADOPTED.

23. IT IS FURTHER ORDERED that the Covad, *et al.* Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended, WC Docket No. 07-267 (filed Sept. 19, 2007), IS GRANTED to the extent indicated herein and otherwise IS DENIED.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities that might result from this Notice of Proposed Rulemaking (Notice). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided above. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.² In addition, the Notice and the IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. In this Notice, we seek comment on whether the Commission should adopt procedural rules governing its consideration of petitions for forbearance pursuant to section 10 or section 332 of the Act. In particular, we seek comment on the need to apply APA notice-and-comment rules to forbearance petitions.⁴ We also seek comment on the burdens of proof and production in forbearance proceedings.⁵ Additionally, we seek comment on whether to adopt rules governing the form and content of forbearance petitions, including possibly a “complete-as filed” requirement and a requirement that the petitioner demonstrate that it has satisfied each element of the forbearance standard.⁶ Further, we solicit comment on the need for rules governing the scope and interpretation of protective orders in forbearance proceedings.⁷ In addition, we seek comment on the need for rules establishing timetables for Commission proceedings addressing forbearance petitions.⁸ In the Notice, we also seek comment on whether additional rules are warranted for petitions seeking forbearance from section 251 or section 271 of the Act.⁹ We further seek comment on whether we should adopt procedural requirements governing the resolution of forbearance petitions.¹⁰ We also seek comment on the need for any other procedural rules governing forbearance petitions, the scope of application of such rules, and the appropriate remedies for violation should the Commission adopt such rules.¹¹ For each of these issues, we seek comment on the possible effects on small entities, associated with any rules the Commission might adopt.¹²

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See 5 U.S.C. § 603(a).

⁴ Notice at para. 5.

⁵ *Id.* at para. 6.

⁶ *Id.* at paras. 6-7.

⁷ *Id.* at para. 8.

⁸ *Id.* at para. 9.

⁹ *Id.* at para. 10.

¹⁰ *Id.* at paras. 11.

¹¹ *Id.* at paras. 12-12.

¹² *Id.* at para. 12.

B. Legal Basis

3. The legal basis for any action that may be taken pursuant to this Notice is contained in sections 1, 4(i), 4(j), 10, 303, 332 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 160, 303, 332, 403.

C. Description and Estimate of the Number of Small Entities to which the Proposed Rules Will Apply:

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.¹³ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁴ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁵ 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.¹⁶

5. **Small Businesses.** Nationwide, there are a total of 22.4 million small businesses, according to SBA data.¹⁷

6. **Small Organizations.** Nationwide, there are approximately 1.6 million small organizations.¹⁸

7. **Small Governmental Jurisdictions.** The term “small 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.”¹⁹ Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.²⁰ We estimate that, of this total, 84,377 entities were “small governmental jurisdictions.”²¹ Thus, we estimate that most governmental jurisdictions are small.

8. **Incumbent Local Exchange Carriers (ILECs).** Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under

¹³ 5 U.S.C. § 603(b)(3).

¹⁴ 5 U.S.C. § 601(6).

¹⁵ 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.”

¹⁶ 15 U.S.C. § 632.

¹⁷ See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

¹⁸ Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

¹⁹ 5 U.S.C. § 601(5).

²⁰ U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

²¹ We assume that the villages, school districts, and special districts are small, and total 48,558. See U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

that size standard, such a business is small if it has 1,500 or fewer employees.²² According to Commission data,²³ 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

9. Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), “Shared-Tenant Service Providers,” and “Other Local Service Providers.” Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁴ According to Commission data,²⁵ 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 94 have more than 1,500 employees. In addition, 12 carriers have reported that they are “Shared-Tenant Service Providers,” and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are “Other Local Service Providers.” Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities that may be affected by our proposed action.

10. Interexchange Carriers (IXCs). Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁶ According to Commission data,²⁷ 316 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 292 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

11. International Service Providers. There is no small business size standard developed specifically for providers of international service. The appropriate size standards under SBA rules are for the two broad census categories of “Satellite Telecommunications” and “Other Telecommunications.” Under both categories, such a business is small if it has \$13.5 million or less in average annual receipts.²⁸

12. The first category of Satellite Telecommunications “comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via

²² 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517110.

