

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

|                                  |   |                             |
|----------------------------------|---|-----------------------------|
| <b>In the Matter of</b>          | ) |                             |
|                                  | ) |                             |
| <b>Section 257 Proceeding to</b> | ) |                             |
| <b>Identify and Eliminate</b>    | ) | <b>GN Docket No. 96-113</b> |
| <b>Market Entry Barriers</b>     | ) |                             |
| <b>for Small Businesses</b>      | ) |                             |

**REPORT**

**Adopted: May 8, 1997**

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By the Commission: Commissioner Chong issuing separate statement.

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## ***I. INTRODUCTION AND STATEMENT OF POLICY***

1. Section 257 of the Telecommunications Act of 1996 (Telecommunications Act or 1996 Act)<sup>1</sup> requires the Commission to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services."<sup>2</sup> In carrying out this mandate, the Commission must "promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity."<sup>3</sup>

2. This *Report* summarizes the Commission's implementation of Section 257, describes our strong commitment to continue to achieve its statutory goals, and outlines steps

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), Section 257.

<sup>2</sup> 47 U.S.C. § 257(a). Section 257 requires completion of the market entry barriers proceeding within fifteen months of enactment of the 1996 Act, which is May 8, 1997.

<sup>3</sup> 47 U.S.C. § 257(b). In addition, every three years following the completion of the market entry barriers proceeding, the Commission must report to Congress on regulations that have been issued to eliminate barriers and any statutory barriers that the Commission recommends be eliminated. 47 U.S.C. § 257(c).

we plan to take in the future. Over the years, the Commission has undertaken various initiatives to advance opportunities for small businesses.<sup>4</sup> We have been implementing Section 257 agency-wide since its enactment on February 8, 1996. Our actions demonstrate our intention to comply fully with the congressional directive of Section 257 and to advance the clear pro-competitive and deregulatory goals of the 1996 Act. Specifically, we have acted to identify and eliminate market entry barriers for small businesses, to remove or reduce impediments, and to increase opportunities for small business participation in the telecommunications market. The Commission also has taken numerous measures designed to enhance new entry, competition, and innovation in the telecommunications market generally, most or all of which should benefit small businesses as well. The *Report* details all of these efforts. Many of the measures described below occurred apart from this *Report* in other Commission proceedings or through agency access and outreach endeavors, in which we integrated the mandate and policy goals of Section 257.

3. The *Report* also demonstrates our commitment to achieving the policy goals of Section 257(b). As described below, the Commission has taken a variety of measures to fulfill the four national policy objectives set forth in Section 257(b). First, with respect to "vigorous economic competition," we have defined the term "market entry barrier" in a manner that facilitates entry by small businesses yet avoids unwarranted regulatory intervention that could distort a competitive marketplace.<sup>5</sup> By including only those impediments that significantly distort market operations and harm consumer welfare within the definition of "market entry barriers," the Commission has recognized that economically unjustified intervention actually would thwart the policy goal of promoting vigorous competition.

4. Second, to promote "technological advancement," the Commission has taken steps to eliminate outdated, unnecessary, or burdensome requirements and procedures. We have undertaken substantial efforts to disseminate information to small entities and entrepreneurs about Commission processes and communications opportunities, and to increase access to Commission decisionmakers. We also have made additional spectrum available which in turn should spur technological advancement. These actions should foster the transfer of innovative ideas from the research laboratory to the consumer marketplace, and thereby advance technological development. Third, we will continue to consider the policy favoring "diversity of media voices," in our review of broadcast ownership rules and

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<sup>4</sup> See *infra* n.12 at 6285-98.

<sup>5</sup> See *infra* ¶¶ 12-19.

in other appropriate contexts,<sup>6</sup> as well as in our further evaluation of issues relating to small businesses owned by women or minorities.<sup>7</sup> Finally, we anticipate that our Section 257 actions thus far, combined with our ongoing commitment to enhance opportunities for small businesses, will promote the fourth policy goal of serving the "public interest, convenience, and necessity" by expediting entry in the telecommunications market, encouraging development of new, innovative communications services, facilitating the availability of services in various geographic markets, and contributing to a vibrant, competitive telecommunications marketplace.

5. This *Report* also reflects our independent recognition of the crucial role that small businesses play in the U.S. economy. As we already emphasized earlier in this proceeding, small businesses not only constitute the vast majority of all employers in this country, but are able to innovate faster than larger firms and to serve niche markets that may not be served by large corporations.<sup>8</sup> Small businesses contribute 47% of all sales in the United States, are responsible for 50% of the private gross domestic product, employ 53% of the private workforce, and produced an estimated 75% of the 2.5 million new jobs created during 1995.<sup>9</sup> Small businesses also produce more than twice the number of innovations per employee as large firms. In addition, while only 3% of the employees in large enterprises work in research and development, 19% of the employees in comparable small enterprises with intellectual property work in research and development.<sup>10</sup> Despite their important role, small businesses represent only a small portion of the businesses in telecommunications.<sup>11</sup>

6. We initiated an omnibus Section 257 proceeding in May 1996 by adopting a *Notice of Inquiry. Section 257 Proceeding to Identify and Eliminate Market Entry Barriers*

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<sup>6</sup> See *infra* ¶¶ 190-194 & 196.

<sup>7</sup> See *infra* ¶¶ 221-225.

<sup>8</sup> See *infra* n.12 at 6283-84.

<sup>9</sup> U.S. Small Business Administration, *The Facts About Small Business*, information pamphlet FS0040, dated Aug. 1996 (*SBA Facts*).

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

<sup>11</sup> See Small Business Administration Comments at 5-9. For example, in 1991, 93% of firms in high-technology industries were small (fewer than 500 employees) but had only 19% of total industry receipts. *SBA Facts*.

for *Small Businesses (Market Entry Barriers Notice of Inquiry)*.<sup>12</sup> We asked how to define small businesses, requested profile data about the characteristics of small telecommunications businesses, inquired about market entry barriers for small businesses generally, and asked whether small businesses owned by minorities or women face unique market entry barriers. Over 80 entities filed comments. The commenters represent every sector of the telecommunications market and include individual entrepreneurs, small businesses, large communications companies, associations, federal and state government representatives, telecommunications policy groups, women's organizations, and minority interests.<sup>13</sup> Three parties -- American Mobile Telecommunications Association, Small Business in Telecommunications and the National Wireless Resellers Association -- conducted independent surveys of their members and provided survey results in their comments.<sup>14</sup> Finally, in conjunction with this proceeding, the Office of General Counsel and the Office of Communications Business Opportunities (OCBO) held a public forum on September 24,

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<sup>12</sup> *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd 6280 (1996).

<sup>13</sup> A list of parties and the abbreviations of each used in this *Report* is provided in Appendix A.

<sup>14</sup> American Mobile Telecommunications Association Comments at 1-11 (50 survey respondents); Small Business in Telecommunications Comments at 62-66 (10,000 surveys sent); National Wireless Resellers Association Comments at 3 (19 survey respondents). *See also* Shark Testimony at 1-2. We discuss the survey results in various sections below. American Mobile Telecommunications Association is a nationwide, non-profit trade association representing the interests of the specialized wireless communications industry. Its members include trunked and conventional 800 MHz and 900 MHz Specialized Mobile Radio (SMR) operators, licensees of wide-area SMR systems, and commercial licensees in the 220 MHz band. American Mobile Telecommunications Association states that its members provide commercial wireless services throughout the country and include a significant number of entities that would qualify as "small business" under even the most stringent definition. Small Business in Telecommunications is a non-profit trade association representing paging companies, tower owners, private carriers, commercial mobile radio service operators, microwave licensees and community repeater operators. The association limits voting rights to persons and companies with annual revenues of less than \$20 million. National Wireless Resellers Association represents resellers of cellular, long-distance, paging, landline local exchange, personal communications, and specialized mobile radio services. The majority of respondents to its survey report annual gross revenues of \$15 million or less.

1996.<sup>15</sup> The panelists represented small telecommunications businesses, associations, government entities, public interest organizations, and the financial and advertising industries.<sup>16</sup>

7. In October 1996, when the formal comment period closed in the omnibus Section 257 proceeding,<sup>17</sup> we began immediately to evaluate the barriers and impediments identified by the commenters, and to consider the specific suggestions in the record, which relate to every communications service within our jurisdiction. Many of the parties' recommendations concern other ongoing Commission rulemakings, and therefore, must be addressed and resolved under the timeframes and in the context of the records in those separate proceedings.

8. However, we have adopted many of the commenters' principal proposals. We also have initiated other measures. As described in this *Report*, some of our key measures implementing Section 257 to date are: deciding to use service-specific definitions of small businesses, rather than adopting a general definition; planning new initiatives that will better enable small businesses to file comments and participate in Commission proceedings; requiring the Bureaus and Offices to ensure that our rulemaking processes enable meaningful comment on Commission proposals and their impact on small businesses; instituting rulemaking proceedings so as to ensure effective and prompt enforcement of the Communications Act and our rules; reducing information filing and other burdens that create obstacles to entry for small businesses; ensuring that the Commission fully considers the interests of small carriers in proceedings to determine funding mechanisms for universal service support; adopting licensing incentives to facilitate small business participation in spectrum auctions; adopting and proposing policies that permit geographic partitioning and

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<sup>15</sup> FCC Public Notice, *Forum on Small Business Market Entry Barriers*, No. 64975 (Sept. 5, 1996) (*Market Entry Barriers Forum*).

<sup>16</sup> See Appendix A (identifies panelists at the *Market Entry Barriers Forum*).

<sup>17</sup> The original filing deadlines established for the *Market Entry Barriers Notice of Inquiry* were July 24, 1996 (comments) and August 23, 1996 (reply comments). In response to subsequent public requests, we twice extended the original filing deadlines. *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, Order, DA96-1100 (released July 9, 1996) (extending deadlines to August 23, 1996 (comments) and September 12, 1996 (reply comments)); *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, Order, DA96-1433 (released Aug. 23, 1996) (extending deadlines to September 27, 1996 (comments) and October 11, 1996 (reply comments)).

spectrum disaggregation in various wireless communications services; adopting spectrum initiatives to encourage technological innovation by equipment manufacturers and others; speeding resolution of complaints; sponsoring conferences on telecommunications services and financing options; increasing public access to the Commission through technology by creating sites on the World Wide Web and establishing the National Call Center; and making continued efforts to ensure that the Telecommunications Development Fund (TDF or Fund) becomes an effective vehicle for removing financial obstacles to entry.

9. The record in our omnibus Section 257 proceeding thus has provided valuable information to assist us in reducing market entry barriers, and increasing entry and expansion of small businesses in the telecommunications market. It is our goal, through the measures described in this *Report* and our ongoing implementation of Section 257, to facilitate delivery to the telecommunications industry the attributes and benefits that small businesses have brought to other sectors of the economy. As this *Report* demonstrates, we shall give careful consideration to the commenters' recommendations as we proceed to vigorously pursue the statutory objective of eliminating obstacles to entry and thereby to ensure a vibrant and strong telecommunications marketplace.<sup>18</sup>

10. We point out that this *Report* focuses primarily on initiatives that relate to small businesses generally. As explained below, prior to taking any action specifically oriented to small businesses owned by women or minorities, we must fully evaluate the Section 257 record according to the constitutional requirements that govern action by the federal government based on race (strict scrutiny) or gender (intermediate scrutiny).<sup>19</sup> We are currently evaluating these issues and expect to release a more extensive report later this year. As part of this evaluation, we are conducting a comprehensive study of the participation of small businesses, including those owned by women and minorities, in the telecommunications market.

11. This *Report* contains several parts. Beginning with Part II, we discuss obstacles to entry identified by commenters that affect small telecommunications businesses as a whole: financial impediments,<sup>20</sup> and general regulatory obstacles, which include

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<sup>18</sup> Because we are implementing Section 257 on a continuing basis and through various Commission proceedings, the absence of discussion in this *Report* of any identified barrier, obstacle, proposal, or other comment from the record in this docketed proceeding thus far does not mean that we are not still considering the idea or that we have rejected it.

<sup>19</sup> See *infra* Part IV.

<sup>20</sup> See *infra* ¶¶ 35-51.



difficulties in obtaining access to Commission decisionmakers and information about new communications services.<sup>21</sup> We also discuss measures to address these impediments, including establishment of the TDF<sup>22</sup> and outreach efforts by the FCC Office of Public Affairs and Office of Communications Business Opportunities.<sup>23</sup> Part III focuses on obstacles that relate to particular types of communications services: common carrier services,<sup>24</sup> wireless telecommunications services,<sup>25</sup> cable services,<sup>26</sup> mass media services,<sup>27</sup> and international services.<sup>28</sup> Part III also addresses spectrum allocation initiatives,<sup>29</sup> as well as outreach activities of the Commission's Compliance and Information Bureau.<sup>30</sup> Finally, Part IV addresses unique market entry issues experienced by small businesses owned by women or minorities.<sup>31</sup>

## **II. GENERAL MARKET ENTRY BARRIERS**

### **A. Definitions and Characteristics**

#### **1. Definition of "Market Entry Barrier"**

12. As discussed above, the purpose of this proceeding is to "identify and eliminate . . . market entry barriers for entrepreneurs and other small businesses" in

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<sup>21</sup> See *infra* ¶¶ 52-81.

<sup>22</sup> See *infra* ¶¶ 44-50.

<sup>23</sup> See *infra* ¶¶ 52-81.

<sup>24</sup> See *infra* ¶¶ 82-108.

<sup>25</sup> See *infra* ¶¶ 109-152.

<sup>26</sup> See *infra* ¶¶ 153-177.

<sup>27</sup> See *infra* ¶¶ 178-196.

<sup>28</sup> See *infra* ¶¶ 197-200.

<sup>29</sup> See *infra* ¶¶ 201-205.

<sup>30</sup> See *infra* ¶¶ 206-209.

<sup>31</sup> See *infra* ¶¶ 210-225.

telecommunications markets.<sup>32</sup> Section 257(b) states that in carrying out this task, the Commission "shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancements, and promotion of the public interest, convenience, and necessity."<sup>33</sup>

13. In the *Market Barriers Notice of Inquiry*, we observed that "market entry barriers" could include:

obstacles that deter individuals from forming small businesses, barriers that impede entry into the telecommunications market by existing small businesses, and obstacles that small telecommunications businesses face in providing service or expanding within the telecommunications industry. . . .<sup>34</sup>

In their comments, parties discussed various kinds of obstacles and impediments that are currently faced by small telecommunications businesses. In this *Report*, we discuss these obstacles and impediments without deciding whether they qualify as "market entry barriers." It is important to note that not all impediments to small business participation in the telecommunications industry qualify as "market entry barriers" relevant to Section 257(a). We also describe several other Commission initiatives to encourage small business participation in the telecommunications industry. In this regard, we believe that this *Report* goes beyond what Section 257(a) requires.

14. America's Carriers Telecommunications Association requests that the Commission construe "market entry barrier" in a commercially effective manner so as to "create a competitive environment which permits small business' ability to expand their market presence once entry has been achieved."<sup>35</sup> The Small Business Administration notes that Section 257 "does not define or limit" the term "market entry barrier" and recommends

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<sup>32</sup> 47 U.S.C. § 257(a).

<sup>33</sup> 47 U.S.C. § 257(b).

<sup>34</sup> *Market Barriers Notice of Inquiry*, 11 FCC Rcd at 6283. We also stated that discrimination could be a market entry barrier as well. *Id.* at 6305-6306. See also *infra* ¶¶ 210-225 (addresses unique obstacles facing small telecommunications businesses owned by women or minorities).

<sup>35</sup> America's Carriers Telecommunications Association Comments at 2-3.

that the Commission construe the term "as aggressively as possible."<sup>36</sup> Telecommunications Resellers Association claims that the market "is an effective regulator only if market forces are adequate to discipline the behavior of all market participants; if one or more such participants retains vestiges of market power, regulatory intervention is essential to protect the public interest."<sup>37</sup> It argues further that "[r]egulatory intervention, therefore, continues to be necessary to ensure opportunities for small resale carriers in markets that are still dominated by much larger providers . . . [and that] [s]uch action could be deregulatory, but it also could require regulatory measures."<sup>38</sup>

15. AT&T opposes our original construction of "market entry barrier," stating that the 1996 Act did not intend the Section 257 proceeding "to carve out certain market niches as the preserve of small companies, or to subsidize their competition against larger entities."<sup>39</sup> AT&T points out that barriers to small firm entry may simply result from the fundamental structure of a given market -- for example, a market where there may be efficiencies due to economies of scale, or where a large up-front investment is required to begin operations.<sup>40</sup>

16. From a public policy perspective, and consistent with the "pro-competitive, de-regulatory national policy framework" established by Congress in the 1996 Act,<sup>41</sup> we do not regard all impediments or obstacles to small business entry to necessarily be "market entry barriers" that require governmental intervention under Section 257. Instead, we believe that the term "market entry barrier" as used in Section 257(a) is primarily intended to encompass those impediments to entry within the Commission's jurisdiction that justify regulatory intervention because they so significantly distort the operation of the market and harm consumer welfare. Removing these impediments will, in our opinion, facilitate the entry or expansion of small businesses into telecommunications markets as required by Section 257(a) and also fulfill the national policy goals articulated in Section 257(b).

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<sup>36</sup> Small Business Administration Comments at 3.

<sup>37</sup> Telecommunications Resellers Association Comments at 13-14.

<sup>38</sup> *Id.* at 14.

<sup>39</sup> AT&T Comments at 2.

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

<sup>41</sup> Statement of Managers, S. Conf. Report No. 104-230, 104th Cong., 2nd Sess. 1 (1996) (Joint Explanatory Statement).

17. Our decision that not all obstacles or impediments to small business entry warrant regulatory intervention under Section 257 is consistent with economic teaching and Commission precedent. In particular, economists have not regarded all obstacles and impediments to entry as fitting within the definition of "barrier to entry" and have instead proffered more narrow definitions. Two rival definitions of entry barriers currently dominate industrial organization economics.<sup>42</sup> First, economist J.W. Bain specified three sources of entry barriers in discussing the benefits of incumbency: the absolute cost advantages of an incumbent firm, economies of scale, and product differentiation advantages of an incumbent.<sup>43</sup> In general, Bain viewed the value of incumbency as a "barrier to entry."<sup>44</sup> In contrast, economist George Stigler sought to define a barrier to entry as "a cost of producing . . . which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry."<sup>45</sup> More recently, Christian von Weizsacker proposed to restrict Stigler's definition to encompass costs that create inefficiency and thus distort the operation of the market to a sufficient degree that regulatory intervention is warranted.<sup>46</sup>

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<sup>42</sup> See generally *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd 7442, Appendix H at 7621-27, ¶¶ 29-44 (1994) (1994 Cable Competition Report).

<sup>43</sup> J.W. Bain, *Barriers to New Competition* (1956).

<sup>44</sup> Arguments that the FCC should act affirmatively to counterbalance these benefits of size and incumbency so as to advantage smaller firms reflect the Bainian viewpoint.

<sup>45</sup> George J. Stigler, *The Organization of Industry* 67 (1968).

<sup>46</sup> C.C. von Weizsacker, *A Welfare Analysis of Barriers to Entry*, 11 Bell J. Econ. 400 (1980). Baumol, Panzar and Willig discuss a concept similar to von Weizsacker's, calling those types of impediments as being those of most concern to government. William J. Baumol, John C. Panzar & Robert D. Willing, *Contestable Markets and the Theory of Industry Structure* 282 (1982) ("unlike von Weizsacker's, our definition seeks to specify operationally what types of impediments meet its criteria, [and] we hope to show . . . that our criterion and his overlap in substance. That is, we argue that anything that is an entry barrier by our definition does reduce the sum of consumers' and producers' surplus, while phenomena such as fixed costs and scale economies need not do so.").

The Stigler/von Weizsacker position is roughly analogous to AT&T's position that advantages of size and scope often are beneficial to consumers. Therefore, AT&T contends, an affirmative governmental policy to force viable small-scale entry would not only forego the efficiencies of size and scope but also would be contrary to the intent of Section 257.

18. A critical difference between the Bainian definition and the others involves economies of scale and scope.<sup>47</sup> The Bainian definition would consider economies of scale and scope to be a barrier to entry, while the others would view such economies as a barrier only under certain circumstances. The Stiglerian approach would state that as long as both the incumbent and the entrant can achieve large-scale production facilities at the same cost, economies of scale do not meet the definition of a barrier to entry, but if the cost of achieving scale or scope economies is higher for the entrant than the incumbent, the efficient operation of the market may be affected to the detriment of consumer welfare.<sup>48</sup> At that point, under the Stiglerian approach, economies of scale or scope may act as a barrier to entry.

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<sup>47</sup> An "economy of scale" describes a condition where relatively large producers can produce and market their products at a lower average cost per unit than relatively small producers. See F.M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* 97 (1990). An "economy of scope" describes a condition where "costs are reduced by producing two or more products jointly, rather than in specialized firms." *Id.* at 361.

<sup>48</sup> The presence of sunk costs can have this effect. Sunk costs are costs that cannot be eliminated even by a total cessation of production. See Baumol, Panzar & Willig at 280. For example, the costs of constructing a telecommunications network may be viewed as sunk costs -- that is, the network may not be useful for anything else. If entry into an industry requires large sunk costs, the firm that incurs these sunk costs first (the incumbent) can have a tremendous advantage. Potential new entrants may realize that any large scale facilities-based entry into the market will probably force prices to decrease and those prices may be in fact below the point necessary to recover the sunk cost investment. As a result, facilities-based entry will be deterred. See Robert Wilson, *Strategic Models of Entry Deterrence*, 1 *Handbook of Game Theory with Economic Applications* (1992). To counterbalance these entry barriers, the 1996 Act provides two means of entry that do not require competitive local exchange companies to construct complete networks before they can begin to offer services -- the use of unbundled elements of the incumbent's network, and resale. Resale also has been used by entrants to enter other telecommunications markets, such as long-distance. See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16145 (1996) (*First Local Competition Order*), Order on Reconsideration, 11 FCC Rcd 13042 (1996), *petition for review and partial stay granted sub nom., Iowa Util. Board v. FCC*, No. 96-3221 and consolidated cases (8th Cir. Oct. 15, 1996), *partial stay lifted in part, Iowa Util. Board v. FCC*, No. 96-3321 and consolidated cases (8th Cir. Nov. 1, 1996).

19. As explained above, we believe that the term "market entry barrier" as used in Section 257(a) is primarily intended to encompass those impediments to entry within the Commission's jurisdiction that so significantly distort the operation of the market and harm consumer welfare that they justify regulatory intervention. This construction of "market entry barrier" is consistent with the position the Commission has taken in the annual assessment of the state of competition in the cable television industry.<sup>49</sup> It is also consistent with AT&T's view that "not all markets can be easily penetrated by all firms."<sup>50</sup> It is not our objective to make viable small business entry into every sector of the telecommunications and information services industries because there may be legitimate efficiency reasons that favor large-scale operation. Finally, our construction of the term "market entry barrier" does not in any way limit our broad obligation under Section 253 of the Act to preempt state or local legal requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."<sup>51</sup>

## 2. Definition of "Small Business"

20. In the *Market Entry Barriers Notice of Inquiry*, we requested comment on how small businesses should be defined under Section 257. Specifically, we asked whether we should define the term by the number of employees, gross revenues, net revenues, assets or any other factors. In addition, we asked whether we should adopt a general size standard or a specific standard for particular services. We also sought comment on whether we should use other factors such as minimum capital requirements, debt/equity ratios, cash flow, net worth or other indicia of a business' ability to enter and compete in the marketplace.<sup>52</sup>

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<sup>49</sup> See *1994 Cable Competition Report*, 9 FCC Rcd at 7622 ("From a public policy perspective, not all impediments, however are necessarily barriers to entry that require some type of government intervention or remediation. For purposes of this *Report*, costs borne by entrants but not incumbents that have adverse effects on consumer welfare are defined as policy-relevant barriers to entry."); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd 2060 at ¶¶ 205-214 (1995); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, CS Docket No. 96-133, FCC 96-496 (released Jan. 2, 1997).

<sup>50</sup> AT&T Comments at 2.

<sup>51</sup> 47 U.S.C. § 253(a).

<sup>52</sup> *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6307.

21. The Commission historically has used a number of different size standards to define small businesses, depending on the particular communications service. For example, in establishing special incentives for small businesses to participate in the Commission's spectrum auctions, we have used a range of size standards, generally depending on the capital requirements of the particular service. Thus, in the broadband Personal Communications Services (PCS) "C" block auction, we limited participation to applicants that, together with their affiliates and persons or entities that hold interests in the applicant and their affiliates, have gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million.<sup>53</sup> A small business was defined as one that, together with its affiliates has average annual gross revenues that are not more than \$40 million for the preceding three calendar years.<sup>54</sup> In contrast, for certain other auctionable services, the Commission has adopted tiered size standards.<sup>55</sup>

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<sup>53</sup> 47 C.F.R. § 24.709(a)(1).

<sup>54</sup> 47 C.F.R. § 24.720(b)(1995). The same approach was originally taken with the Broadband PCS "F" block. However, the Commission subsequently adopted a tiered small business definition for this entrepreneur block. 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 (1996) (*D, E & F Block Competitive Bidding Order*) (defining "small business" using a \$40 million threshold and "very small business" using a \$15 million threshold).

<sup>55</sup> See, e.g., *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 2732, 2811 (1997) (*Paging Second Report and Order*) (small business is defined as an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million or not more than \$15 million); *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, Report and Order, GN Docket No. 96-228, FCC 97-50 (released Feb. 19, 1997) at ¶ 194 (*WCS Report and Order*) (small business is defined as an entity with average gross revenues not exceeding \$40 million or \$15 million in each of the preceding three years); 47 C.F.R. § 90.912(b)(1) (for purposes of the upper 10 MHz of 800 MHz Specialized Mobile Radio (SMR) service, a small business is defined as one that, together with its affiliates, persons or entities that hold attributable interests in such entity, and their affiliates, has average gross revenues that are not more than \$3 million or not more than \$15 million for the preceding three years); 47 C.F.R. § 90.814(b)(1) (for purposes of the 900 MHz SMR service, a small business is defined as one that, together with its affiliates, persons or entities that hold attributable interests in such entity, and their affiliates, has average gross revenues that are not more than \$3 million or not more than \$15 million).

22. We also have adopted small business definitions for a variety of purposes other than auctions. For example, in determining eligibility for cable rate regulatory relief under the Communications Act, the Commission defined a "small cable company" as a "cable television operator that serves a total of 400,000 or fewer subscribers over one or more cable systems."<sup>56</sup> In addition, the Commission has exempted broadcast stations with fewer than five employees from annual employment report requirements.<sup>57</sup> Finally, the Commission has used size standards as a basis for analyzing the impact of its rules on small business entities pursuant to the Regulatory Flexibility Act.<sup>58</sup> In this regard, the Commission has relied on a number of different size standards promulgated by the Small Business Administration to determine the number of small businesses affected by its rules.<sup>59</sup>

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for the preceding three years).

<sup>56</sup> 47 C.F.R. § 76.901(e). For purposes of determining eligibility for relief from regulation of cable programming service tier rates, Section 623(m)(2), as added by the Telecommunications Act, subsequently defined "small cable operator" as 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." 47 U.S.C. § 543(m)(2).

<sup>57</sup> 47 C.F.R. § 73.2080. See also 47 C.F.R. § 76.79 (cable systems with fewer than six full-time employees are exempt from cable annual employment report requirements).

<sup>58</sup> 5 U.S.C. § 603.

<sup>59</sup> For example, for purposes of an Initial Regulatory Flexibility Analysis for its proposed table of allotments for digital television, the Commission relied on the Small Business Administration's size standards for television business entities. See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Sixth Further Notice of Proposed Rulemaking, 11 FCC Rcd 10968, 11060 (1996) (*DTV Sixth Further Notice*). In analyzing the impact of newly promulgated cellular service auction rules, the Commission relied on the Small Business Administration's size standard applicable to radiotelephone carriers. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, Ninth Report and Order, 11 FCC Rcd 14760 (1996). Under this definition, radiotelephone carriers employing no more than 1,500 employees constitute small business concerns under the Small Business Administration's rules. 13 C.F.R. § 121.201. In addition, in our interconnection order, the Commission stated, as it had previously, that incumbent local exchange carriers (LECs) do not constitute small businesses for purposes of the Regulatory Flexibility Act because they are dominant in their field of operation. *First Local Competition Order*, 11 FCC Rcd at 16145.