²³ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “*Trends in Telephone Service*” at Table 5.3, Page 5-5 (June 2005) (hereinafter “*Trends in Telephone Service*”). This source uses data that are current as of October 1, 2004.

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

²⁵ “*Trends in Telephone Service*” at Table 5.3.

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

²⁷ “*Trends in Telephone Service*” at Table 5.3.

²⁸ 13 C.F.R. § 121.201, NAICS codes 517410 and 517910.

a system of satellites or reselling satellite telecommunications.”²⁹ For this category, Census Bureau data for 2002 show that there were a total of 371 firms that operated for the entire year.³⁰ Of this total, 307 firms had annual receipts of under \$10 million, and 26 firms had receipts of \$10 million to \$24,999,999.³¹ Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

13. The second category of Other Telecommunications “comprises establishments primarily engaged in (1) providing specialized telecommunications applications, such as satellite tracking, communications telemetry, and radar station operations; or (2) providing satellite terminal stations and associated facilities operationally connected with one or more terrestrial communications systems and capable of transmitting telecommunications to or receiving telecommunications from satellite systems.”³² For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year.³³ Of this total, 259 firms had annual receipts of under \$10 million and 15 firms had annual receipts of \$10 million to \$24,999,999.³⁴ Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

14. **Wireless Service Providers.** The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of “Paging”³⁵ and “Cellular and Other Wireless Telecommunications.”³⁶ Under both categories, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.³⁷ Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.³⁸ Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.³⁹ Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of

²⁹ U.S. Census Bureau, 2002 NAICS Definitions, “517410 Satellite Telecommunications”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

³⁰ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 517410 (issued Nov. 2005).

³¹ *Id.* An additional 38 firms had annual receipts of \$25 million or more.

³² U.S. Census Bureau, 2002 NAICS Definitions, “517910 Other Telecommunications”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

³³ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 517910 (issued Nov. 2005).

³⁴ *Id.* An additional 14 firms had annual receipts of \$25 million or more.

³⁵ 13 C.F.R. § 121.201, NAICS code 517211.

³⁶ 13 C.F.R. § 121.201, NAICS code 517212.

³⁷ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517211 (issued Nov. 2005).

³⁸ *Id.* The 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.”

³⁹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517212 (issued Nov. 2005).

1,000 employees or more.⁴⁰ Thus, under this second category and size standard, the majority of firms can, again, be considered small.

15. **Cellular Licensees.** The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging"⁴¹ and "Cellular and Other Wireless Telecommunications."⁴² Under both categories, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.⁴³ Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.⁴⁴ Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.⁴⁵ Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.⁴⁶ Thus, under this second category and size standard, the majority of firms can, again, be considered small.

16. **Common Carrier Paging.** As noted, the SBA has developed a small business size standard for wireless firms within the broad economic census categories of "Cellular and Other Wireless Telecommunications."⁴⁷ Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, U.S. Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.⁴⁸ Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.⁴⁹ Thus, under this category and associated small business size standard, the great majority of firms can be considered small.

17. In addition, in the Paging Second Report and Order, the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding

⁴⁰ *Id.* The 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."

⁴¹ 13 C.F.R. § 121.201, NAICS code 517211.

⁴² 13 C.F.R. § 121.201, NAICS code 517212.

⁴³ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 517211 (issued Nov. 2005).

⁴⁴ *Id.* The 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."

⁴⁵ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 517212 (issued Nov. 2005).

⁴⁶ *Id.* The 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."

⁴⁷ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

⁴⁸ U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

⁴⁹ U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000). The 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 "Firms with 1000 employees or more."

credits and installment payments.⁵⁰ A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.⁵¹ The SBA has approved this definition.⁵² An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold.⁵³ Fifty-seven companies claiming small business status won 440 licenses.⁵⁴ An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.⁵⁵ One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.⁵⁶ Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service*, 408 private and common carriers reported that they were engaged in the provision of either paging or “other mobile” services.⁵⁷ Of these, we estimate that 589 are small, under the SBA-approved small business size standard.⁵⁸ We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

18. 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.⁵⁹ The SBA has approved these definitions.⁶⁰ The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670-1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

19. Wireless Telephony. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The SBA has developed a small business size

⁵⁰ Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems, Second Report and Order, 12 FCC Rcd 2732, 2811-2812, paras. 178-181 (Paging Second Report and Order); *see also* Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 10030, 10085-10088, paras. 98-107 (1999).

⁵¹ *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

⁵² *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration, dated Dec. 2, 1998.

⁵³ *See* “929 and 931 MHz Paging Auction Closes,” Public Notice, 15 FCC Rcd 4858 (WTB 2000).

⁵⁴ *See* “929 and 931 MHz Paging Auction Closes,” Public Notice, 15 FCC Rcd 4858 (WTB 2000).

⁵⁵ *See* “Lower and Upper Paging Bands Auction Closes,” Public Notice, 16 FCC Rcd 21821 (WTB 2002).

⁵⁶ *See* “Lower and Upper Paging Bands Auction Closes,” Public Notice, 18 FCC Rcd 11154 (WTB 2003).

⁵⁷ *Trends in Telephone Service* at Table 5.3.

⁵⁸ 13 C.F.R. § 121.201, NAICS code 517211.

⁵⁹ *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).

⁶⁰ *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Dec. 2, 1998).

standard for “Cellular and Other Wireless Telecommunications” services.⁶¹ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.⁶² According to *Trends in Telephone Service* data, 437 carriers reported that they were engaged in wireless telephony.⁶³ We have estimated that 260 of these are small under the SBA small business size standard.

20. Broadband Personal Communications Service. The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.⁶⁴ For Block F, an additional small business size standard for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁶⁵ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.⁶⁶ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 “small” and “very small” business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.⁶⁷ On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.⁶⁸

21. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses.⁶⁹ Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction No. 58. There were 24 winning bidders for 217 licenses.⁷⁰ Of the 24 winning bidders, 16 claimed small business status and won 156 licenses.

22. Narrowband Personal Communications Services. The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior

⁶¹ 13 C.F.R. § 121.201, NAICS code 517212.

⁶² 13 C.F.R. § 121.201, NAICS code 517212.

⁶³ *Trends in Telephone Service* at Table 5.3.

⁶⁴ See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7850-7852, paras. 57-60 (1996); see also 47 C.F.R. § 24.720(b).

⁶⁵ See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7852, para. 60.

⁶⁶ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Dec. 2, 1998).

⁶⁷ FCC News, “Broadband PCS, D, E and F Block Auction Closes,” No. 71744 (rel. Jan. 14, 1997).

⁶⁸ See “C, D, E, and F Block Broadband PCS Auction Closes,” Public Notice, 14 FCC Rcd 6688 (WTB 1999).

⁶⁹ See “C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,” Public Notice, 16 FCC Rcd 2339 (2001).

⁷⁰ See “Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58,” Public Notice, 20 FCC Rcd 3703 (2005).

three calendar years of \$40 million or less.⁷¹ Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.⁷² To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order.⁷³ A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.⁷⁴ A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.⁷⁵ The SBA has approved these small business size standards.⁷⁶ A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.⁷⁷ Three of these claimed status as a small or very small entity and won 311 licenses.

23. Lower 700 MHz Band Licenses. We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.⁷⁸ We have defined a “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.⁷⁹ A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.⁸⁰ Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is “entrepreneur,” which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more

⁷¹ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

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

⁷³ *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476, para. 40 (2000).

⁷⁴ *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476, para. 40 (2000).

⁷⁵ *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476, para. 40 (2000).

⁷⁶ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated Dec. 2, 1998.

⁷⁷ See “Narrowband PCS Auction Closes,” Public Notice, 16 FCC Rcd 18663 (WTB 2001).

⁷⁸ See *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, Report and Order, 17 FCC Rcd 1022 (2002).

⁷⁹ See *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, Report and Order, 17 FCC Rcd 1022, 1087-88, para. 172 (2002).

⁸⁰ See *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, Report and Order, 17 FCC Rcd 1022, 1087-88, para. 172 (2002).

than \$3 million for the preceding three years.⁸¹ The SBA has approved these small size standards.⁸² An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.⁸³ A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses.⁸⁴ Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.⁸⁵ On July 26, 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band (Auction No. 60). There were three winning bidders for five licenses. All three winning bidders claimed small business status.