23. Those parties commenting on the issue of whether we should adopt a general size standard or specific standards for particular services seem to prefer the latter approach. The Small Business Administration argues that the size standards already in place for all types of small telecommunications carriers have served small businesses well and the Commission has not explained why they should be jettisoned for purposes of this proceeding.<sup>60</sup> The Small Business Administration also notes that it would be virtually impossible to develop a single definition of small businesses given the diversity inherent in the telecommunications industry.<sup>61</sup> It argues that a single definition would be contrary to the intent of the Small Business Act, which specifies that the Administrator is to make a detailed definition and that definitions shall vary from industry to industry to the extent necessary to reflect differing characteristics of such industries.<sup>62</sup> Similarly, America's Carriers Telecommunications Association suggests that the Commission fashion policy on the basis of identifiable spheres of services being offered.<sup>63</sup>

24. The Small Business Administration and other commenters also question the Commission's authority to adopt a new small business definition.<sup>64</sup> They argue that, because the 1996 Act does not give the Commission express authority to adopt a small business size standard for the specific purpose of implementing Section 257, the Commission must comply with the Small Business Act's requirement to, among other things, obtain approval from the Small Business Administration Administrator for any new size standards.<sup>65</sup>

25. We agree with those commenters who suggest that the Commission should not adopt a small business definition based on a general size standard. Rather, we believe the more appropriate course is to continue adopting specific size standards tailored to individual services. As the Small Business Administration points out, it would be extremely difficult to create a definition that transcends all of the various services that are implicated by Section 257. The comments also demonstrate that each service has its own characteristics. Different

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<sup>60</sup> Small Business Administration Comments at 11-12.

<sup>61</sup> *Id.* at 12.

<sup>62</sup> *Id.*

<sup>63</sup> America's Carriers Telecommunications Association Comments at 22 n.10.

<sup>64</sup> Small Business Administration Comments at 11; Small Cable Business Association Comments at 22-24.

<sup>65</sup> *Id.* See also 15 U.S.C. § 632(a)(2)(C).

services have different levels of capital intensity as a result of many factors, including the method of allocation, service area definitions, and the method of assignment. This necessarily affects the types of incentives we might consider for a particular service and the types of businesses to whom we would offer such incentives.

26. In light of this, we believe that the better approach would be to adopt specific size standards for individual services in proceedings implementing Section 257 incentives. We note that our decision here is consistent with our current approach to adopting small business definitions in the competitive bidding context. In the *Competitive Bidding Second Memorandum Opinion and Order*, the Commission stated that:

[g]iven the diversity of services that may be subject to competitive bidding and the varied spectrum costs and build-out requirements associated with each, we conclude that it is more appropriate to define the eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements of each particular service in establishing the appropriate threshold.<sup>66</sup>

27. Recently, we reiterated our belief in this approach in the *Competitive Bidding Part 1 Rules NPRM*, where we proposed to continue soliciting comments on the appropriate small business size standard in service-specific rulemaking proceedings.<sup>67</sup> We noted that in such rulemakings we would take into consideration the characteristics and capital requirements of each service. We further noted, however, that for purposes of future auctions, we would express small business definitions purely in terms of gross revenues. In this connection, we proposed to adopt size standards expressed so as to require businesses to have gross revenues "not to exceed" particular amounts, and, consistent with the Small Business Act,<sup>68</sup> to base such standards on the applicant's average gross revenues over the

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<sup>66</sup> *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7269 (1994) (*Competitive Bidding Second Memorandum Opinion and Order*). We note that we recently proposed to continue this approach when developing competitive bidding rules for specific services. See *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding*, Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking, WT Docket No. 97-82, FCC 97-60 (released Feb. 28, 1997) (*Competitive Bidding Part 1 Rules NPRM*) at ¶ 20.

<sup>67</sup> See *Competitive Bidding Part 1 Rules NPRM*, FCC 97-60 at ¶¶ 20-21.

<sup>68</sup> 15 U.S.C. § 632(a).

preceding three years. Accordingly, we will adopt similar service-specific size standards, where appropriate, in future proceedings implementing Section 257 initiatives.

28. Finally, several parties commented on the small business definitions adopted by the Commission for specific services in other contexts and proposed alternative definitions for purposes of Section 257.<sup>69</sup> As we are not now adopting a generic small business definition for purposes of Section 257, we find it unnecessary to address those comments in this report.<sup>70</sup>

### 3. *Characteristics of Small Telecommunications Businesses*

29. In order to identify and eliminate the market entry barriers or impediments facing small telecommunications businesses, we must also understand the typical needs and characteristics of these businesses. Therefore, in the *Market Entry Barriers Notice of Inquiry*, we requested profile data about small telecommunications businesses, including their

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<sup>69</sup> See, e.g., American Mobile Telecommunications Association Comments at 9 (the Commission should define small businesses using a gross revenue test); Community Broadcasters Association Comments at 10 (questioning the Commission's definition of entrepreneur for purposes of the Broadband PCS "C" block auction); Integrated Communications Group Comments at 1-2 (suggesting that the Commission define small business as one with no more than \$11 million in annual receipts); Metricom Comments at 1-6 (suggesting that the Commission apply 47 C.F.R. § 24.720(m) (publicly-traded corporation rule) to all services); PCS Alliance Comments at 1 (calling the Commission's definition of entrepreneur for purposes of the Broadband PCS "C" block auction "mystifying"); Thompson PCS Comments at 3 (questioning the Commission's eligibility threshold for Broadband PCS "C" block); National Telephone Cooperative Association Comments at 9 (stating that the Commission should defer to Small Business Administration standards defining a small telecommunications company); Small Business Administration Comments at 14-16 (questioning the Commission's previous conclusion that incumbent LECs are dominant in their field of operation and, therefore, are not small businesses for purposes of the Regulatory Flexibility Act); United States Telephone Association Reply Comments at 2 (suggesting that LECs be declared small businesses if they serve fewer than 2% of the nation's subscriber lines installed in the aggregate nationwide); National Cable Television Association Comments at 17 (suggesting that for purposes of cable television, the Commission use the small business definitions set forth in 47 U.S.C. § 543(m) and 47 C.F.R. § 76.901(e)).

<sup>70</sup> Such comments may, where appropriate, be considered in future proceedings addressing small business definitions.

financing sources, types of services provided, markets served, geographic areas of operation, and information concerning their employee workforces.<sup>71</sup> As discussed below, we received much general information about the nature of small telecommunications businesses, as well as specific profile information on a number of services, including Specialized Mobile Radio (SMR) services, cable television services, and wireless resale services.

30. A number of commenters point out that, in contrast to small businesses in some other industries, small businesses in the telecommunications industry typically are start-up companies that require a significant amount of equity capital or a combination of debt and equity.<sup>72</sup> In addition, Small Business in Telecommunications notes that due to insufficient capitalization, small telecommunications businesses tend to engage in localized operations, serving only a portion of a larger market. Thus, rather than expand their systems geographically, many small telecommunications businesses find that expansion of product and service lines offered in their local markets present more cost-effective methods of revenue enhancement.<sup>73</sup> Small Business in Telecommunications also notes that unlike large companies, small businesses do not have the capital resources to spread costs over an extended period.<sup>74</sup> Thus, they need to earn a profit in a shorter period of time.

31. Other comments appear to support Small Business in Telecommunications' analysis. For example, American Mobile Telecommunications Association's survey indicates that 60% of its members are greatly affected by the reduced access to capital afforded small businesses.<sup>75</sup> Most American Mobile Telecommunications Association members responding to the survey provide SMR service, while others provide a mix of SMR, paging or paging resale; operate community repeaters; sell equipment and repair service; or operate antennas.<sup>76</sup> Most of the respondents appear to fall under at least one of the small business definitions

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<sup>71</sup> *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6298.

<sup>72</sup> *See, e.g.*, Small Business in Telecommunications Comments at 2; Williams Testimony at 3.

<sup>73</sup> Small Business in Telecommunications Comments at 2-5.

<sup>74</sup> *Id.* at 7.

<sup>75</sup> Shark Testimony at 1.

<sup>76</sup> *Id.*

used by the Commission and the Small Business Administration,<sup>77</sup> and more than 80% emphasized that their smaller asset bases made it difficult to obtain financing. In its comments, American Mobile Telecommunications Association also stated that many of the applicants that dropped out of the 900 MHz SMR auction did so because the costs of acquiring a Major Trading Area (MTA) service area license were too high. However, it notes that these applicants could have or would have purchased spectrum rights to a more limited geographic area.<sup>78</sup>

32. With respect to cable television, the Small Cable Business Association reports that most small cable companies are family-owned businesses. The business structures range from sole proprietorships to small corporations and partnerships.<sup>79</sup> Although most small cable operators provide only multi-channel video programming services, some are entering or seeking to gain entry into new lines of business such as Internet access, other data services, distance learning, and telephony.<sup>80</sup> The typical small cable company serves a rural, low

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<sup>77</sup> For example, for the 900 MHz SMR auction, the Commission defined a small business entity as having no more than \$3 million in average gross revenues for the preceding three years or no more than \$15 million in average gross revenues for the preceding three years. 47 C.F.R. § 90.814(b). Half of those responding to American Mobile Telecommunications Association's survey reported annual gross revenues of less than \$1 million while all of those who responded reported revenues of less than \$15 million. Thus, it would appear that most of those responding to American Mobile Telecommunications Association's survey fall within the Commission's small business definition for the 900 MHz SMR service. Similarly, as noted above, under the Small Business Administration's size standards, a radiotelephone communications company is a small business concern if it employs no more than 1,500 employees. *See supra* n.59. Two-thirds of the respondents to American Mobile Telecommunications Association's survey reported fewer than 15 employees. Thus, it would appear that all of the survey respondents would fall under this small business definition promulgated by the Small Business Administration.

<sup>78</sup> American Mobile Telecommunications Association Comments at 11.

<sup>79</sup> Small Cable Business Association Comments at 7.

<sup>80</sup> Small Cable Business Association Comments at 7; National Cable Television Association Comments at 5-6.

density area or a suburban or niche urban market.<sup>81</sup> Thus, as with other services, small cable operators also tend to serve portions of a market or certain niche markets. Because of this, small cable companies often have higher costs of doing business and face a higher cost of capital than their large counterparts.<sup>82</sup> In terms of capital, Small Cable Business Association notes that cable television requires large amounts of capital to expand its array of video programming. To fund this capital requirement, most small cable systems must rely on venture capital firms and on banks, local and national.<sup>83</sup>

33. With respect to common carrier services, America's Carriers Telecommunications Association comments that traditional capital markets are not readily available to most entrepreneurial start-up businesses seeking entry or expansion. It notes that small carriers generally offer traditional outbound and inbound common carrier telephone services, including calling or travel cards, which often incorporate enhanced features, such as facsimile, voice mail, and certain information services. According to America's Carriers Telecommunications Association, these small carriers find it difficult to obtain capital required to acquire their own network facilities.<sup>84</sup> It also asserts that many resale carriers continue to operate on a localized basis defined by the location of their central office(s) and the calling area served thereby. However, it notes that "switchless resale" has made national operations possible for many more carriers.<sup>85</sup> America's Carriers Telecommunications Association also observes that, while in theory no market segment is foreclosed to small carriers, in reality most small carriers are heavily dependent on small business customers, and service to residential and government customers remains mostly within the preserve of incumbent carriers.<sup>86</sup>

34. Finally, a survey of wireless resellers conducted by the National Wireless Resellers Association indicates that most wireless resellers fall under one of the definitions of

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<sup>81</sup> Small Cable Business Association Comments at 7; National Cable Television Association Comments at 5.

<sup>82</sup> National Cable Television Association Comments at 5; Small Cable Business Association Comments at 9.

<sup>83</sup> Small Cable Business Association Comments at 9.

<sup>84</sup> America's Carriers Telecommunications Association Comments at 19.

<sup>85</sup> *Id.* at 18.

<sup>86</sup> *Id.*

small business used by the Commission or the Small Business Administration and that obtaining access to capital is a significant impediment to their operations. For example, using the Commission's \$40 million average gross revenue threshold adopted for Personal Communications Services (PCS) and Multipoint Distribution Service (MDS), 69% of the respondents to the National Wireless Resellers Association survey reported annual gross revenues of less than \$15 million, while another 16% reported annual gross revenues between \$15-50 million.<sup>87</sup> Using the Small Business Administration's size standard for radiotelephone companies (no more than 1,500 employees), National Wireless Resellers Association states that 75% of survey respondents reported employing between one and 100 people. Although the remaining respondents employed more than 100 people, National Wireless Resellers Association states that most likely, these resellers employ less than 500.<sup>88</sup> In terms of services, cellular, long distance and paging appeared to be the primary resale services provided.<sup>89</sup> Sixty-four percent of those responding indicated that they serve at least 5,000 subscribers. Sixty-eight percent of the National Wireless Resellers Association respondents strongly believed that small businesses have less leverage for loans and, therefore, must contribute a larger percentage of their operating capital in order to secure a loan.

## ***B. Financial Impediments***

### ***1. The Record***

35. As already suggested by the preceding discussion concerning the characteristics of small telecommunications businesses, many parties have identified access to capital as a primary market entry obstacle for small businesses.<sup>90</sup> Given the importance of access to

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<sup>87</sup> National Wireless Resellers Association Comments at 5.

<sup>88</sup> *Id.* at 6.

<sup>89</sup> *Id.* at Appendix A.

<sup>90</sup> Small Business Administration Comments at 3, 5; American Women in Radio and Television and Women of Wireless Comments at 6; CompTel Comments at 4; VoiceTel Comments at 16; Small Business in Telecommunications Comments at 65; Integrated Communications Group Comments at 1, 4; Integration Communications International Comments at 1; B.K. McIntyre Comments at 1-2; Center for Training and Careers Comments at 2; National Paging and Personal Communications Association Comments at 2; Southwest Missouri Cable TV Comments at 3; TRA Communications Consultants Comments at 2-3; Integration Communications International et al. Comments at 1; Romar Comments at

capital, in the *Market Entry Barriers Notice of Inquiry*, we inquired expressly about this issue. Commenters have forwarded much detailed information about financing issues affecting small businesses as well as specific recommendations for Commission action.

36. As indicated earlier, commenters assert that by their nature, small telecommunications businesses tend to be start-up companies or companies in relatively early stages of growth and expansion requiring a significant amount of equity capital or a combination of debt and equity, yet those traditional sources of capital for small businesses are insufficient for today's entry costs.<sup>91</sup> Respondents to the Small Business in Telecommunications survey, for example, identified initial financing as the number one market entry barrier out of 37 possible barriers.<sup>92</sup> The majority of those respondents reported difficulty accessing capital because of their smaller asset base and inability to secure terms and conditions comparable to those obtained by much larger competitors.<sup>93</sup> One party explains that new businesses are not attractive to investors because their start-up costs appear to be excessively high, their revenue streams are poorly defined and uncertain, and their profit margins are unknown.<sup>94</sup> Another states that prospective strategic partners often

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8; Nevadacom Comments at 2; National Women's Law Center Comments at 1; National Cable Television Association Comments at 3; Moore Broadcasting Comments at 1; Small Cable Business Association Comments at 8-9, 14-15; M.L.T. Comments at 1; Grossman Testimony at 2; Williams Testimony at 1-2; Shark Testimony at 1-2; Polka Testimony at 1.

<sup>91</sup> Williams Testimony at 3-4. *See also* Gorman Testimony at 1 (chart shows that the "indicative" cost of capital for start-up companies with zero revenue is 60% p.a.; while it is 35% for a company with \$10 million per year revenues and 25% for those with \$100 million in revenue).

<sup>92</sup> Small Business in Telecommunications Comments at 65. The ten principal issues the respondents identify as barriers are: (1) initial financing; (2) delays in application processing; (3) spectrum scarcity; (4) legal costs; (5) auctioning of spectrum; (6) speculator licensing/application mills; (7) engineering costs; (8) access to new technology; (9) borrowing terms; and (10) price competition.

<sup>93</sup> American Mobile Telecommunications Association Comments at 9. *Accord* Haycock Testimony at 4 ("As a rule, bigger companies have better borrowing power. Because of their size, they are able to arrange financing from equipment manufacturers and financial institutions more easily, at better interest rates, and on more favorable terms and conditions").

<sup>94</sup> Southwest Missouri Cable Comments at 4.



overlook small businesses "because of the erroneous view that we bring nothing to the table."<sup>95</sup>

37. The record also is replete with comments that small businesses must assume great risks and make personal capital contributions to finance their companies. One commenter states that to obtain start-up financing for her company in 1982 she was required to mortgage her family's home.<sup>96</sup> More generally, in the Small Business in Telecommunications survey, the most commonly reported source of initial capital was personal financing, e.g., savings and family gifts, and Small Business Administration loans.<sup>97</sup> Likewise, more than 80% of the American Mobile Telecommunications Association survey respondents claimed that they had to personally contribute a large percentage of operating capital to their businesses. Eighty-five percent of the respondents stated that they are restricted to cash flow, venture capital or "hard-won" loans to expand their businesses, while larger companies may make public offerings.<sup>98</sup> Sixty-eight percent of the National Wireless Resellers Association survey respondents "strongly agree" that "small businesses have fewer assets and less leverage for loans; and therefore must contribute a larger percentage of their operating capital in order to secure a loan;" and 53% of the respondents "strongly agree" that "small businesses cannot obtain financing through stock sales, and are restricted to cash, bank loans or venture capital."<sup>99</sup> Small Business in Telecommunications also points out that because small business entrepreneurs are not able to spread financial risk over large pools of

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<sup>95</sup> Haycock Testimony at 5. *See also* Kansas Star Comments at 1 (stating that attracting strategic partners is important for obtaining financing).

<sup>96</sup> Haycock Testimony at 1.

<sup>97</sup> Small Business in Telecommunications Comments at 4 & n.4. It also claims that small businesses must mortgage homes, that such loans are usually less than \$100,000, and that such amount is insufficient to capitalize more than the smallest of telecommunications businesses. For example, the cost of constructing and operating a very small paging company using only three base stations, a terminal, telephone lines, inventory, and minimum administrative costs would consume that initial investment in less than a year. Small Business in Telecommunications Comments at 3.

<sup>98</sup> Shark Testimony at 2. *Accord* Small Cable Business Association Comments at 8-10; Southwest Missouri Cable Comments at 3, 5.

<sup>99</sup> National Wireless Resellers Association Comments at Appendix A, 2.

investors as large companies do, if their businesses fail, they are subject to bankruptcy.<sup>100</sup> Another commenter also points out that in purchasing equipment, small companies are subject to high deposit requirements and installation charges.<sup>101</sup>

38. Some parties suggest ways for the Commission to address financial impediments. One party suggests that the FCC should encourage lenders to provide non-personally guaranteed funds to small carriers under the same terms and conditions provided to larger carriers.<sup>102</sup> One commenter states that the Commission "must reinstate policies that will help level the playing field . . . [and] expand its financing policy to include the provision of capital needed by small businesses . . . if they are to compete with larger better capitalized companies with ready access to capital."<sup>103</sup> Another contends that the FCC must recognize that gaining access to a spectrum license itself is not enough -- the availability and cost of financing is critical to the success of PCS entrepreneurs.<sup>104</sup> Still another argues that the Commission does not consider the financial realities that entrepreneurs encounter and that exclude small businesses.<sup>105</sup>

39. Many parties address the Telecommunications Development Fund as a source of financing. Williams believes that because of its national and industry-wide scope, TDF

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<sup>100</sup> Small Business in Telecommunications Comments at 24. *Accord* Haycock Testimony at 5 (stating that small business owners often are forced to forego the protection of corporate status and waive personal liability limitations); CompTel Comments at 5 (asserting that it is not uncommon for small businesses to be required to waive personal liability limitations and sign personal guarantees).

<sup>101</sup> Haycock Testimony at 5.

<sup>102</sup> Nevadacom Comments at 2.

<sup>103</sup> Williams Testimony at 5.

<sup>104</sup> NextWave Comments at 4. NextWave further contends that while FCC auction rules have "opened the door for new entrants in the PCS industry and offer entrepreneurs better access to spectrum, these rules do nothing to address the problems faced by small businesses and entrepreneurs when seeking capital to build their networks." *Id.*

<sup>105</sup> Mobile Communications Holdings Comments at 3, 7-8. Some parties also identified specific financial impediments in certain telecommunications services. Many of these issues are addressed below in Part III.

will be substantially undercapitalized.<sup>106</sup> He claims that in contrast to TDF, existing minority-managed funds have greater capital even though they are more limited in focus.<sup>107</sup> Williams also projects that if the Fund could amass \$50 million in capital over the next three years, it would be able to provide seed capital for only 10-15 businesses. United Church of Christ and Minority Media and Telecommunications Council suggest that to improve TDF's capitalization, major competitors should be required to contribute to the TDF (like contributions are made to the Universal Service Fund).<sup>108</sup> Likewise, Williams contends that the FCC should provide incentives for institutional investors to invest in the TDF.<sup>109</sup>

40. As to TDF's policies, America's Carriers Telecommunication Association asserts that the Fund should not give priority to service proposals, e.g., to create a new technology, but rather, should assist small carriers, and as a result, TDF "will have a far better chance of actually advancing the public interests by creating the financial stability needed to do more venturesome projects."<sup>110</sup> National Association of Black Owned Broadcasters contends that the Fund should be used to provide equity investments, low interest loans and loan guarantees to minority businesses, to provide technical assistance and market research, and to augment the budget of the FCC's Office of Communications Business Opportunities.<sup>111</sup> McCarroll argues that anyone who applied for an SMR license before auctions were established and cannot afford to bid for one now in an auction should receive priority in TDF funding.<sup>112</sup> American Women in Radio and Television and Women of Wireless assert that TDF will be an important informational and financial resource for

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<sup>106</sup> Williams Testimony at 6.

<sup>107</sup> *Id.*

<sup>108</sup> United Church of Christ and Minority Media and Telecommunications Council Comments at 13.

<sup>109</sup> Williams Testimony at 6.

<sup>110</sup> America's Carriers Telecommunications Comments at 19-20.

<sup>111</sup> National Association of Black Owned Broadcasters Reply Comments at 19. National Association of Black Owned Broadcasters filed a motion to accept late-filed comments, which we grant.

<sup>112</sup> McCarroll Comments at 1-2.

small women-owned businesses.<sup>113</sup> They and Moore Broadcasting urge the FCC Chairman to appoint board members who understand the potential to create new businesses and who will ensure that businesses owned by women or minorities obtain access to capital.<sup>114</sup> Polka urges the Commission to use the TDF "in a positive way to encourage lending to small cable."<sup>115</sup>

41. Finally, Integrated Communications Group argues that the FCC should augment its efforts beyond TDF, and take "extraordinary measures" to remove market entry barriers. Specifically, it claims that the FCC should work with the Small Business Administration, industry, investment firms, insurance companies, banks, and institutional investors to create a larger pool of funds.<sup>116</sup>

## 2. *Commission Measures*

42. The record shows that financial obstacles create substantial impediments to small business entry in the telecommunications market. We recognize that the telecommunications industry is generally capital intensive<sup>117</sup> and that substantial financial resources are necessary for successful participation in most telecommunications sectors. The Commission is limited, however, in its authority -- and concomitant ability -- to remove financial impediments and obstacles. The FCC has no statutory jurisdiction over the

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<sup>113</sup> American Women in Radio and Television and Women of Wireless Comments at 42. See also B.K. McIntyre Comments at 3 ("it is critical that the FCC use effectively" TDF for new start up companies to gain necessary capital).

<sup>114</sup> American Women in Radio and Television and Women of Wireless Comments at 42; Moore Broadcasting Comments at 3. America's Carriers Telecommunications Association questions the wisdom of appointing as the interim chairman of TDF an officer of a Bell Operating Company (BOC). America's Carriers Telecommunications Association Comments at 14-15.

<sup>115</sup> Polka Testimony at 5.

<sup>116</sup> Integrated Communications Group Comments at 4.

<sup>117</sup> See, e.g., *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, 5571 (1994) (*Competitive Bidding Fifth Report and Order*); Mitchell & Vogelsang, *Telecommunications Pricing: Theory and Practice*, 7-19 (RAND, 1991); see also Small Business in Telecommunications Comments at 2 (stating that wireless telecommunications services have large capital outlay requirements).

financial industry. Thus, we cannot directly require banks, lenders, investors, or any other entity to finance small businesses, or any sized business, in the telecommunications industry.

43. The Commission, however, has taken measures to enhance access to capital for small businesses in the auctions process. Pursuant to Section 309(j) of the Communications Act, the Commission has taken steps to promote capital access for small businesses, businesses owned by minorities or women, and rural telecommunications businesses in the provision of certain spectrum-based services. These mechanisms facilitate access to capital by making the license costs more affordable for small businesses. Specifically, in several auctions, we provided bidding credits for small businesses to enhance their participation in seeking spectrum licenses and allowed successful small business bidders to pay for their licenses in installments over time.<sup>118</sup> For example, the PCS "F" block auction offered installment payments to facilitate small business participation. Upcoming auctions such as the Local Multipoint Distribution Services (LMDS) auction also will offer small business installment payments.

44. Additionally, as described in further detail below, Congress created the Telecommunications Development Fund and provided the Commission with a statutory role in its operation. The Fund is an important resource that will facilitate small business participation in the telecommunications market, and thereby help reduce the effects of financial impediments small businesses encounter. In addition, we will strongly consider the role of financial impediments in our ongoing implementation of Section 257.

45. As provided in Section 707 of the Telecommunications Act,<sup>119</sup> the Fund's mission is to promote access to capital for small businesses in the telecommunications industry, stimulate development of new technology, promote employment and training, and support universal service and the delivery of telecommunications services to underserved areas.<sup>120</sup> TDF is funded primarily by the interest earned on certain deposits for spectrum

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<sup>118</sup> See, e.g., *D, E & F Block Competitive Bidding Report and Order*, 11 FCC Rcd at 7875-7876; *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, Sixth Report and Order, 11 FCC Rcd 136, 161 (1996) (*Competitive Bidding Sixth Report and Order*). See also *Competitive Bidding Part 1 Rules NPRM*, FCC 97-60, at ¶¶ 33 and 36.

<sup>119</sup> Pub. L. No. 104-104, § 707, 110 Stat. 56 (codified at 47 U.S.C. § 614).

<sup>120</sup> See, e.g., Moore Broadcasting Comments at 3; National Cable Television Association Comments at 9; National Association of Black Owned Broadcasters Reply Comments at 9; United Church of Christ and Minority Media and Telecommunications

auctions,<sup>121</sup> and is authorized to make loans and extend credit to small businesses.<sup>122</sup> The FCC's Chairman is authorized to appoint a seven-member board of directors to the TDF, consisting of four representatives from the private sector, and one each from the Commission, Small Business Administration, and the Department of the Treasury.<sup>123</sup>

46. On November 20, 1996, the FCC Chairman appointed the full TDF board of directors.<sup>124</sup> As required by the Act, the board members have significant experience in finance, investment banking, government banking, communications law and administrative practice, and public policy.<sup>125</sup> We believe the combined expertise of the board will help provide funding for small communications businesses and promote technological innovation in the telecommunications industry.

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Council Comments at 13.

<sup>121</sup> The Fund's account consists of interest on deposits made to qualify for competitive bidding under Section 309(j)(8)(C) of the Act, funds that may be appropriated to the Commission for advancement to the Fund, contributions or donations accepted by the Fund, and repayment of credit extended by the Fund. 47 U.S.C. § 614(d).

<sup>122</sup> 47 U.S.C. § 614(e).

<sup>123</sup> 47 U.S.C. § 614(c)(1).

<sup>124</sup> FCC Public Notice, *Public Sector Board Members Appointed to the Telecommunications Development Board* (released Nov. 20, 1996). The TDF Board members are: Interim Chairperson, Solomon D. Trujillo, President and Chief Executive Officer, U.S. West Communications Group; Richard L. Fields, Managing Director of Allen & Company Incorporated; Thomas A. Hart, Jr., Partner, Ginsburg, Feldman & Bress; Debra L. Lee, President and Chief Operating Officer of BET Holdings, Inc. (Black Entertainment Television), Ginger Ehn Lew, Deputy Administrator, Small Business Administration; Kirsten S. Moy, Director, Community Development Financial Institutions (CDFI) Fund, Department of Treasury; and William E. Kennard, General Counsel, Federal Communications Commission.

<sup>125</sup> 47 U.S.C. § 614(c)(1).

47. Pursuant to the statute, the board is in the process of establishing general policies that will govern the overall structure and operation of the Fund.<sup>126</sup> TDF, a non-profit corporation,<sup>127</sup> is authorized to make loans, investments, or other extensions of credit to small businesses; to provide financial advice to small businesses; and to prepare research studies, financial analyses, or other services consistent with the purposes of the Fund.<sup>128</sup> The Board is currently in the process of creating a sustainable source of capital for small communications businesses and is investigating means to leverage the more than \$20.3 million in initial capitalization it has received to date from auction upfront payments in order to create a larger pool for small communications business loans and equity investments.