24. Upper 700 MHz Band Licenses. The Commission released a Report and Order, authorizing service in the upper 700 MHz band.⁸⁶ This auction, previously scheduled for January 13, 2003, has been postponed.⁸⁷

25. 700 MHz Guard Band Licenses. In the 700 MHz Guard Band Order, we adopted size standards for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁸⁸ A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.⁸⁹ Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.⁹⁰ SBA approval of these definitions is not required.⁹¹ An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.⁹² Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these

⁸¹ See *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, Report and Order, 17 FCC Rcd 1022, 1088, para. 173 (2002).

⁸² See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated Aug. 10, 1999.

⁸³ See “*Lower 700 MHz Band Auction Closes*,” Public Notice, 17 FCC Rcd 17272 (WTB 2002).

⁸⁴ See “*Lower 700 MHz Band Auction Closes*,” Public Notice, 18 FCC Rcd 11873 (WTB 2003).

⁸⁵ See “*Lower 700 MHz Band Auction Closes*,” Public Notice, 18 FCC Rcd 11873 (WTB 2003).

⁸⁶ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Memorandum Opinion and Order*, 16 FCC Rcd 1239 (2001).

⁸⁷ See “*Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) Is Rescheduled*,” *Public Notice*, 16 FCC Rcd 13079 (WTB 2003).

⁸⁸ See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, 15 FCC Rcd 5299 (2000).

⁸⁹ See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, 15 FCC Rcd 5299, 5343, para. 108 (2000).

⁹⁰ See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, 15 FCC Rcd 5299, 5343, para. 108 (2000).

⁹¹ See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, 15 FCC Rcd 5299, 5343, para. 108 n.246 (for the 746-764 MHz and 776-794 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

⁹² See “*700 MHz Guard Bands Auction Closes: Winning Bidders Announced*,” *Public Notice*, 15 FCC Rcd 18026 (2000).

bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.⁹³

26. **Fixed Microwave Services.** Fixed microwave services include common carrier,⁹⁴ private operational-fixed,⁹⁵ and broadcast auxiliary radio services.⁹⁶ At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category “Cellular and Other Telecommunications,” which is 1,500 or fewer employees.⁹⁷ The Commission does not have data specifying the number of these licensees that have no more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA’s small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer common carrier fixed licensees and 61,670 or fewer private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies proposed herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

27. **39 GHz Service.** The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of \$40 million or less in the three previous calendar years.⁹⁸ An additional size standard for “very small business” is: an entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁹⁹ The SBA has approved these small business size standards.¹⁰⁰ The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses.

⁹³ See “700 MHz Guard Bands Auction Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 4590 (WTB 2001).

⁹⁴ See 47 C.F.R. §§ 101 et seq. (formerly, Part 21 of the Commission’s Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

⁹⁵ Persons eligible under parts 80 and 90 of the Commission’s Rules can use Private Operational-Fixed Microwave services. See 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee’s commercial, industrial, or safety operations.

⁹⁶ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission’s Rules. See 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

⁹⁷ 13 CFR § 121.201, NAICS code 517212.

⁹⁸ See Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Report and Order*, 12 FCC Rcd 18600 (1997).

⁹⁹ *Id.*

¹⁰⁰ See Letter to Kathleen O’Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998); See Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Hector Barreto, Administrator, SBA, (Jan. 18, 2002).

28. **Local Multipoint Distribution Service.** Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.¹⁰¹ The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.¹⁰² An additional small business size standard for “very small business” was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹⁰³ The SBA has approved these small business size standards in the context of LMDS auctions.¹⁰⁴ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winning that won 119 licenses.