48. Since authorization of TDF in February 1996, OCBO has served as the principal support for TDF, conducting research regarding structural models for the TDF and gaps in financial and technical assistance for small communications businesses, disseminating public information and fielding inquiries regarding TDF. OCBO sends monthly mailings to over 2,300 small enterprises that include up-to-date information on the Fund. In addition, OCBO is compiling information on the types of financial and technical assistance requested of the Fund. This analysis will help the TDF board identify structural impediments to small business financing from other capital sources, and design a structure that will fill unmet needs and complement existing resources. OCBO will provide this information, as well as the comments and proposals submitted in this proceeding which pertain to TDF, to the TDF board of directors so that the board may consider this information as it develops the Fund's organizational structure and policies.

49. The full TDF board has met twice since December 1996<sup>129</sup> and is finalizing its review of market opportunities where TDF could direct its resources. TDF is commencing a search for a fund manager. The board also is working to develop TDF's structure to provide loans, equity investments and technical assistance.

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<sup>126</sup> 47 U.S.C. § 614(c)(3). The statute requires the board to meet at the call of the Chairman or at least quarterly. The first meeting of the board was held on December 3, 1996.

<sup>127</sup> The Fund is to be administered as a not-for-profit organization. *Joint Explanatory Statement* at 211.

<sup>128</sup> 47 U.S.C. § 614(e).

<sup>129</sup> By statute, the TDF board is required to meet "at the call of its Chairman, but at least quarterly." 47 U.S.C. § 614(c)(3).

50. We are hopeful that TDF will be a significant source of funding for small telecommunications businesses and will thereby help to eliminate a major obstacle for small businesses. We shall continue to carefully monitor TDF's progress in this regard and, if necessary, make appropriate recommendations to the TDF board and to Congress.

51. To promote access to capital, and increase the FCC's understanding of how regulatory issues affect small communications business finance, OCBO has hosted two panel discussions on wireless finance. In March 1996, in coordination with the FCC's Wireless Telecommunications Bureau, OCBO held an "Auctions '96" conference and in February 1997, sponsored an "Auctions '97" conference. Both conferences featured panels on financing. The FCC will continue to hold such fora to learn more about the effect of our rules on small business finance, and to provide industry participants an opportunity to hear from capital sources about the factors they consider in deciding to invest in a small communications firm.

### *C. General Regulatory Obstacles*

52. Many of the market entry impediments identified by the commenting parties concerned general regulatory issues, and in particular, difficulties in obtaining access to the Commission itself, participating in Commission proceedings, and in obtaining information about new services.<sup>130</sup> As discussed below, the Commission already has taken several steps to eliminate many of these obstacles.

#### *1. Access to Commission Decisionmakers*

53. Several parties point out that, unlike large companies and associations, small businesses often do not have the time or resources to meet with Commission staff or participate in Commission proceedings.<sup>131</sup> Others note that many small businesses

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<sup>130</sup> Cable Telecommunications Association Comments at 9-10; Small Business in Telecommunications Reply Comments at n.1; Southwest Missouri Cable Comments at 4; American Mobile Telecommunications Association Comments at 11; Community Broadcasters Association Comments at 8-9.

<sup>131</sup> See, e.g., Cable Telecommunications Association Comments at 9-10 (small business representatives do not have time or money to walk the halls of FCC to attempt to influence final language of given rule; most rules are written regarding their impact on large business while effect of adopted rules on small business is unknown); American Mobile Telecommunications Association Comments at 11 (lack of available staff and resources to handle FCC regulatory compliance or participate in proceedings); Grossman Testimony at 2



historically have had little representation before the Commission and other federal or state bodies. As a consequence, these parties believe small businesses are frequently viewed as outsiders in the telecommunications industry.<sup>132</sup> One commenter claims that inability to participate in public meetings is a barrier.<sup>133</sup> Another party notes that because many small businesses lack representation and financial resources, they often are unaware of opportunities in the telecommunications industry and are unable to participate in the Commission's rulemaking process.<sup>134</sup>

54. In a similar vein, the Small Business Administration states that lack of information and access to the Commission's decision-making process acts as the chief impediment to small business' ability to challenge and eliminate market entry barriers that develop as a result of Commission rule makings.<sup>135</sup> Similarly, the Community Broadcasters Association asserts that small businesses need more access to Commission decisionmakers, key policy personnel, and Commissioners.<sup>136</sup> Along the same lines, the Cable Telecommunications Association contends that many small business representatives do not have time or money to "walk the halls" of the Commission in an effort to influence the final language of a given rule.<sup>137</sup>

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(need more access to Commission decisionmakers; takes dozen calls to get appointment); Small Business in Telecommunications Reply Comments at n.1 (problems communicating with FCC staff due to small businesses' funding obstacles); Zesiger Testimony at 12 (access to FCC's decisionmaking process acts as one of chief impediments to small business' ability to challenge and eliminate market entry barriers).

<sup>132</sup> See, e.g., Southwest Missouri Cable Comments at 4 (historically poor representation); B.K. McIntyre Comments at 1 (lack of historical participation); Voice-Tel Comments 16 (frequently viewed as outsider in telecommunications business).

<sup>133</sup> Grossman Testimony at 2-3. See also Community Broadcasters Association Comments at 8-9.

<sup>134</sup> Cable Telecommunications Association Comments at 9-10.

<sup>135</sup> Small Business Administration comments at 12.

<sup>136</sup> Community Broadcasters Association at 8-9.

<sup>137</sup> Cable Telecommunications Association at 9-10. See also Small Business in Telecommunications Reply Comments at n.1 (sympathizes with groups who have pointed out problems in communicating with Commission's staff due to their funding obstacles).

55. At the outset, we note that particular measures, both legislative and regulatory, have been created to ensure that the interests of small businesses are appropriately taken into account by federal agencies. At the legislative level are the Regulatory Flexibility Act (RFA),<sup>138</sup> and, most recently, The Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>139</sup> which Congress enacted as part of the Contract with America Advancement Act of 1996 (CWAAA),<sup>140</sup> that strengthens and broadens the existing mandate under the RFA.

56. For example, prior to the 1996 amendments to the RFA, the Small Business Administration had taken an active role in proceedings before federal agencies to insure that careful and meaningful consideration would be given to the impact on small business interests of an agency's proposed rules. However, neither that agency or any other person could directly challenge in court whether a federal agency had properly complied with the RFA requirements. The 1996 amendments to the RFA now provide for judicial review and include expanded authority for the Chief Counsel for Advocacy of the Small Business Administration to file *amicus curiae* briefs in court proceedings on the question of whether an agency properly complied with the RFA.

57. Other provisions of the new law expand on these efforts, e.g., Section 212 requires federal agencies to publish easily understood "small entity compliance guides" to assist businesses in complying with all regulations for which a final regulatory flexibility analysis is required. Section 213 requires federal agencies to establish within one year of enactment a program to answer inquiries of small entities seeking information on and advice about regulatory compliance, and Section 222 creates a Small Business and Agriculture Regulatory Enforcement Ombudsman within the Small Business Administration to give small businesses a confidential means to comment on agency enforcement activities. These requirements are intended to insure that small business interests are not locked out of the decisionmaking process of federal agencies, that administrative agencies give meaningful consideration to the impact of governmental regulation on small businesses, and that the interests of small businesses that might otherwise not be represented before an agency are properly weighed in the agency's decision-making process.

58. In response to these requirements, the Commission is developing compliance guides to assist small entities. Small entities can call the FCC for informal guidance on

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<sup>138</sup> Pub.L. No. 96-354, 94 Stat. 1164 (1980).

<sup>139</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1996) (codified at 5 U.S.C. §§ 601-612).

<sup>140</sup> Pub. L. No. 104-121, 110 Stat. 847 (1996).

compliance questions. Small entities and other businesses may also call the FCC's National Call Center<sup>141</sup> toll free at 1-888-Call-FCC to receive fact sheets and answers to routine questions. The Call Center will direct callers to the appropriate Bureau or Office staff for more detailed questions.

59. The Commission's Office of Communications Business Opportunities specifically addresses small business concerns.<sup>142</sup> The Commission is mindful of the financial and other difficulties that many small businesses face and of the limited resources that are available to them. As such, OCBO's primary mission is to promote opportunities for small business participation in the communications industry in order to increase competition, encourage innovation, increase employment opportunities, improve services to all communities, and increase the diversity of voices and viewpoints over the public airwaves. OCBO serves as the principal small business policy advisor to the Commissioners and is the Commission's primary resource for implementing SBREFA. It oversees the regulatory flexibility analysis process to ensure that small business interests are fully considered in Commission notice and comment rulemakings on common carrier, cable, wireless, mass media, international communication services and other FCC matters, and may facilitate meetings with FCC staff. OCBO ensures coordination and compliance with CWAAA provisions to increase agency responsiveness to small businesses.

60. OCBO also engages in extensive outreach and research. It provides information to the public, industry, trade organizations, and public interest organizations on the participation of small businesses, minorities, and women in various communications services. For example, OCBO has compiled and published various studies, including an overview of the communications market and the opportunities it provides for small businesses; sends monthly mailings to more than 2,300 small businesses and public interest organizations;<sup>143</sup> and responds to approximately 15,600 small business inquiries a year. OCBO also is the primary resource for research material on small businesses, minority and female ownership and employment in the communications industry. Finally, OCBO organizes and participates in numerous conferences throughout the country designed to

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<sup>141</sup> See also *infra* ¶ 200 (describes National Call Center).

<sup>142</sup> OCBO's address is Room 644, 1919 M Street, N.W., Washington, D.C. 20554; telephone number is: (202) 418-0990; and the e-mail address of OCBO's Consumer and Industry Affairs is: [kbeverly@fcc.gov](mailto:kbeverly@fcc.gov). In addition, OCBO has a homepage on the FCC's World Wide Web site.

<sup>143</sup> Small, minority-owned, and women-owned businesses may request to receive monthly mailings by contacting OCBO.

increase small business participation in the telecommunications industry and the regulatory process.<sup>144</sup>

61. We also wish to emphasize that any interested party may file or participate in Commission proceedings and file comments before the Commission. To assist them, the Commission has published several Fact Sheets describing how to participate in Commission proceedings.<sup>145</sup> Moreover, as indicated above, and as a matter of general policy, we believe it is imperative to solicit the advice and perspectives of all interested parties, including small businesses. We have sought to do so by reaching out to groups who do not ordinarily visit the Commission or participate in its proceedings. For instance, prior to release of our NPRM implementing the local competition provisions of Section 251 of the 1996 Act, Commission staff held numerous discussions not only with BOCs and interexchange carriers, but with new and prospective entrants, state commission staff, cable operators, consumer advocates, and various public interest groups. The record in that proceeding included over 40,000 pages from 240 commenters, and included the views of such diverse groups as consumer advocates, state and local governments, small businesses, schoolteachers, libraries and medical associations. Similarly, in the Commission's Universal Service Proceeding, the Commission undertook an extensive outreach effort. The Federal-State Joint Board has held seven open meetings and heard from over 50 leading experts on issues such as providing services to schools, libraries and health care providers; maintaining universal service in rural, insular, and high cost areas; and competitive concerns raised by universal service.<sup>146</sup>

62. In addition, last year, the Commission adopted a Notice of Inquiry seeking suggestions from all interested parties on how best to streamline its processes and improve its delivery of services.<sup>147</sup> The *Commission Processes Notice of Inquiry* sought comment on ways the Commission could use computer technology, electronic filing, and the Internet to improve processing; how the Commission should expand its use of public meetings, fora, and roundtables; whether the Bureaus and Offices provide sufficient, meaningful, and useful

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<sup>144</sup> See *infra* ¶ 64 and Appendix B (describes OCBO conferences).

<sup>145</sup> FCC Fact Sheet, *How to Participate in the FCC Process* (May 1996). See also FCC Fact Sheet, *How to File Comments with the FCC* (Apr. 1995).

<sup>146</sup> Federal-State Joint Board on Universal Service held open meetings on April 12, 1996, June 5, 1996, June 19, 1996, September 13, 1996, October 17, 1996, and November 7, 1996, and January 14-15, 1997.

<sup>147</sup> *In the Matter of Improving Commission Processes*, Notice of Inquiry, 11 FCC Rcd 14006 (1996) (*Commission Processes Notice of Inquiry*).

information, in a timely fashion; and how we can improve delivery of status information to the public. The Commission received nearly sixty formal comments, reply comments, letters, petitions, and motions in response to the *Commission Processes Notice of Inquiry*. The responses ranged from proposals for major policy initiatives to suggestions for minor adjustments in the way we do business. The Commission has released a report summarizing its efforts to date to improve internal processes and to improve Commission operations.<sup>148</sup>

63. Another vehicle the Commission has used to assist small businesses in the Commission's processes is the use of seminars. One of the first seminars the Commission held following passage of the 1996 Act was designed to help individuals participate in the Commission process.<sup>149</sup> This forum provided the general public with instruction on how to get information from the FCC, how to track specific issues, how to file comments, and how to understand FCC terminology. The Commission also has held two seminars about its World Wide Web site. These seminars included descriptions of the purpose and mission of the site, an overview of the site, presentations on new and future developments, detailed discussions of special topical and Bureau resources, and provided an opportunity for public feedback.<sup>150</sup>

64. Some commenters have offered suggestions in this proceeding for specific types of Commission seminars. For example, one party has recommended that the Commission co-sponsor seminars and workshops jointly with ethnic minority business organizations, groups and chambers of commerce in the various regions of the country.<sup>151</sup> Another commenter requested that the Commission sponsor a series of meetings with large

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<sup>148</sup> Report to the Commission, Office of Plans and Policy, *In the Matter of Improving Commission Processes: FCC Notice of Inquiry PP 96-17*, July 25, 1996.

<sup>149</sup> See FCC News Release, *Learn Your NOIs: FCC Open Forum on How to Participate in the FCC Process* (released May 2, 1996). The materials prepared for this forum are available from OPA and the FCC home page. To increase public access to the Commission's processes the session was broadcast live on C-SPAN. See Appendix B for a listing of Commission public meetings, fora and *en banc* hearings held to date, as well as conferences that Commission representatives have participated in as panelists and speakers.

<sup>150</sup> These fora, titled *How to Find FCC Information on the Internet*, were held on June 24, 1996 and October 22, 1996.

<sup>151</sup> Integrated Communications Group Comments at 5.

and small businesses to facilitate cooperative efforts.<sup>152</sup> The Commission has held several seminars of the types recommended by these parties. For example, through OCBO, the FCC co-sponsored with Broadcast Capital Fund, Inc. two regional conferences in Las Vegas, Nevada and Los Angeles, California about opportunities for minorities in broadcasting. In addition, OCBO held "Auctions '96" and "Auctions '97" conferences that featured presentations by small and large businesses, as well as by FCC and other government staff. These conferences, which were open to the public and free of charge, served to disseminate information, facilitate access to FCC staff, and create opportunities for sharing ideas and concerns. As described in Part III below, the Compliance and Information Bureau also participated in numerous conferences that have been targeted to small businesses.<sup>153</sup>

65. In addition, on April 19-20, 1997, the FCC's Office of Workplace Diversity co-sponsored a conference with the National Association of Broadcasters (NAB) and Fayetteville State University in Fayetteville, North Carolina on participation in and access to the information superhighway by African-Americans and other minorities. At the Fayetteville conference, NAB held its first regional job fair to inform potential applicants about employment opportunities in the broadcasting industry. On May 15, 1997, OCBO is co-sponsoring a free conference with Bowie State University, the National Telecommunications and Information Administration of the Department of Commerce, and private sector members on universal service and access reform.

66. The Commission will consider the recommendations developed in this proceeding as it plans future public seminars. We will encourage bureaus and offices, particularly OCBO, the Wireless Telecommunications Bureau, the Office of Engineering and Technology, and the Compliance and Information Bureau to sponsor, on a regular basis, seminars on issues of importance to small businesses, including emerging technologies, spectrum opportunities, and financing of communications services. We also will encourage regional and local conferences, which are particularly valuable in reaching small businesses that are not able to attend conferences in Washington, D.C.

67. In addition to conducting numerous public seminars, the Commission has initiated an electronic comment filing effort which will make it easier for small businesses and organizations to file comments and review comments filed by others. On April 3, 1997, we adopted an *Electronic Filing Notice of Proposed Rulemaking*, which proposes the necessary rule changes for implementing the electronic filing system and invites comment on

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<sup>152</sup> Brown-Blackwell Comments at 7.

<sup>153</sup> See *infra* ¶¶ 207, 209.

implementation questions.<sup>154</sup> At present, parties must rely on the FCC's duplicating contractor to obtain copies of comments. The *Electronic Filing Notice of Proposed Rulemaking* proceeding, and internal initiatives to modernize systems for processing comments will create the legal, operational, and technical foundation to realize the full potential of electronic filing of rulemaking comments at the FCC. In several major proceedings, parties have been invited to file computer diskettes along with their comments, or to file informal comments via electronic mail. In proceedings where comments have been filed on diskettes, the public is able to view those comments online as long as they can access the World Wide Web site. A contract has been awarded to develop a new database system to receive, process, and make available comments in electronic form. Work is now proceeding on this database system, and initial programming is expected to be completed in mid-1997.

68. Further, the Commission has made it easier for the public to obtain access to Commission Offices and Bureaus and for the Commission to respond to general inquiries from the public. Today, all Commission Offices and Bureaus are accessible through the Commission's Internet site.<sup>155</sup> Each office has an e-mail address and personalized Web page with information about the office and where to direct inquiries. In addition, texts of Commission actions, including notices of proposed rulemaking, orders, public notices, press releases, and speeches are now available on the Internet. The Commission also has created a general FCC mailbox entitled "fccinfo" for electronic mail to the FCC.<sup>156</sup> This address can be used to ask general questions, provide comments, or to get help from the Commission. Fccinfo identifies each inquiry and directs it to the appropriate agency expert for a prompt response. In addition, as described above, the public may utilize the FCC's National Call Center.

69. We believe that all of the initiatives described above will significantly enhance the ability of small businesses to make their perceived barriers known to the Commission and its decisionmakers. We also shall continue to be sensitive to the special needs of small

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<sup>154</sup> *Electronic Filing of Documents in Rulemaking Proceedings*, Notice of Proposed Rulemaking, GC Docket No. 97-113, FCC 97-113 (released Apr. 7, 1997) (*Electronic Filing Notice of Proposed Rulemaking*). See also FCC News Release, *FCC Takes Steps to Initiate Electronic Comment Filing*, Rep. No. 95-96 (released June 24, 1996).

<sup>155</sup> The URL address for the FCC home page is <http://www.fcc.gov>.

<sup>156</sup> The general mailbox for e-mail to the FCC is located at [fccinfo@fcc.gov](mailto:fccinfo@fcc.gov). Freedom of Information Act (FOIA) requests can be sent to [fccfoia@fcc.gov](mailto:fccfoia@fcc.gov). See also FCC News Release, *FCC Upgrades on the Internet* (released June 6, 1995).



businesses in this regard and to look for new ways to enhance their ability to have a voice in our decisionmaking process.

## 2. *Commission Procedure as an Obstacle*

70. The Cable Telecommunications Association maintains that another significant procedural barrier for small businesses is the manner in which Commission rules are proposed and adopted. According to the Cable Telecommunications Association, the current process serves as a barrier to entry and to the continued success of small businesses in the telecommunications marketplace because, in many instances, the agency's rulemaking process does not set forth any proposed rule or variations thereof that enables commenters to analyze the potential impact on small businesses before final rules are adopted. It acknowledges that SBREFA now requires the Commission to analyze the impact of any proposed rule and believes that, by forcing the Commission to change its current procedural processes, implementation of SBREFA should have a positive effect toward the elimination of market entry barriers. Nevertheless, the Cable Telecommunications Association believes that for the Commission to continue to issue non-specific, broad-based inquiries characterized as rulemakings will violate SBREFA because it does not provide an opportunity for meaningful comment on the impact a regulatory proposal will have on small businesses.<sup>157</sup> It strongly recommends that the Commission reinstitute the practice of putting out for public comment in notices of proposed rulemaking the actual proposed language or variations thereof of the rules the Commission is actually considering adopting.<sup>158</sup>

71. The Administrative Procedures Act (APA) requires an administrative agency to give "either the terms or substance of the proposed rule or a description of the subjects and issues involved."<sup>159</sup> Thus, it does not require an agency to set forth the actual text or variations of proposed rules. Nevertheless, we shall make every effort to ensure our rulemaking process complies with the spirit and letter of the APA and SBREFA by facilitating meaningful comment on the effects of our rulemaking proposals and carefully analyzing, and setting forth in that analysis, the effects of our final actions on small businesses. To the extent not precluded by statutory time constraints or the complex nature of the particular subject matters involved, we can further these goals by including in our rulemaking notices the text of actual proposed rules or variations thereof. However, many times the Commission expresses a range of options in its proposals, to solicit comment on

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<sup>157</sup> Cable Telecommunications Association Comments at 12-13.

<sup>158</sup> *Id.*

<sup>159</sup> 5 U.S.C. § 553(b)(3).



those options, and on the underlying issue, before concluding that one option is the best. We believe this practice is consistent with the APA and SBREFA and often allows small businesses and all commenters a fuller opportunity to be part of the FCC's decisionmaking process because their comments affect the Commission's choice of rules. We thus shall strongly encourage bureaus and offices when they craft rulemaking proposals for our consideration to set forth actual text of proposed rules where feasible and practicable, although comment on a range of options and issues also may be solicited.<sup>160</sup>

### 3. *Access to Information*

72. Several parties also claim difficulties in obtaining access to information about new communications services and related regulatory matters as market entry barriers.<sup>161</sup> To remedy this, the parties recommend that the Commission make documents and information accessible electronically to all parties and at costs that are reasonable to the general public and small businesses.<sup>162</sup>

73. We have taken many significant steps to ensure that information about new services and regulatory proceedings is made available. In fiscal years 1994 and 1995, Congress provided the Commission with resources to permit the agency to install up-to-date computer and voicemail technology. This investment in information technology has enhanced the Commission's staff productivity, increased our responsiveness to information request from the public, and has improved the public's access to Commission documents. In addition, OCBO and the Commission's Office of Public Affairs (OPA) have made a special effort to reach out to small businesses and others who have less experience in working with

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<sup>160</sup> It should be fully understood, however, that this may not be possible where statutory time constraints exist, where numerous broad issues exist that make publication of a particular rule or set of rules impractical or inappropriate, or where other extenuating circumstances warrant expeditious action that would preclude setting forth with particularity a specific rule or versions thereof in the notice. To the extent that parties and other interested persons believe that final rules adopted do not adequately address their concerns, they can seek redress through the reconsideration process, i.e., requesting the Commission to modify or otherwise reconsider its rules.

<sup>161</sup> See, e.g., Integrated Communications Group Comments at 5; B.K. McIntyre Comments at 1.

<sup>162</sup> Small Business Administration Comments at 12-13. See also B.K. McIntyre Comments at 3 ("FCC should be technologically neutral and provide easy access to information at a cost that is reasonable").

the Commission and who are uncertain about how to obtain information from the Commission.

74. OPA's Public Service Division provides a variety of information, such as Fact Sheets,<sup>163</sup> Information Bulletins and Brochures, and handles incoming phone calls and requests from walk-in visitors on all topics.<sup>164</sup> OPA maintains mailing lists and performs outreach activities to organizations, businesses and individuals who are interested in particular issues. These services are extremely helpful to small businesses located outside of the Washington, D.C. area that lack the resources that are needed to monitor Commission proceedings. OPA also has expanded its outreach to "nontraditional" media, including community and Spanish language newspapers nationwide.

75. Each day, OPA publishes the *Daily Digest* to help the public stay apprised of the Commission's many activities.<sup>165</sup> The *Daily Digest* contains a list of rulemakings, reports, public notices, speeches, and current events that are released by the Commission. Interested parties can obtain the *Daily Digest* over the Internet by subscribing to the

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<sup>163</sup> The Office of Public Affairs, Public Service Division has published Fact Sheets to help the public obtain information and participate in the Commission rule making process. They include, but are not limited to: FCC Fact Sheet, *How to Participate in the FCC Process* (released May 1996); FCC Fact Sheet, *How to Participate in the FCC Rule Making Process* (released May 1996); FCC Fact Sheet, *Hints on Filing Comments With the FCC* (released May 1996).

<sup>164</sup> The Office of Public Affairs is located at 1919 M Street, N.W., Room 254, Washington, D.C., (202) 418-0200. Interested parties who are unable to visit the FCC in person may obtain documents and services from the FCC's duplicating contractor, International Transcription Service Inc. (ITS) at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800.

<sup>165</sup> The *Daily Digest* is located on the FCC's world wide web site. The URL address is [http://www.fcc.gov/Daily\\_Releases/Daily\\_Digest/welcome.html](http://www.fcc.gov/Daily_Releases/Daily_Digest/welcome.html).

Commission's list-server<sup>166</sup> or through the Commission's fax-on-demand<sup>167</sup> phone line service.

76. Since passage of the Telecommunications Act, the Commission has received numerous requests for information about the Act and its implementation from consumers, the media and industry. To respond to these requests, the Commission issued a new Telecommunications Act Implementation Schedule.<sup>168</sup> In addition, OPA established a special Telecommunications Act home page on the Commission's web site to provide a central location for all public information regarding Commission actions to implement the law.<sup>169</sup> OPA also modified the Commission's Daily Digest to assist the public in tracking the Commission's proceedings that implement the law.<sup>170</sup>

77. OPA also publishes an *Information Seekers Guide* which contains detailed information about all of the Commission's reference rooms, duplicating contractors, and the various ways the public can obtain information at the Commission.<sup>171</sup> In addition, OPA is

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<sup>166</sup> Request for subscriptions to the Commission's list-server should be sent via e-mail to [subscribe@info.fcc.gov](mailto:subscribe@info.fcc.gov). See FCC Public Notice, *Daily Digest on Listserver* (released Oct. 30, 1995).

<sup>167</sup> The "fax-on-demand" service uses simple call and prompt instructions to send materials directly to a fax machine. Lengthy documents can be downloaded directly from the Commissions World Wide Web site at <http://www.fcc.gov>. The listserver provides only the *Daily Digest* and has recently expanded to include speeches.

<sup>168</sup> Information on the FCC's implementation of the Telecommunications Act can be obtained at <http://www.fcc.gov/implsched.html>; <http://www.fcc.gov/telecom.html>.

<sup>169</sup> FCC Daily Digest (released Feb. 27, 1996).

<sup>170</sup> FCC Daily Digest (released Feb. 28, 1996).

<sup>171</sup> *FCC Information Seekers Guide: How to Find Information at the FCC* (Jan. 1997). In addition, OPA has issued a Public Notice to inform small businesses on how they can obtain printouts of docketed proceeding and comments at the Commission's main reference center without incurring "expedited fees" from the Commission's Duplication Contractor. See FCC Public Notice, *Daily Digest on Listserver* (released Oct. 30, 1995). There are currently about 3,400 subscribers to the *Daily Digest* "listserver." This service, in addition to the call-in "fax on demand" service, allows the public to obtain copies of Commission information quickly, easily, and inexpensively. The Commission has developed a new

actively consolidating additional public reference files into the main FCC Reference Center. This will enable the public to obtain all ownership, pending and granted licenses, and EEO files from one central location.<sup>172</sup>

78. In addition to the services provided by OCBO and OPA, another principal way in which the Commission has increased the public's access to Commission documents and participation in the Commission process is through the Internet. The availability of information on the Internet makes it much easier for small businesses and others to obtain Commission information and documents. The Commission created an Internet homepage in 1994, and since that time, many improvements have been made. The Commission's homepage offers an easy to use entry point to the Commission's online resources. The Commission's World Wide Web homepage now receives over 110,000 "hits" per day, indicating that many people are locating information online. Public notices, news releases, Commission decisions, speeches, and such general information as the telephone directory are all posted on this site.<sup>173</sup> Unlike documents that are purchased through the Commission's duplication contractor, all Commission documents on the Commission's Internet site are available for free.

79. In response to comments by Internet users, the Commission continues to take steps to improve services on the Internet. Last year, the Commission conducted two open fora on how to find FCC information on the FCC's World Wide Web site.<sup>174</sup> The addition of a search engine in Fall 1996 has made it much easier for the public to find information at

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"Digital Daily Digest and Index" automated system that captures descriptive data about all documents officially released by the Commission. The system's current use is to produce the *Daily Digest* for paper and electronic release. In the future, this system will allow Internet users to search for all documents using key words. Automatic lists now send the *Daily Digest* and Commission speeches to anyone who "subscribes" to this free service. Persons who are unable to obtain Commission documents via the Internet are encouraged to contact one of the Commission's distribution services or to read summaries of Commission documents that are published in the *Federal Register*.