29. **218-219 MHz Service.** The first auction of 218-219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs).¹⁰⁵ Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.¹⁰⁶ In the 218-219 MHz Report and Order and Memorandum Opinion and Order, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding \$15 million for the preceding three years.¹⁰⁷ A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding \$3 million for the preceding three years.¹⁰⁸ The SBA has approved of these definitions.¹⁰⁹ A subsequent auction is not yet scheduled. Given the success of small businesses in the previous auction, and the

¹⁰¹ See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making*, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

¹⁰² See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making*, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

¹⁰³ See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making*, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

¹⁰⁴ See Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

¹⁰⁵ See “Interactive Video and Data Service (IVDS) Applications Accepted for Filing,” *Public Notice*, 9 FCC Rcd 6227 (1994).

¹⁰⁶ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994).

¹⁰⁷ Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497 (1999).

¹⁰⁸ *Id.*

¹⁰⁹ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA, (Jan. 6, 1998).

prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this analysis that in future auctions, many, and perhaps most, of the licenses may be awarded to small businesses.

30. Rural Radiotelephone Service. The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.¹¹⁰ A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS).¹¹¹ In the present context, we will use the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," i.e., an entity employing no more than 1,500 persons.¹¹² There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

31. Incumbent 24 GHz Licensees. This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of "Cellular and Other Wireless Telecommunications" companies. This category provides that such a company is small if it employs no more than 1,500 persons.¹¹³ For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.¹¹⁴ Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.¹¹⁵ Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.¹¹⁶ Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.¹¹⁷ Thus, under this second category and size standard, the majority of firms can, again, be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent¹¹⁸ and TRW, Inc. It is our understanding that Teligent and its related companies have fewer than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

32. Future 24 GHz Licensees. With respect to new applicants in the 24 GHz band, we have defined "small business" as an entity that, together with controlling interests and affiliates, has average

¹¹⁰ The service is defined in § 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

¹¹¹ BETRS is defined in §§ 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

¹¹² 13 C.F.R. § 121.201, NAICS code 517212.

¹¹³ 13 C.F.R. § 121.201, NAICS code 517212.

¹¹⁴ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 517211 (issued Nov. 2005).

¹¹⁵ *Id.* The 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."

¹¹⁶ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 517212 (issued Nov. 2005).

¹¹⁷ *Id.* The 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."

¹¹⁸ Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

annual gross revenues for the three preceding years not exceeding \$15 million.¹¹⁹ “Very small business” in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.¹²⁰ The SBA has approved these definitions.¹²¹ The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

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

33. Should the Commission decide to adopt any procedural rules governing petitions for forbearance, the associated rules potentially could modify or impose new reporting or recordkeeping requirements. For example, we seek comment on the possible need for rules governing the form and content of forbearance petitions, such as “compete-as-filed” requirements and obligations for forbearance petitioners to demonstrate that they have satisfied each element of the forbearance standard.¹²² The Commission also seeks comment on the possible need or rules governing the scope and interpretation of protective orders in forbearance proceedings, including rules governing the submission of, access to, and use of information submitted pursuant to protective orders in forbearance proceedings.¹²³ In addition, we seek comment on the need for rules establishing timetables for Commission proceedings addressing forbearance petitions, including requirements governing modification of forbearance petitions and processes for *ex parte* filings.¹²⁴ We further seek comment on whether we should adopt procedural requirements governing petitions for reconsideration of forbearance decisions.¹²⁵ The Commission also seeks comment on the need for any other procedural rules governing forbearance petitions, the scope of application of such rules, and the appropriate remedies for violation should the Commission adopt such rules.¹²⁶ These proposals may impose additional reporting and recordkeeping requirements on entities. Also, we seek comment on the effects of any of these proposals on small entities.¹²⁷ Entities, especially small businesses, are encouraged to quantify the costs and benefits or any reporting requirement that may be established in this proceeding.

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

34. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather

¹¹⁹ Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules To License Fixed Services at 24 GHz, *Report and Order*, 15 FCC Rcd 16934, 16967, para. 77 (2000) (24 GHz Report and Order); *see also* 47 C.F.R. § 101.538(a)(2).

¹²⁰ *24 GHz Report and Order*, 15 FCC Rcd at 16967, para. 77; *see also* 47 C.F.R. § 101.538(a)(1).

¹²¹ *See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA, (July 28, 2000).

¹²² *Id.* at paras. 8-9, 12.

¹²³ *Id.* at para. 10.

¹²⁴ *Id.* at para. 11.

¹²⁵ *Id.* at paras. 13-14.

¹²⁶ *Id.* at paras. 15-16.

¹²⁷ *See id.* at para. 16.

than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹²⁸

35. The Commission's primary objective is to implement the "pro-competitive, deregulatory" framework established in sections 10 and 332 of the Act. We seek comment on the burdens, including those placed on small carriers, associated with related Commission rules and whether the Commission should adopt different requirements for small businesses.¹²⁹

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

36. None.

¹²⁸ 5 U.S.C. § 603(c).

¹²⁹ See Notice at para. 12.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, As Amended*, WC Docket No. 07-267, Notice of Proposed Rulemaking

My experience with forbearance over the last two and a half years has been that it is a process that leaves much to be desired. Too often forbearance has resulted in industry driving the FCC's agenda rather than the reverse being true. Decisions are based upon records lacking in data and the Commission faces a statutory deadline that requires a decision with or without such data. Perhaps most egregious is the fact that if the Commission fails to act, forbearance petitions may go into effect based upon the industry's reasoning rather than the Commission's own determination. All of this is to say that I do not believe that forbearance is being used today in the manner intended by Congress. Permanently addressing these flaws will require a legislative fix but there are procedural protections that the FCC can implement on its own authority to mitigate some of these problems. I am therefore pleased to support this item which is the first step to developing procedural rules to improve the handling of forbearance petitions by the FCC. There is an urgent need to adopt procedural protections given that we have numerous forbearance petitions currently pending before the Commission. I am hopeful that the Commission can do so quickly before we become the Forbearance Communications Commission.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended, WC Docket No. 07-267, Notice of Proposed Rulemaking (Nov. 27, 2007).

The Commission's recent history on forbearance petitions – including failing to even issue an order addressing the merits of a sweeping petition – is not one to be envied. This approach has cast open the floodgates for industry-filed petitions, inviting parties to make end runs around the Congressional framework for telecommunications services.

I am pleased that we seek comment in this Notice on procedural rules to guide the Commission in its consideration of forbearance petitions. As I've often stated, Congress has given the Commission a powerful tool in our Section 10 forbearance authority, but the Commission must wield it responsibly. If the statute were not clear enough, numerous Members of Congress have also expressed concern about the Commission's use of its forbearance authority. I have repeatedly urged the Commission to adopt procedural rules for forbearance petitions, such as requiring parties to include in their original petitions detailed information about the services subject to the petition and a detailed analysis of how such proposals satisfy the statutory test. Procedural rules can provide transparency and predictability to all interested participants and can restore confidence in Commission processes, so I am pleased that we are taking this step towards a more rigorous framework and I look forward to working with my colleagues to complete this proceeding as expeditiously as possible.

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

Re: Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended, WC Docket No. 07-267, Notice of Proposed Rulemaking

An integral part of the pro-competitive, de-regulatory national policy framework established by Congress in the 1996 Act is the section 10 forbearance provision. Today we seek comment in general on the need for procedural rules to govern the Commission's consideration of petitions for forbearance. I look forward to working with my fellow Commissioners on this proceeding and hearing from all interested stakeholders.

**STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL**

Re: Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended, Notice of Proposed Rule Making, WC Docket No. 07-267

By all accounts, most Members of Congress, most proponents of individual forbearance petitions, most opponents of forbearance petitions, and a majority of the FCC all agree that the forbearance petition process is flawed and should be fixed. Only Congress can amend Section 10, which is simple and clear in its mandate; but the Commission can take steps to improve its implementation. And that is what we are doing today by initiating this rulemaking.

Among the important issues raised for public comment in the *Notice* are: the specificity required for relief requested by the petitioner; the level of justification required for grant of relief; and the necessity for affirmative Commission action granting or denying a petition. It is also appropriate to examine the effect that forbearance petitions have on our broader rulemaking responsibilities. I look forward to reviewing the comments filed in this proceeding and to evaluating our forbearance regulations in a timely manner so that we can implement rules that we find are necessary to improve the forbearance process. I thank the Chairman and the Bureau for bringing this item forward today.