<sup>172</sup> See FCC Public Notice, *Relocation of Mass Media Bureau's Equal Employment Opportunity Files* (released Mar. 7, 1996).

<sup>173</sup> See FCC Public Notice, *FCC Upgrades Services on the Internet. How to Get FCC Documents from the Internet* (released Apr. 6, 1995).

<sup>174</sup> These public fora were held on June 24, 1996 and October 22, 1996 and were conducted by the Office of Public Affairs.

the FCC web site.<sup>175</sup>

80. As discussed above, on April 3, 1997, the Commission adopted a *Notice of Proposed Rulemaking* to permit parties to electronically file formal comments using the Internet and electronic mail.<sup>176</sup> Testing of the electronic filing system, "Quick Start," is underway. In addition to making it easier for individuals and organizations to file comments, this new process also will enable all interested parties to obtain access to these comments. Today, interested parties located outside of the Washington, D.C. area typically have to order comments through the Commission's duplicating contractor.

81. Through these and other efforts, the Commission successfully disseminates much information about new telecommunications to the public and small businesses.<sup>177</sup>

### III. IMPEDIMENTS IN SPECIFIC SERVICES

#### A. Common Carrier Services

82. In the *Market Entry Barriers Notice of Inquiry*, the Commission sought comment on ways to eliminate market entry barriers and enhance opportunities for entrepreneurs and small businesses in wireline services.<sup>178</sup> Many of the obstacles identified by small businesses in the common carrier services relate directly to control of vital inputs by incumbent carriers and accordingly fall within the definition of policy-relevant entry barriers.<sup>179</sup> Examples of such barriers include: incumbent LEC refusal to comply with interconnection obligations; onerous conditions, such as high deposits for resale; incumbent

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<sup>175</sup> See FCC News Release, *FCC Web Site Search Engine Available; Finding Information Now Much Easier* (released Oct. 10, 1996).

<sup>176</sup> See *supra* ¶ 67.

<sup>177</sup> See also *infra* ¶¶ 131-132 (discusses outreach efforts by the Wireless Telecommunications Bureau) and ¶¶ 206-209 (discusses National Call Center and outreach efforts by the Compliance and Information Bureau).

<sup>178</sup> *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6307.

<sup>179</sup> See *supra* ¶¶ 12-19.

LEC monopoly control over subscriber list information; and incumbent LEC control and assignment of NXXs.<sup>180</sup>

83. Still other obstacles identified involve the Commission's own rules, policies, and processes. Commenting parties assert that these regulatory obstacles have evolved in a manner that favors incumbent carriers and thus create a tremendous disincentive for small businesses to enter the telecommunications marketplace. Examples of these perceived regulatory barriers include: the formal complaint process; regulatory filing burdens; support mechanisms for universal service; and the section 214 certification process. Below we discuss in greater detail the nature of the entry barriers identified in the common carrier services and report on Commission initiatives taken to date, or planned for the near future, that are designed to eliminate these barriers.

### *1. Interconnection and Resale Barriers*

84. Commenting parties raise a number of issues regarding interconnection and emphasize that aggressive enforcement of the interconnection and resale rights set forth in section 251 of the Communications Act, as amended, is essential for small businesses and new entrants to compete effectively in the telecommunications marketplace.<sup>181</sup> In addition, several commenting parties indicate that national implementation of the 1996 Act is essential because disparate regulations throughout the states would operate as a significant obstacle for small businesses.<sup>182</sup> Commenting parties claim that absent strong national standards,

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<sup>180</sup> An "NXX" code, or central office code, is the second three digits of a ten digit telephone number and identifies the carrier switch that serves the particular customer location. See *Administration of the North American Numbering Plan*, Report and Order. 11 FCC Rcd 2588, 2593-2594 (1995) (*Numbering Plan Order*).

<sup>181</sup> See, e.g., America's Carriers Telecommunications Association Comments at 14; National Cable Television Association Comments at 13; Nevadacom Comments at 3-5; Telecommunications Resellers Association Comments at 20-21; Celltech Information Systems Comments at 4-5.

<sup>182</sup> See, e.g., Competitive Telecommunications Association Comments at 10-11 ("dozens of different regulations are a serious obstacle to small carriers"); Working Assets Funding Comments at 10, 12 (complying with 50 different requirements poses a significant barrier); Haycock Testimony at 6 (small companies lack resources to comply with multiple regulatory requirements); Polka Testimony at 4 (advocating national mandatory arbitration procedure).

incumbent LECs will retain the ability to erect insurmountable barriers for new entrants, in particular small businesses.<sup>183</sup>

85. The Commission concurs that carrier compliance with, and our diligent enforcement of, the rights and obligations set forth in section 251 are absolutely necessary for achievement of the pro-competitive goals and policies of the 1996 Act. In August 1996, as required by the 1996 Act, the Commission adopted rules to implement sections 251 and 252 of the Act, which establish the basic obligations of carriers, especially in the local exchange and exchange access markets.<sup>184</sup> Section 251 establishes the general interconnection obligations for all telecommunications carriers,<sup>185</sup> delineates further obligations for LECs,<sup>186</sup> and prescribes additional requirements for incumbent LECs.<sup>187</sup> Section 252 generally sets forth the procedures that state commissions, incumbent LECs, and new entrants must follow to implement the requirements of section 251 and establish specific interconnection arrangements.<sup>188</sup> The Commission's regulations implementing the local interconnection and resale provisions of the 1996 Act, however, have been partially stayed by the United States Court of Appeals for the Eighth Circuit.<sup>189</sup> In particular, the Eighth Circuit has questioned the Commission's jurisdiction to impose national pricing rules, including wholesale rates for resale. Accordingly, although the Commission remains fully committed to enforcement of our rules implementing the various interconnection and resale rights and obligations set forth in section 251, we may do so only to the extent those rules

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<sup>183</sup> See, e.g., Big Sky Teleconferencing Comments at 2 (alleging incumbent interexchange carrier refusal to provide interconnection in violation of section 251(a)(1)); Haycock Testimony at 3-4 (alleging countless abuses by incumbents that deter competition).

<sup>184</sup> See generally *First Local Competition Order*, 11 FCC Rcd 15499; *Implementation of the Local Competition Provisions the Telecommunications Act of 1996*, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392 (1996) (*Second Local Competition Order*).

<sup>185</sup> 47 U.S.C. § 251(a).

<sup>186</sup> 47 U.S.C. § 251(b).

<sup>187</sup> 47 U.S.C. § 251(c).

<sup>188</sup> 47 U.S.C. § 252.

<sup>189</sup> See *Iowa Util. Board v. FCC*, No. 96-3221 and consolidated cases (8th Cir. Oct 15, 1996).

are not currently stayed by the appellate court. We will, however, continue to advocate national pricing rules in court.

## 2. *Enforcement and the Complaint Process*

86. In the *Market Entry Barriers Notice of Inquiry*, the Commission specifically requested comment on whether small businesses have particular difficulties regarding Commission rules or policies.<sup>190</sup> Several commenting parties identified the Commission's own formal complaint process as a barrier.<sup>191</sup> According to America's Carriers Telecommunication Association, formal complaints languish at the Commission for years without action.<sup>192</sup> It further alleges that complaints filed by incumbent carriers receive greater priority by the Commission than complaints filed by small carriers against such incumbents.<sup>193</sup> Excessive delay, according to the commenting parties, renders the complaint process ineffective as a tool to enforce the Communications Act and the Commission's rules, in particular the provisions of the 1996 Act designed to promote entry into the local telecommunications marketplace.<sup>194</sup>

87. To remedy the perceived barriers of the Commission's existing formal complaint process, commenting parties advocate that the Commission adopt a streamlined,

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<sup>190</sup> *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6299-6300.

<sup>191</sup> See, e.g., America's Carriers Telecommunications Association Comments at 6 (formal complaints languish without action); Competitive Telecommunications Association Comments at 12-13 (complaint process is costly, unwieldy, and time-consuming); Small Business in Telecommunications Comments at 39-40 (comprehensive overhaul of complaint process is necessary); Telecommunications Resellers Association Comments at 28 (complaint process is cumbersome and costly); Voice-Tel Comments at 17 (complaint process is not structured to provide special support required by small telecommunications entities).

<sup>192</sup> See America's Carriers Telecommunications Association Comments at 6.

<sup>193</sup> *Id.* at 7 (alleging that as many as 55 complaints filed by resellers against AT&T have languished unresolved for years at the Commission).

<sup>194</sup> See, e.g., America's Carriers Telecommunications Association Comments at 4, 9; Nevadacom comments at 5.



highly expedited complaint process for resolving carrier-to-carrier disputes.<sup>195</sup> For example, America's Carriers Telecommunication Association proposes a procedure for resolving disputes between small, new entrants and incumbent LECs whereby disputes would be resolved by three-person FCC staff "teams" with the goal of rendering a decision within 30 days from receipt of the initial complaint. In addition, the procedure proposed by America's Carriers Telecommunication Association would allow for expedited appeals to the full Commission.<sup>196</sup> Another party proposes that the Commission use injunctive-type procedures to respond to requests for interim emergency relief pending action on a formal complaint.<sup>197</sup>

88. We agree that effective enforcement of the Communications Act and existing Commission rules and policies is imperative if small businesses are to participate fully in the telecommunications marketplace. In recognition of this need, the Commission released a notice of proposed rulemaking that proposes procedures designed to expedite the resolution of formal complaints against common carriers.<sup>198</sup> As some parties recommend in this proceeding, the *Formal Complaint NPRM* sets forth proposed procedures, including legal and evidentiary standards, for requests for cease-and-desist orders and other forms of interim relief designed to expedite disposition of formal complaints and associated requests for relief.<sup>199</sup> Although the Commission proposals for reform of the formal complaint process make no distinctions based on the size of the carrier, the Commission anticipates that what has become an obstacle for small businesses will likely be eliminated as a consequence of revising and expediting the complaint process for all common carriers.<sup>200</sup> Moreover, we recognize that the proposed procedures, which would require greater diligence by both

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<sup>195</sup> See America's Carriers Telecommunications Association Comments at 9-13; Telecommunications Resellers Association comments at 30-31; Nevadacom Comments at 4.

<sup>196</sup> America's Carriers Telecommunications Association Comments at 9-13.

<sup>197</sup> Blue Sky Teleconferencing and SaMComm Comments at 2-4.

<sup>198</sup> See *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers*, Notice of Proposed Rulemaking, CC Docket No. 96-238, FCC 96-460 (released Nov. 27, 1996) (*Formal Complaint NPRM*).

<sup>199</sup> *Id.* at ¶¶ 60-62.

<sup>200</sup> *Id.* at ¶ 21 & n.53 (stating that the proposed revisions to the formal complaint process are designed to expedite the process for all carriers and eliminate the real and perceived barriers cited in the Section 257 proceeding).

complainants and defendants, could be burdensome to some parties and, in particular, small businesses that may need to proceed without the assistance of legal counsel. The Commission has therefore proposed to waive potentially burdensome format and content requirements upon a showing of financial hardship or other public interest showing.<sup>201</sup>

89. Further, in response to suggestions regarding staffing necessary to ensure effective enforcement of and compliance with the Communications Act and the Commission's rules and policies,<sup>202</sup> new staff has been added to both the formal and informal complaints branches of the Enforcement Division within the Common Carrier Bureau. A review of staffing in the Audits Branch of the Accounting and Audits Division in the Common Carrier Bureau is likewise being undertaken.

90. Finally, a "paperless environment" is being implemented to increase the efficiency of the informal complaint process. The Consumer Protection Branch handles approximately 30,000 consumer complaints and inquiries about common carrier issues every year. Historically, the process for handling informal complaints and inquiries has relied heavily on paper files to log all interactions with consumers and carriers. In a paperless environment, all such correspondence submitted to the Common Carrier Bureau in paper form will be optically scanned and posted to an imaging database for processing. Conversion to a paperless environment designed to capture and log information as it arrives at the Common Carrier Bureau will increase efficiency by, among other things: providing a means for the Bureau to identify on-line the status of pending informal complaints and inquiries; facilitating rapid storage and management of documents associated with a particular complaint or inquiry; and providing Commission staff with a virtually real-time means of obtaining statistical information about complaints and inquiries.

### 3. *Information Filing Burdens*

91. Several parties have recognized that with movement to a competitive telecommunications marketplace, day-to-day regulatory filings are unnecessary and may serve

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<sup>201</sup> *Id.* at ¶ 44.

<sup>202</sup> See United Church of Christ and Minority Media and Telecommunications Council Comments at 7 (Common Carrier Enforcement Division should employ sufficient staff to conduct field investigations and ensure compliance with FCC rules and policies).

anti-competitive purposes.<sup>203</sup> Another commenting party proposes relaxed tariff filing requirements for all but the largest carriers.<sup>204</sup>

92. As demonstrated by recent orders, the Commission is committed to eliminating or streamlining tariff filing and other reporting requirements applicable to entities providing common carrier services.<sup>205</sup> In eliminating filing and reporting requirements, the Commission has been mindful to ensure that information regarding carriers and their services will be publicly available in order to protect consumers and to assist consumers and small businesses, in particular resellers, in comparing carriers' service offerings. For example, the Common Carrier Bureau's decision, pursuant to delegated authority, to eliminate thirteen reporting requirements was motivated in large part by the fact that the information provided in such reports is already publicly available in other reports filed by the carriers or else that the incentives for discrimination, which initially prompted the reporting requirements, no longer exist.<sup>206</sup> The Commission believes that its actions taken with respect to reporting requirements will facilitate increased participation by entrepreneurs and small businesses in

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<sup>203</sup> See Independent Telephone & Telecommunications Alliance Comments at 7. See also United States Telephone Association Reply Comments at 7-8 (proposing that LECs with fewer than 2% of subscriber lines installed nationwide file simplified, historically based access tariffs).

<sup>204</sup> See Telecommunications Resellers Association Comments at 16-19.

<sup>205</sup> See *Revision of Filing Requirements*, Report and Order, 11 FCC Rcd 14110 (1996) (*Revision of Filing Requirements Order*). See also *Implementation of the Telecommunications Act of 1996: Reform of Filing Requirements and Carrier Classifications*, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 11716, 11718 (1996) (amending the Commission's rules to specify that carriers may now file the Automated Reporting Management Information System (ARMIS) 43-0 quarterly report and the 43-06 semi-annual Service Quality report on an annual basis); FCC Public Notice, *Common Carrier Bureau Seeks Suggestions on Forbearance*, DA 96-798 (released May 17, 1996) (requesting suggestions on specific regulatory rules or requirements that meet the statutory standards for forbearance). The Commission also has eliminated tariff filing requirements for interstate, domestic, interexchange services offered by nondominant interexchange carriers. This detariffing order, however, has been stayed by the United States Court of Appeals for the D.C. Circuit. See *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, CC Docket No. 96-61, FCC 96-424 (released Oct. 31, 1996), stay granted *sub nom.*, *MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. Feb. 13, 1997).

<sup>206</sup> See generally *Revision of Filing Requirements Order*, 11 FCC Rcd 14110.

the provision of telecommunications services, while preserving their ability to obtain sufficient information to make rational market entry decisions.

#### 4. *Impact of Commission Proceedings on Small Telcos*

93. Several commenting parties express concern that the Commission has failed to consider the potential adverse impact that its proceedings may have on small or rural incumbent LECs by automatically assuming the dominance of rural incumbent LECs and thus avoiding analysis under the Regulatory Flexibility Act.<sup>207</sup>

94. The Commission continues to believe that incumbent LECs do not qualify as small businesses, as defined by the Small Business Administration, because they are dominant in their field of operation due to their current control of bottleneck facilities. Our assessment, however, may change in the future as local telecommunications markets become fully competitive. In the meantime, the Commission nevertheless has adopted the practice of including a discussion of the potential impact of Commission rules on small incumbent LECs.<sup>208</sup> In addition, as suggested by at least one commenting party,<sup>209</sup> the Commission has considered the impact on small carriers when revising the structural safeguards applicable to incumbent LECs as mandated by the 1996 Act.<sup>210</sup>

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<sup>207</sup> See National Telephone Cooperative Association Comments at 8-12; Small Business Administration comments at 14-15; United States Telephone Association Reply Comments at 3. *But see* AT&T Reply Comments at 7-9 (incumbent LEC control of bottleneck facilities compels conclusion that they are dominant in their field of operation).

<sup>208</sup> See, e.g., *Local Competition Order*, 11 FCC Rcd at 16145; *Implementation of the Infrastructure Sharing Provisions in the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 6634, Appendix C at ¶¶ 5-11 (released Feb. 7, 1997); *Revision of Filing Requirements Order*, 11 FCC Rcd at 14127, Appendix B.

<sup>209</sup> See Independent Telephone & Telecommunications Alliance Comments at 6.

<sup>210</sup> See, e.g., *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 17539, 17662-17666 (1996) (considering small incumbent LECs within regulatory flexibility analysis); *Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149, FCC 96-489, ¶¶ 102, 105 (released Dec. 24, 1996) (considering impact of regulation on small service

## 5. Existing Universal Service Funding Mechanisms

95. America's Carriers Telecommunications Association notes that the current method for accessing charges for the support of Universal Service and Lifeline Assistance penalizes small carriers for achieving success as measured by the number of presubscribed lines served.<sup>211</sup> In other words, according to America's Carriers Telecommunications Association, the looming reality that any small interexchange carrier will have to shoulder a portion of the financial burden for universal service once it reaches a certain size operates to discourage such small carriers from expanding their existing interexchange operations or from providing interexchange service in the first place. America's Carriers Telecommunication Association proposes that the Commission amend part 69 of its regulations to fund Universal Service and Lifeline Assistance through a broad-based charge rather than through charges assessed upon a small segment of interexchange carriers.<sup>212</sup>

96. In implementing the Joint Board's recommendations regarding reform of the mechanisms for preserving and advancing universal service, the Commission has already recognized the concern expressed by America's Carriers Telecommunication Association by adopting competitively neutral mechanisms for calculating universal service support.<sup>213</sup> Specifically, in the recently adopted *Universal Service Report and Order*, the Commission has required that any telecommunications carrier providing any interstate telecommunications service for a fee to the public (or to such classes of eligible users as to be effectively available to the public), and certain other providers of telecommunications, must contribute

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providers).

<sup>211</sup> American Carriers Telecommunications Association Comments at 15. Under the currently existing rules, Universal Service and Lifeline Assistance are funded through charges assessed monthly by the National Exchange Carrier Association, Inc. on interexchange carriers that (i) use local exchange switching facilities to provide interstate or foreign telecommunications services and (ii) have at least 0.05% of the total common lines presubscribed to interexchange carriers nationwide. See 47 C.F.R. §§ 69.116, 69.117, 69.603(d).

<sup>212</sup> America's Carriers Telecommunications Association Comments at 15.

<sup>213</sup> See *Federal-State Joint Board on Universal Service*, Report and Order, FCC 97-157 (adopted May 7, 1997) (*Universal Service Report and Order*). See also *Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd 87, 91 (1996) (*Joint Board Universal Service Recommended Decision*).

to the funding of universal service.<sup>214</sup> The Commission also has determined that the contributions likewise must be determined in a competitively neutral manner based on end-user telecommunications revenues.<sup>215</sup> We are thus confident that the concerns raised by America's Carriers Telecommunication Association about the currently existing funding mechanisms for Universal Service and Lifeline Assistance have been and are being fully explored and resolved in the universal service proceeding.

97. In a related vein, some commenting parties suggest that the Commission streamline, or forbear from, its policy of requiring study area waiver petitions for companies seeking to acquire, and subsequently add, additional telephone exchanges to their existing study areas.<sup>216</sup> These parties claim that the procedure required for obtaining study area waivers serves as yet another hurdle for small telecommunications carriers venturing to expand service through the acquisition of exchanges.<sup>217</sup>

98. In general, a carrier must apply to the Commission for a waiver of the frozen study area<sup>218</sup> if it desires to sell or purchase an exchange. In evaluating petitions seeking a

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<sup>214</sup> *Universal Service Report and Order*, FCC 97-157.

<sup>215</sup> *Id.*

<sup>216</sup> See National Telephone Cooperative Association Comments at 4-6; United States Telephone Association Reply Comments at 4-5; Pederson Testimony at 1-2.

<sup>217</sup> National Cable Television Association Comments at 4-6.

<sup>218</sup> A study area is a geographical segment of a carrier's telephone operation, which in general corresponds to a carrier's entire service territory within a state. See 47 C.F.R. Part 36, Appendix. For jurisdictional separations purposes, the Commission froze all service area boundaries effective November 15, 1984. The Commission took such action primarily to ensure that carriers do not set up high cost exchanges within their existing service territories as separate study areas to maximize interstate cost allocations. See *U.S. West Communications, Inc. and Eagle Telecommunications, Inc.*, Memorandum Opinion and Order on Reconsideration, FCC 97-136 (released Apr. 18, 1997) (providing clarification of issues relating to application of one-percent guideline); *MTS and WATS Market Structure: Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, 50 Fed. Reg. 939 (1985) (adopting with minor modifications the Joint Board's recommendations issued in *MTS and WATS Market Structure: Amendment of the Commission's Rules and Establishment of a Joint Board*, Recommended Decision and Order, 49 Fed. Reg. 48, 325 (1984)).

waiver of the rule freezing study areas, the Commission applies a three-prong test: (i) the change in the study area must not adversely affect the Universal Service Fund support program; (ii) the state commission having regulatory authority must not object to the change; and (iii) the public interest supports the change.<sup>219</sup> In evaluating whether a study area change would have an adverse impact on the distribution level of the Universal Service Fund, the Commission applies a "one-percent guideline" to study area waiver requests filed after January 5, 1995.<sup>220</sup> Specifically, a study area waiver is unlikely to be granted if it would result in an annual aggregate shift in universal service assistance in an amount equal to or greater than one percent of the total Universal Service Fund, unless parties can demonstrate an extraordinary public interest benefit.<sup>221</sup>

99. As described in the preceding paragraph, the 1984 freeze of study area boundaries is tied directly to the rules and procedures for jurisdictional separations and Universal Service support. We just completed the first step in the process of effecting sweeping reform of the mechanisms for preserving and advancing universal service. We also will soon commence a proceeding to review our jurisdictional separations rules. Accordingly, we believe that it is premature to consider United States Telephone Association's streamlining proposal. Nevertheless, we shall carefully consider and evaluate the merits of any such proposals in future proceedings.

#### 6. *Impartial Administration of NXXs*

100. Voice-Tel, which is a franchise under which individually owned and operated small business communications consultants provide voice messaging services, describes difficulties encountered as the result of allegedly improper administration of central office codes (i.e., NXXs) by incumbent LECs.<sup>222</sup> Voice-Tel states that it has encountered multiple

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<sup>219</sup> See *U.S. West Communications, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1772 (1995) (*U.S. West Order*).

<sup>220</sup> See generally *U.S. West Order*.

<sup>221</sup> *Id.* at 1774.

<sup>222</sup> Voice-Tel Comments at 7-9. See also Working Assets Funding Service Comments at 8 (numbering plans must be administered fairly and efficiently). Similarly, other commenting parties claim that many incumbent LECs offering subscriber list information impose unreasonable terms and refuse to offer updates. See Association of Directory Publishers Comments at 7-8; America's Carriers Telecommunications Association Comments at 14. But see Yellow Pages Publishers Association Comments at 3 (examination of

instances of LEC service problems including, for example, LEC failure to update translation tables to assignment of numbers reserved for the LEC's own internal use.<sup>223</sup> As a consequence, Voice-Tel's voice-messaging customers often become disgruntled and blame Voice-Tel because they are unable to access their mailboxes.<sup>224</sup>

101. The Commission agrees that access to numbering resources is essential to all entities, not just small businesses, desiring to participate in the telecommunications industry. The concerns raised over numbering plan administration have been, or are in the process of being, addressed by the Commission. For example, the newly added section 251(e)(1) of the Communications Act requires the Commission to create or designate one or more impartial entities to administer numbering and to make such numbers available on an equitable basis.<sup>225</sup> Even prior to the passage of the 1996 Act, the Commission announced the establishment of the North American Numbering Council (NANC) and directed that central office code administration be transferred from the LECs to a neutral entity selected to serve as the North American Numbering Plan Administrator (NANP Administrator).<sup>226</sup> To ensure efficient and

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provision of subscriber list information under Section 257 is redundant); Pacific Bell Reply Comments at 5 (issues under consideration in other proceedings should not be considered in Section 257 proceeding). Regarding the provision of subscriber list information, the Commission intends to consider the impact on small businesses when implementing section 222(e) of the Communications Act, as amended. *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, 11 FCC Rcd 12513 (1996). We anticipate adopting an order implementing section 222(e) sometime during the first half of 1997.

<sup>223</sup> *Id.* at 7-9.

<sup>224</sup> *Id.*

<sup>225</sup> *See* 47 U.S.C. § 251(e)(1).

<sup>226</sup> *See Numbering Plan Order*, 11 FCC Rcd at 2608. Prior to this transfer, central office code assignment has been, and will continue to be, handled by the following incumbent LECs: Alascom, Ameritech, Bell Atlantic, BellSouth, Cincinnati Bell, GTE, NYNEX, Pacific Bell, Southern New England Telephone, SBC, and U.S. West. *Id.* at 2594 & n.20.



impartial number administration, the Commission has required that the new NANP Administrator not be aligned with any particular telecommunications industry segment.<sup>227</sup>

102. While the new NANP Administrator has not yet been selected, the process of selection is progressing. NANC, through various working groups, is developing a plan for the transfer of central office code administration. NANC anticipates that it will be recommending a NANP Administrator meeting the criteria of Section 251(e)(1) by May 15, 1997, and the shifting of the numbering administration functions of the current NANP Administrator to the new impartial NANP Administrator is scheduled to occur three months after the Commission acts on that recommendation, with the shift of CO code administration to occur eighteen months after current NANP Administration functions have been transferred.

103. In the interim period prior to the transfer, Bellcore and the incumbent LECs will continue their existing numbering administration functions. The Commission, however, has declared that any attempts to delay or deny central office code assignments, or to charge different "code opening" fees for different providers of telecommunications services, would violate sections 251(b)(3) and 202(a) of the Telecommunications Act, as well as the Commission's numbering guidelines.<sup>228</sup> The Commission remains committed to closely monitoring actions by incumbent LECs as central office code administrators until those functions are transferred to the new NANP Administrator.<sup>229</sup>

104. In addition, the Commission has specifically declined to allow states to serve as central office code administrators.<sup>230</sup> Although states are authorized to handle matters involving implementation of new area codes, the Commission has expressly prohibited states from implementing service or technology-specific area code overlays.<sup>231</sup> Moreover, to ensure that small businesses do not suffer competitive disadvantages, we have mandated that state commissions choosing to implement an all-services area code overlay must include: (i) mandatory 10-digit dialing by all customers between and within area codes in the area covered by the overlay; and (ii) the availability of at least one NXX in the existing area code

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<sup>227</sup> See *id.* at 2590, 2613.

<sup>228</sup> See *Second Local Competition Order*, 11 FCC Rcd at 19392.

<sup>229</sup> *Id.* at ¶ 335.

<sup>230</sup> *Id.* at ¶ 315.

<sup>231</sup> *Id.* at ¶¶ 285, 319-322.

to every telecommunications carrier authorized to provide telephone exchange service, exchange access, or paging service in the affected area code at least 90 days before introduction of the overlay.<sup>232</sup>

105. The Commission believes that these actions adequately address any entry barriers that small businesses may have previously faced due to incumbent LEC control of central office code assignment. In addition, as further evidence of an ongoing commitment to eliminating obstacles faced by small telecommunications businesses, the Commission has recently launched a home page for the NANC to facilitate open participation in, and wide-spread dissemination of information regarding, numbering plan administration.<sup>233</sup>

## 7. *Preemption of Onerous State Requirements*

106. Several commenting parties cite perceived onerous state regulatory requirements as one of the major obstacles to small business entry into, and expanded participation in, common carrier services.<sup>234</sup> For example, National Cable Television Association and Small Cable Business Association request that the Commission provide strong leadership in preempting municipal attempts to impose burdensome and costly requirements and to extract concessions and revenues from cable operators seeking to expand into telecommunications under the guise of so-called "telecommunications permits." These commenting parties claim that the cost of challenging the municipal requirements or meeting the demands of the municipalities will hinder significantly attempts by small cable operators to diversify into telecommunications services.<sup>235</sup> In addition, these same commenting parties

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<sup>232</sup> See *id.* at ¶ 286.

<sup>233</sup> The URL address for the NANC home page is [http://www.fcc.gov/bureaus/common\\_carrier/www/NANC](http://www.fcc.gov/bureaus/common_carrier/www/NANC).

<sup>234</sup> See, e.g., America's Carriers Telecommunications Association Comments at 15 (identifying overly demanding anti-slamming regulations, specific billing requirements, unreasonable financial burdens); OpTel Reply Comments at 1 (identifying overly restrictive local requirements for the provision of telecommunications services by cable systems); Small Cable Business Association Reply Comments at 6 (identifying overly restrictive requirements imposed via "telecommunications permits" for entry by small cable businesses).

<sup>235</sup> See National Cable Television Association Comments at 4-12; Small Cable Business Association Reply Comments at 6.

request that the Commission preempt municipal regulation of telecommunications services that extends beyond legitimate and routine right-of-way management.<sup>236</sup>

107. The Commission stands ready to enforce the general prohibition set forth in section 253 of the Communications Act, as amended, as reflected in the decisions issued to date by the Commission preempting state and local legal requirements that violate section 253.<sup>237</sup> Specifically, section 253(a) prohibits any state or local requirement that prohibits or has the effect of prohibiting any entity from providing any interstate or intrastate telecommunications service.<sup>238</sup> Indeed, the policy objectives set forth in the 1996 Telecommunications Act, in particular section 257(b), make clear that the Commission must endeavor to promote a marketplace in which decisions to diversify into various segments of the telecommunications marketplace are driven solely by sound business judgment, not regulatory constraints. As required by statute, however, the Commission will consider any preemption request pursuant to section 253 on a case-by-case basis, after notice and opportunity for comment, depending on the facts presented.<sup>239</sup>

108. For example, in both the *Classic Telephone Order* and the *Connecticut Order*, the Commission held that the state or local legal requirements at issue prohibited or had the effect of prohibiting any entity from providing interstate or intrastate telecommunications services. The Commission concluded that absolute prohibitions on the provision of service fall squarely within the scope of actions Congress intended to proscribe under Section 253(a). Moreover, the Commission found that the legal requirements were not otherwise permitted pursuant to Sections 253(b) or 253(c), which preserve certain authority of state and local governments to regulate universal service, protect consumers, manage the public rights-of-

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<sup>236</sup> See National Cable Television Association Comments at 10; Small Cable Business Association Reply Comments at 6. See also OpTel Reply Comments at 1.

<sup>237</sup> See *Classic Telephone, Inc. Petition for Preemption Declaratory Ruling and Injunctive Relief*, Memorandum Opinion and Order, 11 FCC Rcd 13082 (1996), *petition for review docketed sub nom. City of Bogue, Kansas and City of Hill City, Kansas v. FCC*, No. 96-1432 (D.C. Cir. filed Nov. 22, 1996), *petition for review held in abeyance pending further Commission action*, No. 96-1432 (D.C. Cir. filed Jan. 14, 1997) (*Classic Telephone Order*); *New England Public Communications Council Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, 11 FCC Rcd 19713 (1996) (*Connecticut Order*).

<sup>238</sup> 47 U.S.C. § 253(a).

<sup>239</sup> See 47 U.S.C. § 253(d).

way, and impose compensation requirements for the use of the public rights-of-way.<sup>240</sup> In both orders, the Commission preempted the state or local legal requirement at issue and required the state or local authority to act in a manner consistent with Sections 253 and the opinions expressed in the orders.

## ***B. Wireless Services***

109. Some commenters argue that many market entry barriers in the wireless telecommunications services relate to Commission rules, policies and practices that create disincentives for small businesses to participate in the wireless telecommunications services. These include: the Commission's spectrum assignment decisions and its construction requirements, application processing, and enforcement practices. As was the case with common carrier services, other obstacles identified by commenters relate to the control of vital inputs by incumbent facilities-based carriers, including the reluctance of facilities-based carriers to negotiate resale agreements. Many commenters also express views concerning our competitive bidding incentives for small businesses in spectrum-based wireless services. We address all of these issues below.

### ***1. Spectrum Assignment Policies***

110. Commenters indicate that our spectrum assignment decisions, and specifically the assignment of spectrum for large geographic service areas and in large spectrum blocks, create a barrier to entry for small businesses. *Small Business in Telecommunications* explains that wide-area geographic systems are more capital intensive to construct and operate than other types of systems. For example, *Small Business in Telecommunications* notes that such systems require more capital in order to construct numerous sites, employ a larger sales force, and build a larger distribution network, often including several telephone lines to route billing traffic. Moreover, *Small Business in Telecommunications* argues that larger systems lead to greater operational costs due to the competition that results from the presence of more carriers in the larger geographic area. *Small Business in Telecommunications* claims these larger systems may reduce price per unit, but increase the need to engage in expensive advertising and promotion. Thus, *Small Business in Telecommunications* contends that these costs are often too expensive for a small business and, thus, create a substantial market entry barrier for small businesses.<sup>241</sup>

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<sup>240</sup> See 47 U.S.C. § 253(b)-(c).

<sup>241</sup> *Small Business in Telecommunications Comments* at 24.

111. American Mobile Telecommunications Association generally agrees with the contentions of Small Business in Telecommunications. It argues that entry barriers for small businesses are even higher in circumstances in which the Commission has decided to convert from site-specific to geographic area licensing for services in which a substantial number of small, incumbent licensees are already operating.<sup>242</sup> In these circumstances, smaller incumbents often find their license areas encompassed within the larger geographic service area. Despite our provisions allowing these incumbents to participate in the auction for a license covering a larger, geographic area, the commenters argue that small business incumbents are often left with limited expansion opportunities because they lack the resources to bid on more frequencies or territory.<sup>243</sup> As an example, American Mobile Telecommunications Association states that many small businesses dropped out of the 900 MHz SMR auction due to the high costs of acquiring a MTA license. American Mobile Telecommunications Association explains, "[w]hen the entry costs exceed what the prospective participant can justify economically, the entity must forego participating."<sup>244</sup> Small Business in Telecommunications also raises concerns that the Commission's allocation

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<sup>242</sup> American Mobile Telecommunications Association Comments at 10. The Commission has adopted or is considering wide-area geographic licensing in encumbered services in the following proceedings: *Amendment of Part 90 of the Commission's Rules to Provide For the Use of the 220-222 MHz Band by the Private Land Mobile Services*, Third Report and Order and Fifth Notice of Proposed Rulemaking, PR Docket No. 89-552, FCC 97-57 (released Mar. 12, 1997) (*220 MHz Third Report and Order*); *Amendment of the Commission's Rules Regarding Multiple Address Systems*, Notice of Proposed Rulemaking, WT Docket No. 97-81, FCC 97-58 (released Feb. 27, 1997) (*MAS NPRM*); *Paging Second Report and Order*, 12 FCC Rcd 2732; *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, First Report and Order, Eighth Report and Order and Second Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1996) (*800 MHz SMR Order and NPRM*); *Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool*, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639 (1996) (*900 MHz SMR Order*); *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, Report and Order, 10 FCC Rcd 9589 (1995) (*MDS Report and Order*).

<sup>243</sup> Small Business in Telecommunications Comments at 26-27; American Mobile Telecommunications Association Comments at 10-11.

<sup>244</sup> American Mobile Telecommunications Association Comments at 11.

of spectrum in larger blocks in some services reflects a bias in favor of larger commercial carriers, while ignoring the needs of small businesses operating site specific systems.<sup>245</sup>

112. As we have discussed in the service-specific rulemakings for those services where we have decided to or proposed to adopt geographic area licensing, we believe that using predefined geographic areas better serves the public interest than other types of licensing schemes, such as site-specific licensing.<sup>246</sup> Under a geographic licensing approach, licensees can build and modify their systems in response to market demands without having to come to the Commission for additional authorizations. Thus, such an approach speeds the licensing process and reduces the need for multiple filings to serve a single geographic area (which are required under a site-specific licensing approach). In addition, geographic licensing is administratively more efficient and less burdensome because licensees are required to file fewer license applications and, thus, the Commission has fewer applications to process.

113. With respect to the impact on incumbent licensees of geographic area licensing, we note that in the context of the service-specific rulemakings, the Commission has either proposed or adopted provisions designed to protect incumbent operations from harmful interference as a result of future operations under the new licensing approach.<sup>247</sup> We believe that this approach represents a balancing of competing interests, including those of incumbents, new entrants, small businesses, and large businesses.<sup>248</sup>

114. While we are mindful of the challenges that small businesses may face in their efforts to acquire geographic area licenses, we have taken steps to alleviate the perceived difficulties. First, our decisions defining the service areas and spectrum blocks by which licenses for wireless services are to be assigned have taken into account the needs of small businesses. For example, in some services, we have adopted band plans that included licenses for small geographic areas and spectrum blocks; thus, promoting economic opportunity for a wide variety of applicants, including small businesses, rural telephone

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<sup>245</sup> Small Business in Telecommunications Comments at 12.

<sup>246</sup> 800 MHz SMR Order and NPRM, 11 FCC Rcd at 1503-1515; 900 MHz SMR Order, 11 FCC Rcd at 2653-56.

<sup>247</sup> 800 MHz SMR, 11 FCC Rcd at 1515-1517; 900 MHz SMR Order, 11 FCC Rcd at 2653-56.

<sup>248</sup> See, e.g., 800 MHz SMR Order and NPRM, 11 FCC Rcd at 1503-1515.

companies and businesses owned by minorities or women.<sup>249</sup> Moreover, in many of our auctionable services, we have adopted special provisions, such as bidding credits and installment payment plans, to assist small businesses, minority and women-owned businesses and rural telephone companies in acquiring spectrum assigned in geographic service areas and spectrum blocks.<sup>250</sup>

115. Finally, we believe, and many commenters in this proceeding agree,<sup>251</sup> that rules and policies that permit geographic partitioning<sup>252</sup> and spectrum disaggregation<sup>253</sup> may also address the concerns raised regarding geographic area licensing. We recently adopted rules permitting all licensees in the broadband PCS service to partition their license areas or disaggregate their spectrum blocks to entities that meet certain minimum eligibility requirements.<sup>254</sup> We note that this is a relatively new policy, and will be subject to review and refinement in specific proceedings if in practice it does not result in the intended benefits. We hope that such provisions will help to: (1) remove potential impediments to

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<sup>249</sup> For example, in broadband PCS, the Commission adopted a band plan consisting of two 30 MHz spectrum blocks licensed by Major Trading Areas (MTAs) and four smaller blocks each consisting of 10 MHz of spectrum licensed by Basic Trading Areas (BTAs), a smaller geographic service area. 47 C.F.R. § 24.229. *800 MHz SMR*, 11 FCC Rcd at 1479-1480. We also note that the Commission has increasingly used EAs, which are smaller than MTAs. See, e.g., *800 MHz SMR Order and NPRM*, 11 FCC Rcd at 1484-1485.

<sup>250</sup> See, e.g., *220 MHz Third Report and Order*, FCC 97-57, at ¶¶ 296, 301.

<sup>251</sup> See, e.g., American Mobile Telecommunications Association Comments at 11; Small Business in Telecommunications Comments at 22; Center for Training and Careers Comments, at 2; United States Hispanic Chamber of Commerce Comments at 1-2; National Wireless Resellers Association Comments at iii, 13; Rural Telecommunications Group Comments at 5, 10, 20-22.

<sup>252</sup> Geographic partitioning is the assignment of geographic portions of a license along geopolitical or other boundaries (e.g., county lines).

<sup>253</sup> Spectrum disaggregation is the assignment of discrete portions or "blocks" of a spectrum license from the existing licensee to a geographic licensee or qualifying entity.

<sup>254</sup> *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees*, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 96-148 and GN Docket No. 93-113, FCC 96-474 (released Dec. 20, 1996) (*CMRS Partitioning and Disaggregation Order and FNPRM*).

entry thereby increasing competition in the PCS marketplace; (2) encourage parties to use spectrum more efficiently; and (3) speed service to unserved and underserved areas. Parties that are unsuccessful bidders or that did not participate in the PCS auctions will be able to use partitioning and disaggregation as a method to acquire PCS licenses after the auctions.<sup>255</sup> Smaller or newly-formed entities, for example, may enter the PCS market for the first time through partitioning and disaggregation.<sup>256</sup>

116. In addition, we currently permit or are considering similar partitioning and disaggregation rules in services other than broadband PCS, including the Multipoint Distribution Service (MDS),<sup>257</sup> 800 MHz SMR,<sup>258</sup> paging,<sup>259</sup> 220 MHz,<sup>260</sup> 38 GHz fixed point-to-point microwave,<sup>261</sup> Wireless Communications Service (WCS),<sup>262</sup> Local Multipoint

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<sup>255</sup> See *id.* at ¶ 48.

<sup>256</sup> *Id.* at ¶ 13.

<sup>257</sup> *MDS Report and Order*, 10 FCC Rcd at 9614-15 (allowing partitioning for all BTA licensees).

<sup>258</sup> *800 MHz SMR Order and NPRM*, 11 FCC Rcd at 1576, 1578-1580 (permitting partitioning for rural telephone companies and requesting comment on partitioning and disaggregation for EA licensees in the upper 10 MHz block).

<sup>259</sup> *Paging Second Report and Order*, 12 FCC Rcd at 2821-2826 (permitting geographic partitioning for paging licensees and seeking comment on disaggregation for all licensees).

<sup>260</sup> *220 MHz Third Report and Order*, FCC 97-57 (permitting partitioning for all Phase II 220 MHz licensees and seeking comment on partitioning for Phase I licensees and disaggregation for all licensees).

<sup>261</sup> *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, Notice of Proposed Rulemaking and Order, 11 FCC Rcd 4930, 4972-73, ¶¶ 89-90 (1995) (*38 GHz NPRM*) (proposing partitioning for rural telephone companies and seeking comment on whether partitioning and disaggregation should be available to all licensees).

<sup>262</sup> *WCS Report and Order*, FCC 97-50 (permitting partitioning and disaggregation for all WCS licensees).



Distribution Service (LMDS),<sup>263</sup> cellular,<sup>264</sup> and General Wireless Communications Services (GWCS).<sup>265</sup> We also are exploring whether to allow partitioning and disaggregation for other Commercial Mobile Radio Services.<sup>266</sup> We believe these efforts may enhance the ability of small businesses to compete in the wireless telecommunications industry.

## 2. *Spectrum Warehousing and Construction Requirements*

117. Small Business in Telecommunications also argues that our policies relating to construction requirements encourage spectrum warehousing.<sup>267</sup> As a consequence, it believes those policies create a barrier to market entry for small businesses due to the unavailability of sufficient amounts of spectrum for their use.

118. In particular, Small Business in Telecommunications points to our policy of granting extended implementation authority in the Specialized Mobile Radio (SMR) service to large companies which, it believes, encourages spectrum warehousing.<sup>268</sup> Moreover, Small Business in Telecommunications claims that the Commission has engaged in disparate treatment in enforcing construction requirements for large companies and small companies. Specifically, it claims that the Commission apparently has not cancelled any extended implementation authorizations for failure to construct and has not conducted an inventory to determine whether licensed facilities subject to extended implementation authority have been constructed. It believes small businesses that may be subject to much shorter construction

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<sup>263</sup> *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band to Establish Rules and Policies for Local Multipoint Distribution Service and Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, CC Docket No. 92-297, FCC 97-82 (released Mar. 13, 1997) (*LMDS Order and NPRM*) (permitting geographic partitioning and spectrum disaggregation for LMDS licensees).

<sup>264</sup> *CMRS Partitioning and Disaggregation Order and FNPRM*, FCC 96-474, at ¶ 95.

<sup>265</sup> *Id.* at ¶¶ 96-97.

<sup>266</sup> *See id.* at ¶ 94.

<sup>267</sup> Small Business in Telecommunications Comments at 28-34.

<sup>268</sup> *Id.* at 28.

period requirements are subjected to relatively frequent inquiries regarding their efforts to construct their systems within the applicable construction period along with being the target of finder's preference requests.<sup>269</sup> Small Business in Telecommunications further asserts that the Commission's licensing policies for companies subject to extended implementation authority have led to mass filings of applications that were not contemplated in the originally granted application. Small Business in Telecommunications argues that this practice has allowed large companies to block competing entities from obtaining additional spectrum.

119. Pursuant to either a waiver of our construction and loading rules<sup>270</sup> or Section 90.629 of the Commission's rules, some existing SMR licensees have been granted extended implementation periods of up to five years to construct their systems.<sup>271</sup> Extended implementation authority for SMRs was initially established to facilitate construction of wide-area systems by all licensees, both large and small.<sup>272</sup> We have previously stated that extended implementation authority may raise concerns about spectrum warehousing. As a result and partially in response to complaints from several small businesses that this type of extended construction period impeded their ability to acquire much needed spectrum, in 1995, we decided not to grant new extended implementation authority for SMRs in the 800

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<sup>269</sup> *Id.* at 31.

<sup>270</sup> See, e.g., *Fleet Call, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 1533, *recon. dismissed*, 6 FCC Rcd 6989 (1991); Letter from Ralph A. Haller, Chief, Private Radio Bureau to David Weisman, DA 92-1734, 8 FCC Rcd 143 (1993). Loading requirements govern the number of mobile stations that must be placed on each channel of a trunked system. 47 C.F.R. § 90.631(a). Under Section 90.631(c) of our rules, an SMR system seeking additional channels is required to demonstrate that it has achieved a loading level of 70 mobiles per channel on its existing system.

<sup>271</sup> 47 C.F.R. § 90.629. Section 90.629 of the Commission's rules provides that any such authority "is conditioned upon the licensee constructing and placing its system in operation within the authorized implementation period and in accordance with an approved implementation plan of up to five years." SMR licensees with extended implementation authority are required to submit annual certifications of compliance with their yearly station construction commitments. Moreover, if the Commission concludes, at any time, that the licensee has failed to meet such construction commitments, it may terminate extended implementation authority and give the licensee six months from the termination date to complete construction of the system.

<sup>272</sup> See *800 MHz SMR Order and NPRM*, 11 FCC Rcd at 1524.

MHz band.<sup>273</sup> In eliminating extended implementation authority in the 800 MHz SMR service, we noted that the geographic area licensing plan we adopted for the majority of the spectrum allocated to the service rendered extended implementation authority no longer necessary.<sup>274</sup> In addition, 800 MHz SMR licensees that were operating under extended implementation authority were required to demonstrate that continuing to allow them extended time to construct their facilities furthered the public interest.<sup>275</sup> These re-justifications are currently pending before the Wireless Telecommunications Bureau.

120. In addition, we note that in recent years, we have adopted longer construction periods which benefit all licensees, both large and small.<sup>276</sup> We also have adopted and made proposals to adopt flexible construction requirements in other wireless services.<sup>277</sup> With regard to the concerns raised regarding spectrum warehousing, we intend to initiate a proceeding relating to construction requirements generally. We anticipate that this proceeding will examine the relationship between longer and more flexible construction requirements and spectrum warehousing.

121. As noted above, Small Business in Telecommunications also suggests that the Commission's enforcement of its construction requirements has resulted in disparate treatment between large and small companies. It argues that while the Commission often grants extensions of time to large companies to construct their larger systems, the

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<sup>273</sup> *Id.* Although extended implementation authority was eliminated in the 800 MHz SMR commercial context, it remains an option for private land mobile radio services.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 1525.

<sup>276</sup> See, e.g., *Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services*, Third Report and Order, 9 FCC Rcd 7988, 8074-8077 (1994); *800 MHz SMR*, 11 FCC Rcd at 1520-1521. Recently we adopted construction requirements for EA and Regional 220 MHz licensees implementing land mobile or paging systems to construct based stations to provide coverage to at least one-third of the population of their EA or Region within five years of initial authorization and at least two-third of the population of their EA or Region within 10 years of initial authorization. Alternatively, these licensees may meet a "substantial service" construction requirement. *220 MHz Third Report and Order*, FCC 97-57, at ¶ 163.

<sup>277</sup> See, e.g., *MAS NPRM*, FCC 95-58, at ¶¶ 36-39; *WCS Report and Order*, FCC 97-50, at ¶¶ 111-115; *LMDS Order and NPRM*, FCC 97-82, at ¶¶ 266-267.

Commission rarely grants extension requests to small companies and uses its finders preference program to recover unconstructed spectrum.<sup>278</sup> It is unclear whether this argument is an extension of Small Business in Telecommunications' criticism of the extended implementation authority rules or whether Small Business in Telecommunications' claim is that the Commission has treated similarly situated companies differently in terms of considering requests for extensions of time to construct. Notably, Small Business in Telecommunications does not provide an example in which the Commission has granted an extension of time to construct to a large company while denying a similar request from a similarly situated small company. Moreover, it is not clear if Small Business in Telecommunications is suggesting that our finder's preference program somehow contributes to the problem of spectrum warehousing or itself creates a market entry barrier.<sup>279</sup> Nonetheless, we note that in a separate proceeding, we have sought comment on whether our finder's preference program should be eliminated.<sup>280</sup>

### 3. *Application Processing and Filing*

122. Small Business in Telecommunications also argues that some methods used by the Commission to process applications result in entry barriers for small businesses. For example, Small Business in Telecommunications claims that the Commission has failed to adequately oversee its frequency coordination process. It alleges that such failure has resulted in biased processing of applications as a result of the "extreme influence" large companies exert on frequency coordinators.<sup>281</sup> Small Business in Telecommunications also claims that the failure of these coordinating entities to adequately process all applications equally has resulted in large numbers of applications being filed with the Commission through application mills. It states that this problem will be exacerbated if the Commission decides to privatize further the coordination process. Small Business in Telecommunications

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<sup>278</sup> Small Business in Telecommunications Comments at 32.

<sup>279</sup> We already have eliminated finder's preference in certain services. See, e.g., *800 MHz SMR Order and NPRM*, 11 FCC Rcd at 1501; *900 MHz SMR Order*, 11 FCC Rcd at 2658-59.

<sup>280</sup> See *Amendment of Part 90 Concerning the Commission's Finder's Preference Rules*, Notice of Proposed Rulemaking, 11 FCC Rcd 13016 (1996).

<sup>281</sup> Small Business in Telecommunications Comments at 49-50.

argues that such privatization will increase costs associated with filing applications for frequencies requiring frequency coordination.<sup>282</sup>

123. We believe our recent *Refarming* decision<sup>283</sup> addresses some of the concerns raised by Small Business in Telecommunications. Specifically, we recently adopted rules that will inject competition in the frequency coordination process.<sup>284</sup> Previously, frequency coordinators had sole control over the frequencies within their pool. We expect that such competition will reduce prices, improve coordination services, and provide more flexibility to private land mobile radio licensees.<sup>285</sup>

124. Small Business in Telecommunications also argues that the Commission "needs to be more considerate of the needs of small business in its plans and provisions for electronic filing of applications and access to information."<sup>286</sup> For example, it argues that the types of software programs used by the Wireless Telecommunications Bureau for electronic filing or reviewing applications on-line do not adequately take into account the needs of small businesses because the expense of equipment needed to perform such tasks is often unaffordable by small businesses. To better meet the needs of small businesses, Small Business in Telecommunications suggests that the Commission design its programs so that they can be used on less sophisticated machines, and, in particular, can be used to prepare applications on machines which are not interconnected.<sup>287</sup>

125. We agree that our processes for electronic filing and viewing should be readily accessible by small businesses. We are taking steps to alleviate difficulties experienced by small businesses and others in accessing application and other licensing information on-line. For example, the Wireless Telecommunications Bureau is currently evaluating software that would make it easier for licensees to review and download only that information they need

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<sup>282</sup> *Id.* at 51-53.

<sup>283</sup> *Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them*, Second Report and Order, PR Docket No. 92-235, FCC 97-61 (released Mar. 12, 1997) (*Refarming Second Report and Order*).

<sup>284</sup> *Id.* at ¶ 40.

<sup>285</sup> *Id.*

<sup>286</sup> Small Business in Telecommunications Comments at 54.

<sup>287</sup> *Id.* at 54-56.

from public notices listing commercial services applications and licensing information. This would reduce the amount of time and costs spent by small businesses to research the status of commercial applications.

#### 4. *Enforcement Policies*

126. Small Business in Telecommunications also argues that the Commission does not allocate sufficient resources to the enforcement of its rules. It claims that complaints filed by its members remain pending for long periods, that alleged violations of construction requirements by large companies go unaddressed and that the Commission staff has, at times, urged settlement of complaints despite apparent rule violations. Moreover, it asserts that many enforcement decisions rendered by the Commission do not comport with law. All of this, Small Business in Telecommunications argues, creates regulatory uncertainty which in turn results in unnecessary and unreasonable risk for small business operators.<sup>288</sup>

127. We agree that speedy enforcement of the Communications Act and our rules is imperative if small businesses are to participate effectively in the telecommunications industry. Indeed, we have recently taken a number of steps to improve our enforcement program. For example, we recently issued a Notice of Proposed Rulemaking proposing changes to our formal complaint procedures for common carriers in an effort to improve the speed and effectiveness of our formal complaint process.<sup>289</sup> The rules ultimately adopted would apply to commercial mobile radio service licensees and other wireless providers that are regulated as common carriers.

128. In addition, the Wireless Telecommunications Bureau's Enforcement Division has streamlined its informal complaint processes. While the time it takes to resolve such a complaint varies depending on the complexity of the issues involved, on average, the Bureau resolves such complaints within ninety days of its receipt of a complaint. Moreover, the streamlined procedures have resulted in faster resolution of written informal complaints. For example, the Enforcement Division's informal complaint resolution rate for the six month period from June 1996 to November 1996 was 87 informal complaints per month. This is an increase from its record of 45 informal complaints per month during fiscal year 1995. This represents a 93% resolution rate increase.

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<sup>288</sup> Small Business in Telecommunications Comments at 39-53; Small Business in Telecommunications Reply Comments at 6-10.

<sup>289</sup> See *supra* ¶ 88 & n.198 (discussion of *Formal Complaint NPRM*).

129. In an effort to reduce the filing of unfounded complaints against carriers, the Enforcement Division has taken steps to assist consumers in dealing with wireless carriers. For example, the Division has published a consumer information bulletin describing how to file a complaint with the FCC. Because the bulletin urges the consumer to try to resolve the complaint with the company before filing with the Commission, the benefit to the carriers involved is a reduction in the number of frivolous complaints filed. Such efforts are beneficial to carriers, both large and small, in that our experience has shown that informal complaints often are filed by consumers who are unfamiliar with industry practices and applicable FCC rules. In addition, the Division has developed fact sheets addressing a range of topics that provide the consumer with needed information about industry practices and applicable FCC rules.

130. The Enforcement Division also has engaged in a number of programs to assist small businesses and consumers. For example, the Division has published a consumer alert to potential investors, such as small business operators and consumers about how to avoid wireless telecommunications investment scams. These scams often involve situations where promoters attempt to entice unwitting small businesses and consumers into making large investments in emerging technology licenses. Because such scams misrepresent the risk or obligations associated with FCC licenses, such fraudulent activities often result in the loss of entire investments by the consumer or small business. In an effort to provide information on this subject and to decrease its occurrence, representatives of the Enforcement Division have met with various consumer groups concerning licensing fraud issues. Moreover, the Division continues to provide information about consumer complaints to the National Fraud Information Center, a private organization maintaining a database of fraud information for use by federal and state enforcement agencies. In addition, the Division provides information on licensing fraud issues to consumer groups such as the American Association of Retired Persons and the Consumer Federation of America for distribution to their membership. The Enforcement Division also has provided technical support for the Federal Trade Commission and the Securities and Exchange Commission regarding wireless investment scams and has worked to support several investigations conducted by them on this front. Representatives of the FCC staff have prepared declarations and appeared as witnesses in fraud cases brought by the FTC and SEC.

## **5. Outreach Efforts**

131. Some commenters raise the issue of outreach efforts to small businesses. For example, Voice-Tel suggests that the Commission establish a central office to address issues

of concern to small businesses.<sup>290</sup> As discussed above, the Office of Communications Business Opportunities was established to address issues relating to small communications businesses. Moreover, the Wireless Telecommunications Bureau has designated a small business contact<sup>291</sup> person to coordinate issues of particular concern to small businesses in the wireless telecommunications industry. In addition, the Wireless Telecommunications Bureau (WTB) has sponsored a number of fora to discuss upcoming auctions and wireless telecommunications services. For example, WTB held an industry forum on February 28, 1997 on the Wireless Communications Service.<sup>292</sup> Attendance at these fora was free of charge. In addition, prior to the start of service-specific FCC auctions, WTB routinely holds seminars for bidders to provide additional information about auction procedures. After each auction, WTB also conducts a customer survey of auction participants regarding their experiences in the auction and the auction process generally.

132. Members of our staff also spoke at the "Auctions '97 Conference" which was held on February 19, 1997. This conference, co-sponsored by the Wireless Telecommunications Bureau and OCBO, addressed small business opportunities in the wireless industry and included discussions on auctions planned for 1997, opportunities in contracting, resale and unlicensed devices, and financing issues. The free conference was attended by approximately 400 people. OCBO is preparing a summary of the conference highlights which will be posted on the Commission's Web site and mailed to over 2,200 small businesses listed on OCBO's mailing list. Finally, members of the Commission and its staff have spoken at numerous industry, trade association, and public interest organization conferences on opportunities in wireless services licensed by the Commission, and will continue to do so.<sup>293</sup>

## 6. *Interconnection and Resale*

133. In the *Market Entry Barriers Notice of Inquiry*, we expressly asked for comment on the obstacles small businesses face in their abilities to resell, interconnect, or

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<sup>290</sup> See Voice-Tel Comments at 17-18.

<sup>291</sup> D'wana Speight, Chief Counsel to the Chief of the Wireless Telecommunications Bureau, serves as the Bureau's designated contact person on small business concerns.

<sup>292</sup> See FCC Public Notice, *FCC Sponsors Forum on Wireless Communications Service Event To Be Held February 28, 1997 at FCC Auction Site*, DA 97-309 (released Feb. 7, 1997).

<sup>293</sup> See *infra* Appendix B (list of FCC outreach and conferences).



benefit from economies of scale.<sup>294</sup> In response to these questions, National Wireless Resellers Association<sup>295</sup> raised a number of concerns regarding market entry barriers for small businesses. First, it argues that some Commission policies erect significant market barriers to small wireless resellers.<sup>296</sup> For example, it questions the Commission's decision to sunset its longstanding rule prohibiting carriers from restricting resale of their services.<sup>297</sup> National Wireless Resellers Association also argues that the Commission's decision erects a market entry barrier because as facilities-based carriers will use the Commission's sunset provision as a basis for refusing to negotiate resale agreements, while financial institutions, sensing the carriers' reluctance to negotiate, will refuse to provide capital to resellers.

134. National Wireless Resellers Association further argues that the Commission's inaction in resolving disputes about Commercial Mobile Radio Service (CMRS) interconnection issues and the pending reseller complaints on the same subject have created a regulatory environment in which carriers, despite the requirements of Sections 201 and 202 of the Communications Act, feel no pressing obligation to negotiate in good faith with resellers regarding either resale or switch-based resale agreements.<sup>298</sup> National Wireless Resellers Association contends that this has resulted in significant barriers to entry and expansion by delaying additional competition and the deployment of innovative services and by creating uncertainty in the industry impacting resellers' access to capital.

135. In addition, National Wireless Resellers Association argues that the Commission must endeavor to balance the unequal bargaining positions between facilities-based carriers and resellers. To accomplish this, it suggests that the Commission: (1) adopt a policy promoting unencumbered resale and interconnection; (2) actively enforce the requirements of Sections 201 and 202 of the Act and require carriers to interconnect with reseller switches; (3) adopt rules promoting geographic partitioning and spectrum

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<sup>294</sup> *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6299-6300.

<sup>295</sup> National Wireless Resellers Association is a trade association representing the interests of the wireless resale industry.

<sup>296</sup> National Wireless Resellers Association Comments at 6.

<sup>297</sup> *Id.* at 7. See *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, First Report and Order, 11 FCC Rcd 18455 (1996) (*CMRS Resale Order*), petitions for recon. pending.

<sup>298</sup> National Wireless Resellers Association Comments at 10-11.

disaggregation of channels; and (4) immediately classify facilities-based carriers as incumbent local exchange carriers (LECs).<sup>299</sup>

136. In our *CMRS Resale* decision, we extended the resale rule applying to cellular carriers to broadband PCS and covered SMR providers. We also provided that this rule will sunset five years after we award the last group of initial licenses for currently allocated broadband PCS spectrum.<sup>300</sup> A petition for reconsideration is now pending regarding this issue and, therefore, we will address National Wireless Resellers Association's concerns about the resale sunset in the context of that proceeding. We note that we intend to actively enforce the requirements of Sections 201 and 202 of the Telecommunications Act, as well as other provisions of the Act and our rules. To date, the Wireless Telecommunications Bureau has received ten formal complaints regarding resale obligations. Of these ten complaints, six have been resolved and four are pending. The Wireless Telecommunications Bureau also has received four complaints regarding interconnection obligations (including reseller/switch interconnection issues), which are pending. We further note that we already have taken steps to implement National Wireless Resellers Association's suggestion that we "promote geographical partitioning of licenses and disaggregation of channels"<sup>301</sup> as a way to provide existing licensees and new entrants, including resellers, with a fair opportunity to compete and develop their businesses. Finally, with respect to National Wireless Resellers Association's suggestion that we recognize that facilities-based wireless carriers offering local exchange service should be treated as incumbent local exchange carriers, we note that we rejected a similar argument in our *First Local Competition Order*.<sup>302</sup> In the *First Local Competition Order*, we concluded that CMRS providers are not *de facto* LECs simply because they provide telephone exchange and exchange access services.<sup>303</sup> In addition, we

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<sup>299</sup> *Id.* at 12-18.

<sup>300</sup> See *CMRS Resale Order*, 11 FCC Rcd 18455.

<sup>301</sup> National Wireless Resellers Association Comments at 13.

<sup>302</sup> See *First Local Competition Order*, 11 FCC Rcd at 15995-15996 (the Commission declined to treat CMRS providers as local exchange carriers for purposes of Section 251(c) of the Communications Act). The National Wireless Resellers Association states that it disagrees with the Commission's conclusion in that proceeding.

<sup>303</sup> *Id.* at 15996.

noted that Congress also concluded that CMRS providers' offering of such services, by itself, did not require them to be classified as LECs.<sup>304</sup>

#### 7. *Definition of "Covered SMR"*

137. In the CMRS proceeding, the Commission determined that an SMR licensee offering interconnected service falls within the statutory definition of an CMRS provider.<sup>305</sup> American Mobile Telecommunications Association argues that this is an "over-inclusive" definition which creates a market entry barrier.<sup>306</sup> It explains that, contrary to the Commission's intention, its definition of a "covered SMR" will include many licensees offering primarily local, dispatch service to specialized customers in a non-cellular system configuration.<sup>307</sup> American Mobile Telecommunications Association also argues that these entities, many of which are small businesses and which cannot compete against other CMRS providers, will be subject to a panoply of CMRS-related regulations which will result in increased costs.<sup>308</sup> We note that the "covered SMR" definition issue is currently pending before the Commission in a number of proceedings.<sup>309</sup> We will fully address American Mobile Telecommunications Association's concerns in the context of those proceedings.

#### 8. *Competitive Bidding Incentives*

138. As we stated in the *Market Entry Barriers Notice of Inquiry*, Section 309(j) of the Act, like Section 257, embodies Congress' intent to facilitate opportunities for small

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<sup>304</sup> *Id.*

<sup>305</sup> *Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411 (1994) (CMRS Second Report and Order).

<sup>306</sup> American Mobile Telecommunications Association Comments at 2.

<sup>307</sup> *Id.* at 13.

<sup>308</sup> *Id.* at 14.

<sup>309</sup> See, e.g., *CMRS Resale Order*, 11 FCC Rcd 18455; *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 (1996), First Memorandum Opinion and Order on Reconsideration, FCC 97-74 (released Mar. 11, 1997); American Mobile Telecommunications Association Petition for Declaratory Ruling (filed Dec. 16, 1996).

businesses in telecommunications.<sup>310</sup> In enacting Section 309(j), Congress found that "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries"<sup>311</sup> and that small businesses should "continue to have opportunities to become Commission licensees."<sup>312</sup> To this end, Section 309(j) requires the Commission to establish competitive bidding rules and other provisions to ensure that small businesses, businesses owned by minorities and women, and rural telephone companies (collectively referred to as "designated entities") have an opportunity to participate in the wireless telecommunications industry.

139. Section 309(j) requires that in designing systems of competitive bidding, the Commission "promot[e] economic opportunity and competition . . . by disseminating licenses among a wide variety of applicants, including small businesses . . . and businesses owned by members of minority groups and women."<sup>313</sup> Section 309(j)(4)(D) requires that in prescribing regulations, the Commission "ensure that small business . . . and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and for such purposes, consider the use of tax certificates, bidding preferences, and other procedures."<sup>314</sup>

140. The Commission has designed a number of incentives to encourage the participation of designated entities in the wireless spectrum-based services. For example, in the broadband PCS auctions, the Commission established entrepreneurs blocks in which participation was limited to applicants with \$125 million or less in annual gross revenues for the previous two years and total assets of \$500 million or less.<sup>315</sup> Other incentives have

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<sup>310</sup> *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6286.

<sup>311</sup> H.R. Rep. No. 111, 103rd Cong., 1st Sess. 254 (1993).

<sup>312</sup> *Id.* at 255.

<sup>313</sup> 47 U.S.C. § 309(j)(3)(B).

<sup>314</sup> 47 U.S.C. § 309(j)(4)(D). Subsequent to Section 309(j)'s enactment, Congress eliminated the Commission's minority tax certificate program. Self-Employed Health Insurance Act of 1995, Pub L. No. 104-7, § 2, 109 Stat. 93 (1995).

<sup>315</sup> *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5537. *See also Competitive Bidding Sixth Report and Order*, 11 FCC Rcd 136.

included reduced upfront payments,<sup>316</sup> bidding credits,<sup>317</sup> installment payment plans with favorable interest rates,<sup>318</sup> and reduced down payments on winning bids.<sup>319</sup> In establishing these competitive bidding rules, the Commission concluded that:

[t]he record clearly demonstrates that the primary impediment to participation by designated entities is lack of access to capital. This impediment arises for small businesses from the higher costs they face in raising capital and for businesses owned by minorities and women from lending discrimination as well. In this regard, it should be noted that although auctions have many beneficial aspects, they threaten to erect another barrier to participation by small businesses and businesses owned by minorities and women by raising the costs of entry into spectrum-based services.<sup>320</sup>

141. Many commenters noted that access to capital continues to be a primary barrier to small business participation in wireless services.<sup>321</sup> However, many stated that

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<sup>316</sup> See *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5599-5600 (25% reduction for all broadband PCS C block small business applicants).

<sup>317</sup> See, e.g., *D, E & F Block Competitive Bidding Report and Order*, 11 FCC Rcd at 7875-7876 (25% bidding credit for small businesses and 15% bidding credit for very small businesses); *Competitive Bidding Sixth Report and Order*, 11 FCC Rcd at 161 (25% bidding credit for small businesses in broadband PCS C block auctions); *900 MHz SMR*, 11 FCC Rcd at 1705-06 (15% bidding credit for very small businesses and 10% bidding credit for small businesses).

<sup>318</sup> See, e.g., *800 MHz SMR Order and NPRM*, 11 FCC Rcd at 1574; *Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, Second Report and Order, 11 FCC Rcd 624, 662-663 (1996) (*GWCS Second Report and Order*).

<sup>319</sup> See, e.g., *GWCS Second Report and Order*, 11 FCC Rcd at 663.

<sup>320</sup> *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5537.

<sup>321</sup> See, e.g., Small Business in Telecommunications Comments at ii; Integrated Communications Comments at 1; Center for Training and Careers Comments at 2; National Paging and Personal Communications Association Comments at 2; American Mobile

despite our incentives, the use of competitive bidding itself has become a barrier as it has resulted in higher costs for entry into wireless spectrum-based services.<sup>322</sup> For example, Small Business in Telecommunications argues that small companies paid more for spectrum at auction than large publicly-traded corporations.<sup>323</sup> Small Business in Telecommunications asserts that this dynamic was due to the likelihood that small licensees would draw competing bids from those entities that quickly recognize that in the "auction battle," the small business participant has limited resources, while large companies are scaring off competing bidders who presumed that the larger entity was both willing and able to continue the bidding process to high levels.<sup>324</sup> Small Business in Telecommunications further argues that the Commission should exercise a more judicious use of auctions, following a comprehensive examination of alternative licensing methods. It also contends that the Commission should closely evaluate the use of auctions in frequencies occupied with incumbents, especially where the incumbents are small businesses.<sup>325</sup>

142. As noted above, we have recognized previously that competitive bidding, despite the public interest benefits associated with its use, has the potential to erect another barrier for small businesses and other designated entities by raising the costs of entry into spectrum-based services.<sup>326</sup> However, we note that Section 309(j) provides mechanisms to address this potential problem, and the Commission has adopted special incentives for designated entities in various services. In addition, our policies regarding geographic partitioning and spectrum disaggregation should aid small businesses and other entrepreneurs through the creation of smaller, less capital intensive licenses that are more easily within the reach of smaller entities. Moreover, such policies may increase access to capital that can be

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Telecommunications Association Comments at 9; Williams Testimony at 1-2.

<sup>322</sup> See, e.g., Small Business in Telecommunications Comments at 9-38; Small Business in Telecommunications Reply Comments at 4-5; American Mobile Telecommunications Association Comments at 8, 10; National Wireless Resellers Association Comments at 4.

<sup>323</sup> Small Business in Telecommunications Comments at 25 & n.13. See also American Mobile Telecommunications Association Comments at 10.

<sup>324</sup> Small Business in Telecommunications Comments at 25.

<sup>325</sup> *Id.* at 38.

<sup>326</sup> *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5537.

used to construct and maintain wireless systems.<sup>327</sup> We further note that small businesses have both participated in and been successful bidders in the majority of spectrum auctions we have conducted to date. Specifically, in our simultaneous multiple-round spectrum auctions, 79% of the auction bidders were small businesses (as defined for each respective service) and small businesses acquired 54% of the total licenses offered in these auctions.<sup>328</sup>

143. Finally, with respect to Small Business in Telecommunications' suggestion that the Commission examine alternatives to competitive bidding, we note that in granting the Commission authority to assign licenses through competitive bidding, Congress recognized the benefits of this assignment method in ensuring the efficient use of spectrum and faster deployment of new services and technologies to the public as opposed to other methods of licensing. Specifically, Congress found that other licensing methods such as lotteries and comparative hearings "in many respects . . . have not served the public interest."<sup>329</sup> Indeed, in authorizing the Commission's use of competitive bidding, Congress limited the Commission's authority to license spectrum using lotteries.<sup>330</sup> Consequently, we will

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<sup>327</sup> See *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees*, Notice of Proposed Rulemaking, 11 FCC Rcd at 10195-10196 (1996).

<sup>328</sup> These results include auctions for the narrowband PCS, broadband PCS, direct broadcast satellite, multipoint and/or multichannel distribution, 900 MHz SMR, and digital audio radio services. The Interactive Video and Data Service (IVDS) service auction was an oral outcry auction; thus, those results are excluded.

<sup>329</sup> H.R. Rep., No. 111, 103rd Cong., 1st Sess. 248. Congress noted that comparative hearings "frequently have been time consuming, causing technological progress and the delivery of services to suffer." *Id.* Lotteries, moreover, "engendered rampant speculation; undermined the integrity of the FCC's licensing process and, more importantly, frequently resulted in unqualified persons winning an FCC license. Many lottery applicants had no intention to build or operate a system using the spectrum, but instead only sought to acquire a license at nominal cost and then sell it, making a large profit and at the same time delaying the delivery of services to the public." *Id.*

<sup>330</sup> See 47 U.S.C. § 309(i)(1) (The Commission has the authority to use lotteries if "(A) there is more than one application for any initial license of construction permit which will involve a use of the electromagnetic spectrum; and (B) the Commission has determined that the use is not described in subsection [309](j)(2)(A)"). Section 309(j)(2)(A) authorizes the use of competitive bidding if, among other things, the principal use of the spectrum is for subscription-based services. 47 U.S.C. § 309(j)(2)(A).

continue to seek comment, where appropriate, on the use of competitive bidding to assign licenses for individual services in specific rulemaking proceedings, and we will continue to assign licenses for spectrum-based services through competitive bidding where permitted by the Communications Act and where we find that the public interest would be served. However, to the extent Small Business in Telecommunications suggests that we engage in a broad examination of our licensing alternatives, we note that Section 309(j)(12) requires the Commission, no later than September 30, 1997, to conduct a public inquiry and submit a report to Congress evaluating the use of competitive bidding, including the extent to which competitive bidding has improved the efficiency and effectiveness of the process for granting licenses and has facilitated the introduction of new spectrum-based technologies and the entry of new companies in the telecommunications market.<sup>331</sup> We anticipate requesting information from the public to be included in this report shortly.

144. In the *Market Entry Barriers Notice of Inquiry*, we asked for comment on whether our competitive bidding incentives have enhanced opportunities for small business participation. We also asked how existing incentives could be modified and invited suggestions for new mechanisms. In addition, we sought preliminary views on how Section 309(j) incentives have operated in the five completed auctions employing small business incentives.<sup>332</sup>

145. We received several comments in response to these inquiries. NextWave has a positive view of the competitive bidding incentives used thus far, stating that "[d]espite many setbacks, the Commission crafted a set of rules for and conducted the recent C block auction in a manner that has met, in substantial part, the Congressional mandate of "disseminating licenses among a wide variety of applicants."<sup>333</sup>

146. Other commenters, however, did not share this view. Thompson PCS states that very few small businesses won Basic Trading Area (BTA) licenses in the C block auction.<sup>334</sup> It believes this was because the criteria used to qualify as an entrepreneur was "far to [sic] lax."<sup>335</sup> PCS Alliance apparently agrees, calling the Commission's definition of

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<sup>331</sup> 47 U.S.C. § 309(j)(12).

<sup>332</sup> *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6308.

<sup>333</sup> NextWave Comments at 2.

<sup>334</sup> Thompson PCS Comments at 3.

<sup>335</sup> *Id.*



an "entrepreneur" for purposes of the C block auction "mystifying."<sup>336</sup> American Mobile Telecommunications Association, noting that small business bidders won 26% of the 900 MHz licenses auctioned earlier this year, questions whether such a level of participation by small businesses can be expected in future auctions.<sup>337</sup> It states that tiered bidding credits and installment payment plans are valuable, but have only a relatively limited impact on breaching entry barriers in non-entrepreneur block auctions.<sup>338</sup>

147. Other commenters allege that the Commission has a practice of changing rules in mid-stream.<sup>339</sup> Along these lines, minority and women entrepreneurs, in particular, complain that they lost financing once the Commission eliminated its race- and gender-specific competitive bidding provisions in light of *Adarand v. Peña*.<sup>340</sup> They argue that with the elimination of these special provisions, the incentives for many companies to offer financing or enter into strategic alliances with these entrepreneurs disappeared. As a result, many found it more difficult or even impossible to participate in the broadband PCS C block auction.<sup>341</sup> PCS Alliance states that these problems were exacerbated by the Commission's decision to issue licenses in the broadband PCS A and B blocks first.<sup>342</sup> Williams sums up his opinion of the success of the Commission's special incentives by stating that such incentives, where available, succeeded in generating substantial participation by small businesses and businesses owned by minorities or women in the auctioning process and a fair allocation of licenses was issued to the small and minority and women-owned businesses. However, where such incentives were not available, few, if any, small and minority and women-owned businesses acquired licenses.<sup>343</sup>

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<sup>336</sup> PCS Alliance Comments at 1.

<sup>337</sup> American Mobile Telecommunications Association Comments at n. 18.

<sup>338</sup> *Id.*

<sup>339</sup> See, e.g., Integrated Communications Group et al. Comments at 2; PCS Alliance Comments at 1.

<sup>340</sup> 115 S.Ct. 2097 (1995) (*Adarand*). See *infra* ¶ 210 (discusses *Adarand*).

<sup>341</sup> See, e.g., Integrated Communications Group Comments et al. at 2; Thompson PCS Comments at 1; Kansas Star Communications Comments at 2; PCS Alliance Comments at 1.

<sup>342</sup> PCS Alliance Comments at 1.

<sup>343</sup> Williams Testimony at 3. See also *infra* ¶ 219 (discusses related comments).

148. Many commenters provide suggestions for further enhancing opportunities for small businesses in the auction process. Williams states that the Commission should adopt entrepreneur blocks in other auctionable services and consider a tiered incentives process.<sup>344</sup> Several commenters suggest that the Commission adopt small business definitions that reflect true small businesses and take steps to avoid the possibility of large companies circumventing these definitions.<sup>345</sup> Thompson PCS states that the Commission should relax its PCS cross-ownership rules.<sup>346</sup> American Mobile Telecommunications Association suggests that the Commission also must consider its auction procedures in looking for ways to assist small businesses. For example, it argues that the Commission's use of simultaneous multiple round auctions places a burden on small businesses which generally do not have the resources to oversee a bidding process which can span months.<sup>347</sup>

149. We agree that we must continue to take steps to eliminate entry barriers and other burdens that discourage small businesses from participation in auctions for spectrum-based services. Some of the suggestions made by commenters already have been implemented. For example, the Commission continues to adopt special incentives to encourage the participation of small businesses in auctions. Indeed, the Commission has adopted or proposed tiered bidding credits and, in some cases, tiered installment payment plans as suggested in Williams' testimony in a number of services, such as: broadband PCS D, E & F block,<sup>348</sup> WCS,<sup>349</sup> 900 MHz SMR,<sup>350</sup> 800 MHz SMR,<sup>351</sup> Interactive Video and Data

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<sup>344</sup> Williams Testimony at 4, 5, 6. See also American Mobile Telecommunications Association Comments at 9 ("[E]ntrepreneur blocks that limit participation to genuinely small business defined on a service-by-service basis considering factors such as size of spectrum awards and expected capital requirements [are] a key to addressing what is otherwise a significant barrier to entry").

<sup>345</sup> TRA Communications Consultants Comments at 2; Thompson PCS Comments at 3. See also American Mobile Telecommunications Association Comments at n. 19 (most respondents to survey believe gross revenue test should be used to define small businesses).

<sup>346</sup> Thompson PCS Comments at 3.

<sup>347</sup> American Mobile Telecommunications Association Comments at 10. American Mobile Telecommunications Association notes that 70% of the respondents to its survey noted that they employ 15 or fewer employees, with more than half employing fewer than five employees.

<sup>348</sup> *D, E, and F Block Competitive Bidding Report and Order*, 11 FCC Rcd at 7842-7853.

Service (IVDS),<sup>352</sup> and paging.<sup>353</sup> The Commission also has eliminated the PCS cross-ownership rule.<sup>354</sup> In addition, the Commission is considering a number of changes to its competitive bidding procedures to increase the pace of auctions, and thereby, shorten the duration of each auction,<sup>355</sup> which would address, at least in part, the concerns of American Mobile Telecommunications Association noted above.

150. Finally, in the *Market Entry Barriers Notice of Inquiry*, we sought comment on whether we needed to do more to make sure that small businesses have meaningful opportunities to participate in the provision of spectrum-based services.<sup>356</sup> NextWave argues that the Commission should consider policies that support entrepreneurs in their efforts to build their systems, recognizing that these small businesses will need to build out quickly not only to comply with FCC rules, but also to reduce the lead time of licensees in the Broadband PCS "A" and "B" block. In furtherance of this objective, NextWave suggests that the Commission remain flexible in its approach to small businesses' and entrepreneurs' participation in the wireless industry. This could be accomplished by: (1) encouraging equipment vendor support by ensuring that Commission rules do not discourage vendor financing; (2) not requiring businesses that participate in the installment payment plan to sign a promissory note; (3) limiting the cross-collateralization of licenses; and (4) permitting a one-time deferral of interest payments.<sup>357</sup>

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<sup>349</sup> See *WCS Report and Order*, FCC 97-50, ¶ 193.

<sup>350</sup> *900 MHz SMR Order*, 11 FCC Rcd at 2645.

<sup>351</sup> *800 MHz SMR Order and NPRM*, 11 FCC Rcd at 1574.

<sup>352</sup> *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Tenth Report and Order, PP Docket No. 93-253, FCC 96-447 (released Nov. 21, 1996), ¶ 18.

<sup>353</sup> *Paging NPRM*, 11 FCC Rcd at 3134.

<sup>354</sup> *D, E & F Block Competitive Bidding Report and Order*, 11 FCC Rcd at 7875-7876.

<sup>355</sup> See *Competitive Bidding Part 1 Rules NPRM*, FCC 97-60.

<sup>356</sup> *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6308.

<sup>357</sup> NextWave Comments at 5-7.

151. We are considering some steps to facilitate faster build-out of PCS systems by entrepreneurs. For example, we recently adopted rules that shorten the voluntary negotiation period for relocation of microwave incumbents by PCS licensees in the "C," "D," "E," and "F" blocks from two years to one year.<sup>358</sup> We believe this rule change will help to eliminate an obstacle to entry for "C" and "F" block licensees by encouraging faster relocation of microwave incumbents and, therefore, enabling these licensees to more quickly build-out their PCS systems and commence operation. With respect to the issues raised by NextWave, we are considering the issue of cross-defaults in the context of our *Part 1 NPRM* proceeding.<sup>359</sup> In addition, we recently codified a procedure for requiring applicants eligible for the installment payment program to execute a promissory note and security agreement as a condition of participating in any installment payment plan that is offered by the Commission.<sup>360</sup> Since this practice is consistent with normal commercial and government lending practices we do not see, and NextWave has not demonstrated, how such a requirement presents a market entry barrier or other undue burden on small businesses. Finally, with respect to NextWave's request for a one-time deferral of interest payments, we note that our current rules already permit qualifying participants in the installment payment program to pay their installment payment within 90 days after its due date without any type of penalty. We also allow licensees to seek a three- to six-month grace period during which no installment payments need be made.<sup>361</sup> We believe these procedures give adequate latitude to businesses that request extra time to meet their obligations to the Commission and the government.

152. The Wireless Telecommunications Bureau is exploring using its current licensing databases to fashion specialized licensing databases which we anticipate will be of particular interest to small businesses. The objective is to provide small businesses with readily accessible information which will assist them in ascertaining additional opportunities for entry, expansion, or growth. The Bureau is exploring ways to provide interested parties with information concerning spectrum availability and types of services being provided by

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<sup>358</sup> *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, Second Report and Order, WT Docket No. 95-157, FCC 97-48 (released Feb. 27, 1997).

<sup>359</sup> See *Competitive Bidding Part 1 Rules NPRM*, FCC 97-60, at ¶¶ 76, 78. A cross-default provision would specify that if a licensee defaults on one installment payment loan, it would also default on any other installment payment loans it holds. *Id.* at ¶ 76.

<sup>360</sup> See *id.* at ¶ 10.

<sup>361</sup> 47 C.F.R. § 1.2110(e)(4)(ii).

existing licensees. We believe that the availability of such databases will facilitate small businesses' efforts to discover and realize partitioning and disaggregation opportunities.

### C. *Cable Services*

153. Before addressing the specific cable-related market entry concerns raised by commenters, we note that even prior to the enactment of Section 257, the Commission already had taken significant steps to minimize the impact of our regulations on small cable businesses. In 1995, we established a new form of cable rate regulation designed to take into account the unique circumstances of small cable systems and companies.<sup>362</sup> The *Small System Order* extended rate relief to approximately 7,000 small cable systems and is the most important action the Commission has taken on behalf of small systems since the imposition of rate regulation under the 1992 Cable Act.<sup>363</sup> By tailoring rules specifically for small cable systems, the *Small System Order* has had a significant impact in easing the burdens of regulation for smaller cable companies.

154. The commenters in this proceeding have brought to our attention certain additional areas in which they believe market entry barriers exist for small cable operators and other small video programming providers. These areas include access to programming, access to capital, the franchise renewal process, certain practices of incumbent cable systems, and pole attachment rights, all of which are discussed below.

#### 1. *Access to Programming and Related Obstacles*

155. Several commenters assert that, due to their size, small cable operators have difficulty in obtaining programming on terms and conditions comparable to their larger

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<sup>362</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995) (*Small System Order*).

<sup>363</sup> In the *Small System Order*, we defined a small system as one serving 15,000 or fewer subscribers and a small cable company as one that serves no more than 400,000 subscribers across all of its systems. In addition, the Commission's Cable Services Bureau continues to entertain petitions for special relief from systems that slightly exceed the small system eligibility criteria but that can demonstrate sufficient similarities with eligible small systems so as to justify extending that relief to them as well.

competitors.<sup>364</sup> According to the Small Cable Business Association, huge price differentials for programming continue to exist that cannot be cost-justified. It also states that small cable operators have encountered difficulty due to the refusal of some independent programmers to deal with the National Cable Television Cooperative and thus are at a competitive disadvantage compared to large cable operators, DBS providers, and certain wireless providers.<sup>365</sup> Similarly, Watson Cable argues that exclusive agreements of larger cable companies with new programmers preclude access to such programming by small cable operators and asks the Commission to remove such barriers.<sup>366</sup> In a similar vein, the Small Cable Business Association argues that the Commission should restrict the ability of broadcasters to engage in disparate pricing of broadcast retransmission consent fees between large and small video programming distributors.<sup>367</sup>

156. These concerns implicate the program access rules we adopted pursuant to Section 628 of the Communications Act.<sup>368</sup> One of the purposes of Section 628 is to increase "competition and diversity in the multichannel video programming market . . . ." <sup>369</sup> In adopting program access rules, "the Commission sought to carry out Congress' preference

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<sup>364</sup> Small Cable Business Association Comments at 15. *See also* Southwest Missouri Cable Comments at 4; Press Broadcasting Reply Comments at 1-2. Describing itself as an independent broadcaster with only one television station, Press Broadcasting expresses support for the concerns voiced by Small Cable Business Association and Southwest Missouri Cable about the ability of small businesses to compete in a telecommunications marketplace dominated by vertically- or horizontally-integrated entities. According to Press Broadcasting, however, residual rates charged to cable operators for certain programming are significantly less than the rates charged to broadcasters for the same programming. It suggests that the Commission specifically inquire into the extent to which price differentials may distort the cost of programming. Press Broadcasting Reply Comments at 4.

<sup>365</sup> Small Cable Business Association Comments at 10-11, 18.

<sup>366</sup> Watson Cable Comments at 1-2.

<sup>367</sup> Small Cable Business Association Comments at iii & 16.

<sup>368</sup> 47 U.S.C. § 548. *See* 47 C.F.R. § 76.1000-76.1003.

<sup>369</sup> 47 U.S.C. § 548(a).

that program access disputes be resolved in the marketplace."<sup>370</sup> Based on this preference, we "specifically rejected a generally applicable approach to program access issues, such as requiring program vendors to offer their programming to all MVPDs [multichannel video programming distributors] at the same rate on the same terms."<sup>371</sup> Rather, Section 628 dictated that we narrowly tailor our rules to address conduct by vertically integrated programmers, i.e., programmers affiliated with cable operators.<sup>372</sup> Absent regulation, such programmers have the incentive and ability to favor their affiliated cable operators over competing MVPDs. Our rules thus "focus on discrimination between [MVPDs] that are in competition with each other."<sup>373</sup> Commenters in the instant proceeding urge us to expand the focus of the program access rules by more broadly regulating the disparity between programming rates paid by small cable operators and rates paid by larger MVPDs, even where that disparity does not involve competing MVPDs.

157. We do not deem it appropriate to seek to impose new regulations governing the relationship between programmers and distributors at the wholesale level. While higher programming rates obviously are not in the financial interest of smaller operators, this alone does not allow the Commission to step in with a new scheme of regulation. As discussed elsewhere in this item, our efforts to take account of the hardships faced by small cable systems have been aimed more at eliminating potentially burdensome regulatory requirements, rather than marketplace activity that does not appear to be intended to deter competition. The complaints articulated by commenters are consistent with the common practice of vendors offering discounts for bulk purchasers. Even our rules regulating vertically integrated programming vendors allow variations in rates, terms, and conditions when selling to a particular programming distributor based on "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor . . . ."<sup>374</sup> Likewise, Congress recently re-affirmed the right of a cable operator to engage in discriminatory pricing at the retail level by

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<sup>370</sup> *Applications of Turner Broadcasting System, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19595 (1996) (*Turner*).

<sup>371</sup> *Id.* at n.35.

<sup>372</sup> 47 U.S.C. § 548(b).

<sup>373</sup> *Applications of Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841, 5859 (1996).

<sup>374</sup> 47 C.F.R. § 76.1002(b)(3).

offering bulk discounts to multiple dwelling units.<sup>375</sup> Although we found in 1992 that Congress sought to rely on the marketplace to the extent possible,<sup>376</sup> the Telecommunications Act of 1996 reflects an even more deregulatory intent on the part of Congress.<sup>377</sup> In this environment, we therefore do not believe it appropriate to seek to expand the scope of our program access rules to address the disparity in programming rates where competing MVPDs are not involved.

158. With respect to disparate pricing for programming acquired through broadcaster retransmission consent, Section 325 of the Communications Act<sup>378</sup> imposed upon the Commission the duty to ensure that its regulation of broadcaster retransmission consent did not conflict with its obligation under Section 623<sup>379</sup> to ensure that basic service rates are reasonable. Subject to this proviso, Congress expressly gave broadcasters flexibility to negotiate the terms of carriage and did not appear to exclude from the negotiating table such factors as the individual characteristics of the cable system requesting carriage. As the Senate Committee Report explaining Section 325 states, it "is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals: it is not the Committee's intention in the bill to dictate the outcome of the ensuing marketplace negotiations."<sup>380</sup> We thus are reluctant to limit the scope of negotiations under the retransmission provisions of Section 325 absent clear and persuasive evidence that the present system is not meeting the objectives Congress had in mind.

## 2. *Cable Technical Standards*

159. Southwest Missouri Cable asserts that the Commission's stringent proof of performance technical standards require considerable expense and expertise that many small

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<sup>375</sup> 1996 Act, § 301(b)(2).

<sup>376</sup> See *Turner*, 11 FCC Rcd 19595, at ¶ 23.

<sup>377</sup> S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996).

<sup>378</sup> 47 U.S.C. § 325.

<sup>379</sup> 47 U.S.C. § 543.

<sup>380</sup> Senate Committee on Energy and Commerce, S. Rep. No. 92, 102d Cong., 2nd Sess. at 36 (1991).



cable operators cannot afford.<sup>381</sup>

160. Our cable technical standards serve a number of important objectives, including ensuring broadcast signals retransmitted by cable systems are not subject to material degradation, promoting uniform and nationwide standards generally, and ensuring cable systems do not exceed our cable signal leakage standards by causing excessive radiation that might interfere with use of aeronautical radio services and thereby endanger life or property. In *Cable Television Technical Standards*,<sup>382</sup> we revised our cable technical rules and required proof of performance testing to ensure compliance. We emphasized that the newly revised rules were intended "to define the basic technical quality of service cable subscribers are entitled to receive."<sup>383</sup> In deciding to exempt small cable systems serving 1,000 or fewer subscribers from having to comply with the testing component of the new rules, we stated:

[A]lthough formal testing is often needed for the regulatory process to function, much less expensive subjective viewing tests may well be adequate in more limited subscriber situations where informal resolution of complaints will necessarily be the norm. Consequently, we will not impose any formal testing requirements on cable systems serving fewer than 1,000 subscribers. However, we believe that all subscribers are entitled to receive a signal consistent with our rules. . . . Should such systems not be in compliance, the Commission generally will not take enforcement action before giving such operators a reasonable time to take remedial action.<sup>384</sup>

In addition, we stated that we would allow local franchising authorities of small cable systems "to adopt less stringent standards" because they "are in the best position to evaluate the costs of compliance with technical standards and the impact that such costs will have on

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<sup>381</sup> Southwest Missouri Cable Comments at 4.

<sup>382</sup> *Cable Television Technical and Operational Requirements, Review of the Technical and Operational Requirements of Part 76 Cable Television*, Report and Order, 7 FCC Rcd 2021 (1992) (*Cable Television Technical Standards*).

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* at 2034.

the provision of cable service."<sup>385</sup> We continue to believe that this is a reasonable approach with respect to ensuring adequate signal quality and, absent a fuller reexamination, represents an appropriate balancing of the need for adequate technical standards and the interests of small cable businesses.<sup>386</sup>

161. Additional testing and reporting requirements apply when a cable operator transmits signals over aeronautical frequencies.<sup>387</sup> Although these rules further important safety considerations, it may be possible to eliminate certain reporting requirements to ease regulatory burdens on smaller entities, without jeopardizing public safety. After further examination, we will decide whether to propose relaxed reporting requirements in this context.

### 3. Access to Capital and the Definition of "Affiliate"

162. Commenters suggest the Commission could ease the difficulty small cable operators face in obtaining access to capital by narrowly defining the term "affiliate" as that term is used in the small cable operator provisions of the Telecommunications Act.<sup>388</sup> As enacted by the 1996 Act, Section 623(m) of the Communications Act,<sup>389</sup> grants partial and, in some cases, total rate deregulation to small cable operators in franchise areas where they serve 50,000 or fewer subscribers. As set forth in the *Cable Act Reform Order*, and pursuant to statutory definitions, a small cable operator is an operator that, directly and through its affiliates, serves fewer than 1% of all the subscribers in the United States and is not affiliated with entities having gross annual revenues exceeding \$250 million in the aggregate. The Commission has requested comment on the manner in which the term "affiliate" should be defined for purposes of determining whether a particular cable operator qualifies as a "small cable operator" entitled to rate deregulation.

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<sup>385</sup> *Id.*

<sup>386</sup> We note that the 1996 Act amended certain rules regarding enforcement of technical standards. See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 5937, 5952 (1996) (*Cable Act Reform Order*). We have adopted interim rules, and soon will adopt final rules, implementing these provisions. *Id.*

<sup>387</sup> 47 C.F.R. §§ 76.610 - 76.614.

<sup>388</sup> 1996 Act, § 302(c). See *Cable Act Reform Order*, 11 FCC Rcd at 5947-48.

<sup>389</sup> 47 U.S.C. § 543(m).

163. A number of commenters argue that in determining whether one entity is affiliated with another, we should disregard purely passive investments.<sup>390</sup> According to the Small Cable Business Association, if the Commission defines the relationships that constitute an "affiliation" too broadly, small cable operators will be forced to choose between foregoing deregulation or foregoing outside financing even though Congress intended deregulation to foster access to capital.<sup>391</sup> This, it argues, would undercut Congress' effort in the Telecommunications Act to deregulate small cable businesses and might destabilize capital markets.<sup>392</sup> Commenters recommend that the Commission adopt an affiliation standard that excludes passive investments by establishing reasonable definitions and setting non-restrictive affiliation rules that give small cable access to sources of capital funding.<sup>393</sup>

164. The Commission intends to give full and careful consideration to the concerns raised by small cable companies in the *Cable Act Reform* proceeding (Docket 96-85), including the extent to which it would be appropriate to define the term "affiliated" to exclude passive investments in small cable companies. The commenters have raised important issues concerning the benefits of permitting such passive investments, but we note that substantial countervailing arguments also have been made that merit our consideration. We expect to address and resolve these issues in the near future.

#### 4. *Franchise Renewal Process*

165. The Small Cable Business Association maintains that many cable operators face significant abuse in the franchise renewal process because municipalities fail to follow the procedural protections of 47 U.S.C. § 546, and, in other instances, demand system upgrades wholly unrelated to community needs and costs or seek compensation in excess of the five percent franchise fee cap.<sup>394</sup> According to the Small Cable Business Association, because municipalities are shielded from liability for damages under 47 U.S.C. § 555A, they maintain positions contrary to federal law and force cable operators to choose between

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<sup>390</sup> National Cable Television Association Comments at 7-8; Small Cable Business Association Comments at 9, 14.

<sup>391</sup> Small Cable Business Association Comments at 14-15.

<sup>392</sup> *Id.* at iii, 9, 14.

<sup>393</sup> *Id.*; National Cable Television Association Comments at 7-8.

<sup>394</sup> Small Cable Business Association Reply Comments at 4-5.

unreasonable franchise renewal terms, litigation, or shutting down the cable system.<sup>395</sup> The Small Cable Business Association recommends that the Commission initiate an inquiry into the franchise renewal processes that exist at the municipal level and, from this investigation, recommend to Congress changes in federal law that will more affirmatively preempt overreaching by local franchise authorities.<sup>396</sup> Along similar lines, Watson Cable states that Commission staff should draft a model franchise that is fair and equitable to all parties.<sup>397</sup>

166. As the commenters recognize, Section 626(e)(1) expressly provides for a right of judicial appeal for cable operators who have been denied renewal or have been "adversely affected by a failure of the franchising authority to act in accordance with the procedural requirements" of Section 626. In view of Congress' enactment of a specific judicial remedy, and in the absence of specific information that abuses have occurred, we believe it would be premature at this juncture to move forward on the Small Cable Business Association's proposal. Nevertheless, commenters are free to bring to the Commission's attention documented instances of abuse and, if appropriate, we shall recommend legislative initiatives to address any such issues.

#### 5. *Leased Access Requirements*

167. Southwest Missouri Cable argues that imposing leased access requirements is not practicable, is a severe economic burden imposed on small business, and is totally unnecessary.<sup>398</sup> The Small Cable Business Association states the Commission should adopt leased access rules that adequately compensate small cable companies for their true costs in meeting leased access requests so that such requirements do not cripple small cable financially or competitively.<sup>399</sup>

168. Blab Television, on the other hand, asserts that the present regulatory framework involves application of an extremely complex economic formula and, under it,

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<sup>395</sup> *Id.* at 5.

<sup>396</sup> *Id.*

<sup>397</sup> Watson Cable Comments at 2.

<sup>398</sup> Southwest Missouri Cable Comments at 4.

<sup>399</sup> Small Cable Business Association at 20.

prospective leased access programmers cannot create sensible business plans.<sup>400</sup> It maintains that the complexity of Commission rules and the inaccessibility of underlying information from cable operators make it extremely difficult to determine if a given rate is "reasonable" under the statute and that, consequently, leased access programmers face artificially high carriage rates.<sup>401</sup> Blab Television states that a low, across-the-board, fixed rate would eliminate market entry barriers and protect both programmers and cable operators. It also advocates a fixed rate should serve as a rebuttable presumption that can be overcome by specific evidence provided by a cable operator.<sup>402</sup>

169. Section 612 imposes leased access requirements on cable systems generally.<sup>403</sup> Pursuant to Section 612(b)(1)(D), the leased access rules do not apply to cable systems with fewer than 36 activated channels, except to the extent required by the terms of a franchise agreement that predates enactment of the statute.<sup>404</sup> This provision exempts many smaller cable operators from leased access requirements altogether. Although the statute imposes leased access requirements on small systems that have 36 or more activated channels,<sup>405</sup> the Commission recently modified our leased access rules and included special provisions lessening the burden of leased access for qualifying small systems.<sup>406</sup> The new rules excuse operators of eligible small systems from having to respond to requests for leased access unless the leased access programmer provides specified information designed to show that its

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<sup>400</sup> On January 3, 1997, Blab Television filed a "Motion for Leave to File Late Comments" from Blab Television. We have granted its motion, and its comments have been included and considered in the record of this proceeding.

<sup>401</sup> Blab Television Comments at 5-7.

<sup>402</sup> *Id.* at 8-9.

<sup>403</sup> 47 U.S.C. § 532.

<sup>404</sup> 47 U.S.C. § 532(b)(1)(D).

<sup>405</sup> 47 U.S.C. § 532(b)(1)(A)-(C).

<sup>406</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Leased Commercial Access*, Second Report and Order and Second Order on Reconsideration, CS Docket No. 96-60, FCC 97-27 (released Feb. 4, 1997). See 47 U.S.C. § 532.

request is bona fide.<sup>407</sup> The rules also give qualifying small system operators twice as much time as other cable operators to comply with certain procedural deadlines that are triggered when a programmer makes a valid request for leased access time.<sup>408</sup> In addition, the revised rules also should benefit small leased access programmers, such as Blab Television, because the rules should result in lower maximum rates for tiered services, permit resale, grant access to highly penetrated tiers, and require part-time rates to be prorated without a surcharge.<sup>409</sup> While the new rules do not adopt the approach recommended by Blab Television, they include an "average implicit fee" formula for calculating the maximum reasonable rate, which should lead to reduced rates for users such as Blab Television. We believe the modified leased access rules strike the proper balance required to ensure that the congressional objectives underlying Section 612 are fully realized without imposing onerous burdens on small cable systems.

#### 6. *Access Contracts to Multiple Dwelling Units*

170. OpTel maintains that cable operators often enter into service contracts with owners of multiple dwelling units (MDUs) that end up being "perpetual" and thus allow franchised cable operators to lock-up whole blocks of subscribers.<sup>410</sup> According to OpTel, these perpetual contracts block market entry and slow the development of competition.<sup>411</sup> It maintains that the Commission should apply a "fresh look" policy to perpetual or other long-term contracts and provide an opportunity for MDU owners or managers to escape such contracts.<sup>412</sup> OpTel contends that the Commission has applied the "fresh look" approach in the common carrier area and has the authority to apply it in this context. Applying this policy would make it easier for an incumbent provider's established customers to consider taking service from new entrants and obtain the benefits of a new, more competitive environment, according to OpTel.<sup>413</sup> In a similar vein, Watson Cable states that exclusive

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<sup>407</sup> *Id.* at ¶ 134.

<sup>408</sup> *Id.* at ¶¶ 104, 130.

<sup>409</sup> *Id.* at ¶ 160.

<sup>410</sup> OpTel Comments at 1-3.

<sup>411</sup> *Id.* at 4-5.

<sup>412</sup> *Id.* at 5-8.

<sup>413</sup> *Id.* at 5-9.

agreements of larger cable companies with apartment complexes deny access to smaller cable companies that serve the same area.<sup>414</sup>

171. The National Cable Television Association and Tele-Communications, Inc. argue in reply comments that OpTel's proposal proceeds from faulty factual and legal premises and should not be considered in this proceeding.<sup>415</sup> They maintain that OpTel's proposal would seek abrogation of private contractual arrangements in order to allow it to obtain a competitive advantage over franchised cable operators even though no proof exists that the exclusive agreements cable operators have are the result of any different process than other MVPD agreements in existence today.<sup>416</sup> Moreover, both the National Cable Television Association and Tele-Communications, Inc. state that the contracts about which OpTel is concerned are not the type of market entry barrier contemplated by Section 257 because they do not reflect legal or regulatory barriers nor result from disparities in the ability to raise capital. Instead, such contracts are the result of arms-length, privately-negotiated agreements which are equally available to franchised cable operators and other MVPDs.<sup>417</sup>

172. These issues are related to matters that are the subject of a pending proceeding known as the "Inside Wiring" rulemaking,<sup>418</sup> where the Commission is addressing, among other things, the ability of a cable operator or other MVPDs to claim ownership or control over wiring installed within MDUs. The Commission is considering whether MDU owners and residents have sufficient flexibility to choose between competing MVPDs, or whether Commission action would be appropriate. We believe the Inside Wiring rulemaking is the better forum to address the MDU issues raised by commenters in the instant proceeding.

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<sup>414</sup> Watson Cable Comments at 1-2.

<sup>415</sup> National Cable Television Association Reply Comments at 2; Tele-Communications, Inc. Reply Comments at 3.

<sup>416</sup> National Cable Television Association Reply Comments at 3-4; Tele-Communications, Inc. Reply Comments at 3-4.

<sup>417</sup> National Cable Television Association Reply Comments at 5; Tele-Communications, Inc. Reply Comments at 2-4.

<sup>418</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, Final Order on Reconsideration and Further Notice of Proposed Rulemaking, 11 FCC Rcd 4561 (1996).

The Commission intends to act in the Inside Wiring proceeding shortly, and will address issues related to MDUs in an appropriate manner.

## 7. *Pole Attachment-Related Impediments*

173. Both the Small Cable Business Association and the National Cable Television Association maintain that cable systems that operate in rural areas face entry barriers and competitive barriers from electrical and telephone cooperatives because the rates and conditions which these entities charge for pole attachment usage are not subject to pole attachment regulation.<sup>419</sup> They recommend that the Commission inform Congress of entry barriers imposed by rural electric and telephone cooperatives that are currently exempt from federal restrictions.<sup>420</sup>

174. Specifically, they ask that we propose to Congress a statutory amendment to Section 224 of the Communications Act,<sup>421</sup> that would apply the pole attachment/access to right-of-way rules to telephone cooperatives and electric cooperatives. Those rules generally require a "utility" to grant cable operators and telecommunications providers (other than ILECs) access to any poles, ducts, conduits and rights-of-way owned or controlled by a utility and used, in whole or in part, for wire communication. The rules also regulate the rates and terms a utility may impose on cable operators and telecommunications carriers seeking access to the utility's facilities. The current law excludes from the definition of utility "any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State."<sup>422</sup> Telephone cooperatives and electric cooperatives thus are excluded from the definition of "utility." Small rural cable operators complain that cooperatives charge them exorbitant rates for pole attachments or deny access altogether. In their view, this problem is exacerbated by the fact that many cooperatives have become DBS retailers. They argue that the exemption under the pole attachment provisions of the Communications Act and our corresponding rules gives cooperatives the ability to raise their competitors' cost of doing business.

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<sup>419</sup> Small Cable Business Association Reply Comments at 1-3; National Cable Television Association Comments at 15-16.

<sup>420</sup> Small Cable Business Association Comments at 2. On the subject of pole attachments, Watson Cable maintains that larger companies tie up valuable space that does not allow for placement of additional lines on existing poles. Watson Cable Comments at 1.

<sup>421</sup> 47 U.S.C. § 224.

<sup>422</sup> 47 U.S.C. § 224(a)(1).



175. When it created this exemption almost twenty years ago, Congress found that "cooperative utilities charge the lowest pole rates" to pole users.<sup>423</sup> Further, in the rural areas generally served by cooperatives, the technical quality of over-the-air television was often poor, giving the customer-owners of these utilities "an added incentive to foster the growth of cable television in their areas."<sup>424</sup> The comments indicate that much has changed with respect to the conditions that gave rise to the exemption. Instead of charging the lowest rates, cooperative utilities now charge the highest rates, according to the comments. To the extent cooperatives offer DBS service, their incentive to foster the growth of cable television may have turned into a disincentive. While the comments thus suggest that some of the circumstances that gave rise to the exemption no longer exist, the record in this proceeding provides an inadequate basis to make a firm recommendation whether to retain or eliminate the exemption. We will continue to consider the matter.

#### 8. *Other Matters*

176. The Commission is examining other areas not specifically raised in the Section 257 proceeding that have the potential for imposing barriers on small cable businesses. For example, the Commission is revisiting its current regulation that requires cable operators to be able to override normal programming to give viewers notice of a national emergency.<sup>425</sup> Under current rules, cable systems must "provide a video interruption and an audio EAS (Emergency Alert System) message on all channels,"<sup>426</sup> which can require the purchase, installation, and maintenance of special equipment. The Commission is giving careful consideration to whether an extended implementation schedule for smaller cable systems can be developed that would satisfy Section 624,<sup>427</sup> without undermining the congressional intent underlying that section.

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<sup>423</sup> S. Rep. No. 580, 95th Cong., 2d Sess. at 18 (1978).

<sup>424</sup> *Id.*

<sup>425</sup> See *Amendment of Part 73, Subpart G of the Commission's Rules Regarding the Emergency Broadcast System*, Report and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 1786 (1994). See also *Amendment of Part 73, Subpart G of the Commission's Rules Regarding the Emergency Broadcast System*, Memorandum Opinion and Order, 10 FCC Rcd 11494 (1995).

<sup>426</sup> 47 C.F.R. § 11.51(g)(2).

<sup>427</sup> 47 U.S.C. § 544.

177. In a separate proceeding, we have sought comment on the implementation of Section 713 which requires the Commission to prescribe rules mandating that video programming be closed captioned for the benefit of persons with hearing disabilities.<sup>428</sup> Section 713(d) allows the Commission to exempt classes of video programmers and providers from our rules where the provision of closed captioning would be "economically burdensome."<sup>429</sup> The *Closed Captioning Notice* recognizes the market entry objectives of Section 257<sup>430</sup> and seeks comment on whether we should define economic burdens based on the size of the programmer or provider.<sup>431</sup>

#### ***D. Mass Media Services***

178. In the mass media area, the Commission already has made considerable progress in reducing regulatory hurdles that may impact small businesses and impede entry. We have streamlined and improved our processes so that the average time for processing routine television station sales has been reduced from three months to two months and the average time for processing non-routine radio station sales from twelve months to five months. The Mass Media Bureau also has begun publishing radio application status and station technical information on the Internet so that it is readily available to the public. It has commenced work on a project to provide for electronic filing of broadcast applications, which will scan for incomplete or inaccurate applications and provide for automatic computer analysis of interference issues. The Commission also plans to resolve the proceeding instituted to reform the comparative hearing process for the award of new broadcast licenses. All of these efforts should significantly assist small businesses by generally easing the burdens and delays associated with the regulatory process.

179. The commenters have raised additional entry barrier issues and these are addressed below.

##### ***1. Low Power Television***

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<sup>428</sup> 47 U.S.C. § 613. See *In the Matter of Closed Captioning and Video Description of Video Programming*, Notice of Proposed Rulemaking, 12 FCC Rcd 1044 (1997) (*Closed Captioning Notice*).

<sup>429</sup> 47 U.S.C. § 613(d)(1).

<sup>430</sup> *Closed Captioning Notice*, FCC 97-4, at ¶ 85 & n.165.

<sup>431</sup> *Id.* at ¶ 71.

180. Community Broadcasters Association argues that small businesses, particularly, low power television (LPTV), have not been given the amount of regulatory attention they deserve and that Section 257 requires.<sup>432</sup> More specifically, some commenters state that Section 257's goal of diversity will be rendered virtually meaningless under the Commission's proposed digital television (DTV) conversion proposal because low power television stands to lose approximately forty-five percent of its stations, thereby decreasing diversified ownership which will result in significantly less diversified programming.<sup>433</sup> These commenters maintain that the Commission must realize that, regardless of financial and other non-regulatory hurdles that small businesses face, potential investors are less likely to invest in such services if regulatory hurdles accompany business risks and handicap an enterprise.<sup>434</sup>

181. According to these interests, the Commission should change its "small business" focus from trying to facilitate multi-billion dollar bidding in spectrum auctions to assisting currently-existing businesses that are truly small so that these business are not eradicated. In particular, these commenters believe the Commission should propose multiple classes of DTV -- full power and small stations -- and open a second window for these smaller DTV allotments and designate only low power television station licensees as eligible.<sup>435</sup> They urge the Commission to use a wide range of solutions proposed by the low power television industry to protect as many existing low power television authorizations as possible and to accommodate as many of these businesses with DTV conversion channels as feasible.<sup>436</sup> For this purpose, one commenter recommends that substantial preferences be given to small business applicants and a higher preference to those who do not own any full-time radio or television stations.<sup>437</sup> Another commenter states that the Commission should stop blocking proposals to improve low power television facilities.<sup>438</sup>

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<sup>432</sup> Community Broadcasters Association Comments at 2.

<sup>433</sup> Moore Broadcasting Comments at 1; Abacus Television Comments at 4.

<sup>434</sup> Community Broadcasters Association Comments at 2.

<sup>435</sup> Abacus Television Comments at 5.

<sup>436</sup> *Id.* at 6.

<sup>437</sup> TRA Communications Consultants and Skinner Comments at 4.

<sup>438</sup> Moore Broadcasting Comments at 5.

182. With respect to concerns expressed by some commenters about the impact of the conversion of DTV on LPTV stations, on April 21, 1997, the Commission released the *DTV Fifth Report and Order* in MM Docket No. 87-268,<sup>439</sup> which issued initial licenses and established the service rules for DTV.<sup>440</sup> In the *DTV Fifth Report and Order*, following Congress' direction in Section 336(a)(1) of the 1996 Act,<sup>441</sup> we determined that initial eligibility for DTV licenses should be limited to those full-power broadcasters who, as of the date of issuance of the initial digital licenses, hold a license to operate a television broadcast station or a permit to construct such a station, or both. We reiterated our previous determination that there is insufficient spectrum to include LPTV stations and translators, which are secondary under our rules and policies, to be initially eligible for a DTV channel and that we had not been able to find a means of resolving this problem. However, we also pointed out that limiting initial eligibility to full-power broadcasters does not necessarily exclude LPTV stations from the conversion to DTV.

183. On the same day, in the *DTV Sixth Report and Order* in MM Docket No. 87-268,<sup>442</sup> we adopted a number of measures intended to minimize the impact of DTV implementation on existing LPTV service.<sup>443</sup> These measures include many of the changes to the technical rules requested by the LPTV and TV translator industries. The new rules

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<sup>439</sup> See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, MM Docket No. 87-268, FCC 97-116 (released Apr. 21, 1997) (*DTV Fifth Report and Order*).

<sup>440</sup> See *DTV Sixth Further Notice*, 11 FCC Rcd 10968. While this proceeding progressed further, all-digital advanced television systems were developed. Thereafter, the Commission began to refer to "advanced television" as "digital television" or "DTV" in recognition that, with the development of the technology, any advanced television system was certain to be digital. See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Fourth Report and Order, 11 FCC Rcd 17771, 17773 (1996).

<sup>441</sup> 47 U.S.C. § 336(a)(1).

<sup>442</sup> See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Sixth Report and Order, MM Docket No. 87-268, FCC 97-115, ¶¶ 6, 114-147 (released Apr. 21, 1997) (*DTV Sixth Report and Order*) (adopting a Table of Allotments for DTV, rules for initial DTV allotments, procedures for assigning DTV frequencies, and plans for spectrum recovery). Thus, LPTV stations will continue to have secondary status to full-service television stations. See 47 C.F.R. § 73.702(b).

<sup>443</sup> *DTV Fifth Report and Order*, at ¶ 18.

provide additional flexibility to accommodate low power operations during and after the transition to DTV and thus mitigate the impact of DTV implementation on LPTV. For example, we decided to allow low power stations that are displaced by new DTV stations to apply for a suitable replacement channel in the same area, on a first-come, first-served basis, without being subject to competing applications.<sup>444</sup> We also provided for additional operational flexibility for low power stations by removing or relaxing various restrictions imposed by the LPTV technical rules. That is, we deleted the restrictions on use of a channel either seven channels below or fourteen channels above the channel of another station in the low power TV service. In addition, we determined that LPTV and TV translator stations should be allowed to make use of terrain shielding, Longley-Rice terrain dependent propagation prediction methods, and appropriate interference abatement techniques to show that the station will not cause interference to other full or low power stations. We also decided to allow LPTV and TV translator station operators and applicants to agree to accept interference from other LPTV and TV translator stations.

184. In the *DTV Sixth Report and Order*, we also noted that, as secondary operations, LPTV and TV translator stations would be able to continue to operate until a displacing DTV station or a new primary service provider is operational. Thus, low power operations may continue on all existing TV channels, including channels 60-69, provided they do not cause harmful interference to any primary operations. Licensees of those LPTV and TV translator stations that are displaced may request operation on these channels on a non-interfering basis.<sup>445</sup> We concluded that these various rule changes would preserve many existing low power operations, open many new channels for those low power operations subject to possible displacement by DTV, and allow hundreds of LPTV and TV translators to continue service to their viewers. We further recognized that most low power stations would be able to continue to operate throughout the DTV transition.<sup>446</sup>

185. In addition to the above considerations discussed in the *DTV Sixth Report and Order*, we note that DTV may offer new opportunities for small businesses. For example, small businesses may have opportunities to apply for licenses to use much of the recovered spectrum. Also, new opportunities might arise for small businesses to participate in the manufacturing or sale of equipment for DTV, LPTV, and related services, or for wireless services that might possibly be provided over recovered spectrum from the transition by broadcasters to DTV.

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<sup>444</sup> *Id.* at ¶ 144.

<sup>445</sup> *Id.* at ¶ 142.

<sup>446</sup> *Id.* at ¶ 143.

## 2. *Wireless Cable*<sup>447</sup>

186. Integration Communications International et al. maintain that the biggest barrier to wireless cable's competition with wireline cable and DBS services and to the goal of a level playing field is insufficient channel capacity.<sup>448</sup> They state that wireless cable operators must digitize and compress the signal to increase capacity but the high costs of hardware to digitize and compress is prohibitive for small businesses.<sup>449</sup> Wireless cable interests also contend that the Commission should allow wireless cable operators to receive digitalized, compressed signals from one source such as DBS service, in order to avoid the enormous capital investment that otherwise would be necessary for digital compression equipment at each system headend.<sup>450</sup>

187. The Commission is sensitive to the commenters' complaint that existing technology for digital modulation in Multipoint Distribution Service station operation is too expensive for small businesses, and that the Commission should approve more cost effective methods of digitized signal reception by wireless cable operators. We already have taken some steps to address this issue. Specifically, we authorized the use of digital modulation techniques in MDS and ITFS on an interim basis until final rules could be promulgated.<sup>451</sup> That ruling was adopted to "provide a quick and easy framework for wireless cable operators and MDS or ITFS licensees to increase their channel capacity and service offerings through

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<sup>447</sup> "Wireless cable" is a service permitting delivery of video programming to subscribers utilizing spectrum allocated to the Multipoint Distribution Service and the Multichannel Multipoint Distribution Service (collectively referred to as MDS), as well as leased channels from the Instructional Television Fixed Service (ITFS). Wireless cable resembles cable television, but instead of coaxial or fiber optic cable, wireless cable uses over-the-air microwave radio channels to deliver programming to subscribers. Our use of the term "wireless cable" does not imply that it constitutes cable television for statutory or regulatory purposes.

<sup>448</sup> Integration Communications International et al. Comments at 1-2.

<sup>449</sup> *Id.*

<sup>450</sup> Wireless Cable Association International Comments at 1. *See also* Integration Communications International et al. Comments at 1.

<sup>451</sup> *Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, Declaratory Ruling and Order, 11 FCC Rcd 18839 (1996).

the use of digital compression techniques . . . [and to] enable the industry to gain experience with a broad array of digital technology and to perform further testing in order to fine tune performance measures for use of this technology in wireless cable systems." <sup>452</sup> In addition, on March 14, 1997, a group of entities in the wireless cable industry filed a petition for rulemaking proposing to engage in fixed two-way digital transmissions, and we issued a public notice seeking comment on the petition.<sup>453</sup> The Commission will continue to take suitable steps to enhance the wireless cable operators' ability to provide competition in the video marketplace, including, as appropriate, authorization of new technological advancements for use by such operators.

188. Broadcast Data et al. maintain that the Commission should repeal or modify Sections 21.44 and 21.912, which, in their view, unfairly impose a so-called "death penalty" on MDS licensees.<sup>454</sup> They apparently believe that, in order to operate, small MDS businesses must enter into channel leasing agreements whereby larger wireless cable entities provide programming or equipment in exchange for channel capacity as part of a channel aggregation strategy.<sup>455</sup> Because the smaller entities are at a significant bargaining disadvantage the lease terms may permit the lessee to cease providing programming or remove previously provided equipment from the licensee. Consequently, the licensee may become subject to Rule 21.303(d), which requires a licensee that has not provided service for a consecutive period of 12 months to submit its license for cancellation within 30 days, and Section 21.44 (a)(3), which compels forfeiture of a station license upon "the voluntary removal or alteration of the facilities, so as to render the station not operational for a period of 30 days or more." According to the commenters, small incumbent MDS operators are thus at the mercy of larger operators with whom the incumbent has a channel lease agreement. Moreover, they believe auction winners may be motivated to discontinue service

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<sup>452</sup> *Id.* at ¶ 2.

<sup>453</sup> FCC Public Notice, *Pleading Cycle Established for Comments on Petition for Rulemaking to Amend Parts 21 and 74 of the Commission's Rules to Enhance the Ability of Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, DA 97-637 (released Mar. 31, 1997).

<sup>454</sup> Broadcast Data et al. Comments at 7-10.

<sup>455</sup> *Id.* The commenters refer to § 21.912(d) of the Commission's Rules for the proposition that licenses may be forfeited the day following the cessation of programming. That rule section, however, only pertains to channels held or leased by cable television companies for the purpose of providing otherwise unavailable locally produced programming, and represents an exception to the rule's Cable/MDS cross-ownership prohibition.

by the terms of Section 21.932<sup>456</sup> because the vacated frequency spectrum occasioned by a cancellation or forfeiture automatically becomes part of the protected service area of the entity that received the license as a result of the MDS auction. Thus, the commentators urge that the Commission eliminate the "death penalty" provisions of the rules or guarantee the licensee access to the larger operator's site, equipment, and, if necessary, channel capacity.

189. The wireless cable industry continues to make strides towards enhancing competition in the video marketplace. Because wireless cable's ability to compete effectively with other providers on a more equal footing is tied, with other factors, to MDS operators' ability to attract investment capital, we continue to believe that channel accumulation is an essential element in the accomplishment of that goal.<sup>457</sup> Section 21.932 of our rules was specifically adopted to enhance the auction winner's opportunity for success.<sup>458</sup> Thus, we held that the "available MDS spectrum within a BTA authorization will increase if the unconstructed facilities or unused channels held by an MDS incumbent with transmitter locations within a particular BTA are forfeited or if previously proposed conditional licenses or modifications are not granted."<sup>459</sup> Moreover, we believe our rules provide sufficient safeguards to protect existing licensees in a manner consistent with the public interest. Where appropriate we will grant reinstatement pursuant to Section 21.44(b) and waivers pursuant to Section 21.303 of our rules. We caution all small business licensees, however, to scrutinize carefully any channel lease agreement before entering into such an arrangement. We believe it is the responsibility of the respective parties to negotiate the terms most suited to their needs.

### 3. *Broadcast Ownership Consolidation*

190. Some commenters maintain that ownership consolidation in the broadcast industry under relaxed ownership restrictions constitute market entry barriers. For example, the United Church of Christ and Minority Media and Telecommunications Council assert that minority-owned businesses are effectively being squeezed out of local markets by better

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<sup>456</sup> See 47 C.F.R. § 21.932 (forfeiture of incumbent MDS station licenses).

<sup>457</sup> See *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, Notice of Proposed Rulemaking, 9 FCC Rcd 7666, 7667 (1994).

<sup>458</sup> See *MDS Report and Order*, 10 FCC Rcd at 9612.

<sup>459</sup> *Id.*



financed group owners and that the Commission's definition of "local market," in combination with Section 202(b) of the 1996 Act, permits undue concentrations of ownership in local communities.<sup>460</sup> It recommends that the Commission establish a minimum number of separately-owned stations that must remain in existence in a community after a sale or transfer, that 50 percent of a community's radio and television ownership should be separately owned, and that the Commission should adopt a Grade A contour as the boundary for television station markets.<sup>461</sup> Integrated Communications Group contends that such FCC policies on consolidations, mergers, and acquisitions constitute market entry barriers for minorities because the resources of small businesses are limited and group owners greatly influence major advertisers and media budgets and buys.<sup>462</sup>

191. Similarly, National Association of Black Owned Broadcasters maintains that the Commission, the courts, and Congress have fostered policies that have resulted in consolidation of ownership in the broadcast industry and a retreat from promotion of minority ownership and that these actions include: (1) repeal of the "seven station rule"; (2) adoption of rules permitting radio duopolies; (3) Congress' repeal of the tax certificate for sales to minorities and women; (4) the U.S. Supreme Court's *Adarand* decision; and (5) the

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<sup>460</sup> United Church of Christ and Minority and Telecommunications Council Comments at 3.

<sup>461</sup> *Id.* at 3-4. See also Romar Comments at 5 (Commission should change rule that uses overlapping city-grade contours of a potential co-owned duopoly to establish market size and a duopoly's compliance). On March 25, 1997, the Minority Media and Telecommunications Council filed a supplemental reply comment in MM Docket No. 96-197 (newspaper/radio cross ownership), MM Docket Nos. 91-221 and 87-8 (TV multiple ownership), MM Docket Nos. 94-150, 92-51 and 87-154 (attribution). Letter from David Honig, Executive Director, Minority Media and Telecommunications Council to William Caton, Secretary, FCC (dated March 25, 1997) (MMTC Supplemental Request). Minority Media and Telecommunications Council suggests several incentives that could be provided in exchange for, or in recognition of, a company's efforts to promote minority ownership through incubation, financing, and sale initiatives. It requests the Commission issue a Further Notice of Proposed Rulemaking expressing its tentative views on the proposed incentives. MMTC Supplemental Request at 1-3.

<sup>462</sup> Integrated Communications Group Comments at 4. See also Community Broadcasters Association Comments at 10-11 (consolidation in radio and television industries is driving small businesses out at a record pace).

Telecommunications Act of 1996.<sup>463</sup> It, as well as the United Church of Christ and Minority Media and Telecommunications Council, maintain that the Commission should recommend to Congress reinstatement of the minority tax certificate policy.<sup>464</sup>

192. Commenters are correct in pointing out that there has been greater consolidation of radio ownership since the relaxation of the Commission's broadcast radio ownership rules. This, however, is consistent with congressional policy as reflected in the 1996 Act, which explicitly directed the FCC to eliminate the national radio ownership rule and to replace the local radio ownership rule with specific, significantly relaxed limits on local radio ownership depending on the size of the local market.<sup>465</sup> The Commission issued an order on March 8, 1996, revising the radio ownership rules accordingly.<sup>466</sup> In addition, we will consider the issues raised by the commenters regarding our former minority tax certificate program in our subsequent evaluation of unique obstacles for small businesses owned by women and minorities.<sup>467</sup>

193. As to the commenters' proposals to redefine the local television market for purposes of enforcing the television duopoly rule, the Commission has recently released a Second Further Notice of Proposed Rule Making in its local television ownership proceeding.<sup>468</sup> This proceeding seeks comment on revising the television duopoly rule, including whether to modify the current Grade B signal contour test for measuring the local geographic market, as well as revising the radio-television cross-ownership rule. The Commission expressly sought "comment on what aggregate effect these proposed rules may

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<sup>463</sup> National Association of Black Owned Broadcasters Reply Comments at 11.

<sup>464</sup> National Association of Black Owned Broadcasters Reply Comments at 2; United Church of Christ and Minority Media and Telecommunications Council Comments at 4. *See also* Integrated Communications Group Comments at 4 (Commission should offer incentives to sellers of media properties in major markets when sold to a consortium of minorities, women, and small businesses).

<sup>465</sup> Sec. 202(a) & (b) of the 1996 Act, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>466</sup> *See Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, Order, 11 FCC Rcd 12368 (1996).

<sup>467</sup> *See infra* Part IV.

<sup>468</sup> *Review of the Commission's Regulations Governing Television Broadcasting*, Second Further Notice of Proposed Rule Making, FCC 96-438 (released Nov. 7, 1996).

have on small stations, or stations owned by minorities and women."<sup>469</sup> In addition, there is a pending rulemaking proceeding examining the Commission's broadcast attribution rules, the rules by which we define what constitutes a "cognizable interest" in applying the multiple ownership rules."<sup>470</sup> In this proceeding, the Commission sought comment on the potential impact on our attribution rules resulting from the relaxation of our multiple ownership rules as required by the 1996 Act. The Commission stated that "the attribution rules must function effectively and accurately to identify all interests that are relevant to the underlying purposes of the multiple ownership rules and that should therefore be counted in applying those rules."<sup>471</sup>

194. Finally, the 1996 Act directs the Commission to conduct a biennial review of all its ownership rules.<sup>472</sup> The first such review will be conducted in 1998. In this review, we expect to examine issues related to the changes and consolidation that have resulted in the market since the passage of the 1996 Act, including the impact on small businesses and small businesses owned by minorities or women, resulting from the industry and regulatory changes during the past several years. In addition, there is a pending proceeding in which the Commission proposed initiatives to increase minority and female ownership of mass media facilities.<sup>473</sup>

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<sup>469</sup> *Id.* at ¶ 9.

<sup>470</sup> *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable /MDS Interests, Review of the Commissions Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, Further Notice of Proposed Rule Making, MM Docket Nos. 94-150, 92-51 & 87-154, FCC 96-436 (released Nov. 7, 1996).*

<sup>471</sup> *Id.* at ¶ 7.

<sup>472</sup> Sec. 202(h) of the 1996 Act.

<sup>473</sup> *See Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, Notice of Proposed Rulemaking, 10 FCC Rcd 2788 (1995) (Minority and Female Ownership NPRM).* We also note that the Minority and Media Telecommunications Council filed a supplemental reply comment on March 25, 1997 in several pending ownership and attribution proceedings. *See supra* n.461.

#### **4. *FCC Policing of Abuse and Enforcement of Rules***

195. Brown-Blackwell states the Commission should be more active in investigating possible fraud and in monitoring licensees for abuse and enforcing its rules where ownership interests of minorities and women are affected because apathy in such areas can prevent entry into the marketplace. She recommends that the Commission be more sensitive to potential abuse by passive investors and strictly enforce its rules where a "passive investor" attempts to wrest power or ownership from the majority equity shareholder.<sup>474</sup> In a similar vein, Romar contends that the Commission should police against abuse of preferences, i.e., where after a construction permit is awarded, the interest of the minority or female is transferred to others. It believes the Commission should impose a minimum ownership period, perhaps three to five years, for any person who claims a female or minority preference during comparative review.<sup>475</sup>

196. As discussed in Part IV of this *Report*, the Commission is continuing to explore issues relating to minorities and women in telecommunications services and expects to issue a more comprehensive report on those issues in the future. As part of that effort, we shall fully consider issues relating to the potential abuses described by these commenters and take appropriate action where warranted.

#### **E. *Other Services***

##### **1. *International Bureau***

197. With respect to international services, several commenters express concern about Commission actions that they believe may hinder small businesses' ability to enter the telecommunications market, such as the Commission's actions with respect to TelQuest's application to operate a fixed transmit/receive earth station to uplink and receive U.S. and Canadian DBS programming.<sup>476</sup> On July 15, 1996, the International Bureau concluded that, because Canada had not yet authorized the satellites with which TelQuest proposed to communicate, TelQuest's earth station applications should be dismissed, without prejudice, as

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<sup>474</sup> Brown-Blackwell Comments at 6, 10-11.

<sup>475</sup> Romar Comments at 9.

<sup>476</sup> Integration Communications International et al. Comments at 2; TelQuest Comments at 16; Abalos et al. Comments at 1; National Association of Women Business Owners Comments at 2; National Association of Women Business Owners -- Greater Detroit Chapter Comments at 2.

premature. In taking this action, the International Bureau reiterated that its policy is to dismiss earth station applications where the space station with which the earth station will communicate has not yet been authorized.<sup>477</sup>

198. The specific matter of TelQuest's application is pending separately in connection with TelQuest's application for review of two International Bureau Orders. We will address that matter in that proceeding. However, based on the comments received in this proceeding, we find nothing in the International Bureau policy reflected in that case that imposes burdens uniquely or predominantly on small businesses.<sup>478</sup>

199. Several commenting parties object to the Commission's financial qualifications requirements for satellite applicants, on the ground that the Commission's standards are an entry barrier for small businesses. For example, Mobile Communications Holdings contends that Commission Rule 25.143(b)(3) imposes an overly stringent financial standard upon satellite applicants in the 1.6/2.4 GHz Mobile Satellite Service (Big LEO service). It argues that the rule fails to take into consideration the financial realities faced by entrepreneurs and that it adversely affects small businesses because it fails to take into account the unique ways that small businesses obtain capital.<sup>479</sup> It claims that due to the Commission's rule, small

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<sup>477</sup> See *Applications of TelQuest Ventures, L.L.C. and Western Tele-Communications, Inc.*, 11 FCC Rcd 8151 (1996). The Commission noted that this policy prevents premature consideration of systems that may never operate and deters applicants from filing competing premature applications in the hope of obtaining earth station authorizations for the purpose of influencing space station licensing decisions. *Id.* at 8154. On October 29, 1996, the International Bureau denied TelQuest's petition for reconsideration finding that TelQuest's earth station application was properly dismissed, without prejudice. See *Applications of TelQuest Ventures, L.L.C. and Western Tele-Communications, Inc.*, Report and Order, 11 FCC Rcd 13943 (1996), *applications for review pending*.

<sup>478</sup> TelQuest has also sought reconsideration of our decision in *Streamlining the Commission's Rules and Regulations for Satellite Application and Licensing Procedures*, Report and Order, FCC 96-425 (released Dec. 16, 1996), on a number of related grounds. The arguments raised in that proceeding will be addressed in that proceeding.

<sup>479</sup> Mobile Communications Holdings Comments at 3. *But see* L/Q Licensee Reply Comments at 1-3 (financial standard for MSS above 1 GHz applicants is not a barrier to entry into satellite services market even for small, entrepreneurial companies; strict financial standard is based on sound public policy and represents appropriate requirement to demonstrate that sufficient funds are available to proceed). The FCC's financial standard requires applicants to provide evidence of current assets, operating revenues, or irrevocably

companies must meet a far more rigorous evidentiary showing of "irrevocably committed" funds, in contrast to larger competitors who may qualify merely on the basis of a sizable balance sheet even though they intend to rely only upon external sources of financing.<sup>480</sup> Other commenters assert that our decision<sup>481</sup> to impose a uniform financial standard on geostationary fixed-satellite service applicants is inequitable and a significant impediment to entry for international satellite systems.<sup>482</sup> As a means of addressing these concerns, parties generally recommend that the Commission apply the financial standards more flexibly. However, one party disagrees with this proposal and asserts that a less rigorous standard is not in the public interest.<sup>483</sup>

200. The specific requests for action concerning financial standards as applied to satellite services generally relate to other ongoing proceedings pending before the Commission and the courts, and are more appropriately addressed in connection with those specific proceedings. In this regard, we note that Mobile Communications Holdings has pending an appeal of our decision adopting rules, including a rigorous financial standard, for

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committed debt or equity financing sufficient to meet the estimated costs of constructing and launching all planned satellites, and operating costs of the system for the first year. This showing can be made in two ways. First, applicants relying on internal financing must submit a balance sheet demonstrating current assets and operating revenues in excess of system costs. These applicants also must submit evidence of a management commitment to expend the necessary funds for the project. Second, applicants relying on outside financing must submit evidence of these arrangements, including a demonstration that the financing has been approved and does not rest on contingencies that require action by either party to the transaction.

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<sup>480</sup> Mobile Communications Holdings Comments at i, 3-4, 6 and 8.

<sup>481</sup> *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems and DBSC Petition for Declaratory Rulemaking Regarding the Use of Transponders to Provide International DBS Service*, Report and Order, 11 FCC Rcd 2429 (1996) (*DISCO I Order*).

<sup>482</sup> Columbia Communications Corporation Comments at i; Orion Comments at 2.

<sup>483</sup> See, e.g., Motorola Satellite Reply Comments at 5 (more flexible standard or waiver not in public interest; small businesses may participate in Big LEO MSS services); *id.* at 3 (proceeding not proper forum for FCC to grant waiver or revise rules).

the Big LEO service,<sup>484</sup> as well as an appeal of our decision finding it not financially qualified,<sup>485</sup> and an amendment to its application in which it submits additional information concerning its financial qualifications. We also have pending petitions for reconsideration of our decision in the *DISCO I Order* to adopt a uniform financial standard for domestic and international fixed satellite service satellites. Furthermore, we have raised issues concerning the proper financial standard to be applied in the non-voice non-geostationary mobile satellite service (Little LEOs) in an outstanding Notice of Proposed Rulemaking.<sup>486</sup> We believe these matters are most appropriately addressed in connection with the records developed in those proceedings.

## 2. *Office of Engineering and Technology*

201. In December 1996, the Commission adopted a Notice of Proposed Rulemaking to eliminate unnecessary and burdensome Experimental Radio Service (ERS) regulations for ERS applicants and licensees, many of which are small entities.<sup>487</sup> In the *Experimental Radio Notice*, the FCC proposes to reorganize the ERS regulatory structure so as to promote greater technical innovation and new services and to encourage experiments, without compromising the Commission's processes or the public safety. If adopted, the proposals would provide an increased opportunity for manufacturers, inventors, entrepreneurs, and students to experiment with new radio technologies, equipment designs, characteristics of radio wave propagation, and new service concepts using the radio spectrum.<sup>488</sup> Because the proposals would streamline the ERS regulations and would remove excessive regulatory

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<sup>484</sup> *Amendment of Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.6/2483.5-2500 MHz Frequency Band*, Report and Order, 9 FCC Rcd 5936 (1994) (*Big LEO*).

<sup>485</sup> *Application of Mobile Communications Holdings, Inc.*, Order, 10 FCC Rcd 2274 (1995), *recon.*, 11 FCC Rcd 7824 (1996).

<sup>486</sup> *See Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service*, Notice of Proposed Rulemaking, IB Docket No. 96-220, FCC 96-426 (released Oct. 29, 1996).

<sup>487</sup> *Amendment of Part 5 of the Commission's Rules to Revise the Experimental Radio Service Regulations*, Notice of Proposed Rulemaking, ET Docket No. 96-256, FCC 96-475 (released Dec. 20, 1996) (*Experimental Radio Notice*).

<sup>488</sup> *Id.* at ¶¶ 1, 2, 5-12, 19-20 & Appendix B.

burdens, they would be beneficial to small businesses.

202. In another recent proceeding, the Commission has provided licensees an alternative means of demonstrating compliance with the Commission's antenna performance standards.<sup>489</sup> This measure removes an obstacle that had previously existed for manufacturers and licensees, a number of which are small businesses.<sup>490</sup> Instead of satisfying these standards by complying with existing minimum antenna gain requirements, licensees will now be able to make a showing that directional antennas they use under Parts 74, 78, and 101 comply with maximum beamwidth requirements. The practical effect of the *Flexible Antenna Report and Order* is to permit licensees to use technologically innovative directional microwave antennas (such as planar-array antennas), which our rules had unintentionally prohibited.

203. On January 9, 1997, the Commission adopted the *U-NII Report and Order*, making available 300 megahertz of spectrum at 5.15-5.35 GHz and 5.725-5.825 GHz for a new category of Unlicensed National Information Infrastructure (U-NII) devices.<sup>491</sup> These devices will provide short-range, high speed wireless digital communications on an unlicensed basis. We anticipate that U-NII devices will support the creation of new wireless local area networks and will facilitate access to the National Information Infrastructure (NII). In order to permit significant flexibility in the design and operation of U-NII devices, we adopted the minimum technical rules necessary to prevent harmful interference to other services and to ensure that the spectrum is used efficiently.<sup>492</sup>

204. By fostering development of a broad range of new devices and service offerings, the *U-NII Report and Order* should stimulate economic development and the growth of new industries and, at the same time, further our Section 257 objectives. Specifically, allowing unlicensed devices access to the 5.15-5.35 GHz and 5.725-5.825 GHz bands will enable educational institutions to form inexpensive broadband wireless computer

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<sup>489</sup> *Amendment of Parts 74, 78, and 101 of the Commission's Rules to Adopt More Flexible Standards for Directional Microwave Antennas*, Report and Order, 12 FCC Rcd 1016 (1997) (*Flexible Antenna Report and Order*).

<sup>490</sup> *Id.* at 1016, 1017-20, 1023-25.

<sup>491</sup> *Amendment of the Commission's Rules to Provide for Operation of Unlicensed NII Devices in the 5 GHz Frequency Range*, Report and Order, 12 FCC Rcd 1576 (1997) (*U-NII Report and Order*).

<sup>492</sup> *Id.* at 1577, 1592.



networks between classrooms, thereby providing cost-effective access to an array of multimedia services on the Internet. Use of the new spectrum by unlicensed wireless networks also could help improve the quality and reduce the cost of services provided by small business users (including medical providers) of the networks.<sup>493</sup>

205. On March 13, 1997, the Commission adopted its *Simplify and Streamline the Equipment Authorization Process Notice*.<sup>494</sup> By this action, the Commission proposes to eliminate two of its five equipment authorization procedures, namely, the type acceptance procedure and the notification procedure. As a result, there will be only one procedure for equipment that must be authorized by the Commission: certification. The Commission would not change the two existing manufacturer self-authorization programs: verification and declaration of conformity (DoC). These proposals would lead to a simpler and far less cumbersome set of equipment authorization requirements. Errors in applications that can lead to delays in obtaining equipment authorization should decline. Clearer, less burdensome regulations will promote compliance. In addition, the Commission proposes to relax the equipment authorization requirements for a broad array of equipment, including unintentional radiators, consumer ISM equipment and a variety of radio transmitters. Thus, adoption of these proposals would further advance our Section 257 objectives to enhance market opportunities for small businesses, such as manufacturers who supply parts and services to telecommunications service providers, to speed delivery of their products to the public, and would save manufacturers some \$100 million by reducing the number of applications necessary for equipment authorization.

### 3. *Compliance and Information Bureau*

206. The FCC's Compliance and Information Bureau is furthering the Commission's Section 257 mandate through information dissemination initiatives that are particularly valuable to small businesses, which, as discussed above, often lack resources and information. First, as part of its ongoing commitment to make information available to the public expeditiously and inexpensively, in 1996, CIB established a new FCC National Call Center. The National Call Center provides consumers with free, one-stop shopping for

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<sup>493</sup> *Id.* at 1585.

<sup>494</sup> *Amendment of Parts 2, 15, 18 and Other Parts of the Commission's Rules to Simplify and Streamline the Equipment Authorization Process for Radio Frequency Equipment*, Notice of Proposed Rule Making, ET Docket No. 97-84, FCC 97-84 (released Mar. 27, 1997) (*Simplify and Streamline the Equipment Authorization Process Notice*).

Commission information.<sup>495</sup> The National Call Center responds to inquiries on telecommunications issues including, but not limited to, broadcasting, cable, wireless services, new technologies, telephone rates or charges, and long-distance carriers. The National Call Center also provides information on how to obtain a license or FCC form and how to file a complaint. When the Call Center receives a call that should be directed to an agency expert, the Call Center electronically transfers the call to the Commission's Washington Office at no additional cost to the caller. Full-time bilingual (English/Spanish) Call Center Specialists are also available to assist the public. The Call Center also provides TTY access.<sup>496</sup> The toll-free Call Center services, now available in 26 states, are being phased-in geographically as budget constraints permit.

207. As part of its outreach efforts, CIB Public Affairs Specialists and Compliance Specialists in field offices throughout the country have identified and compiled lists of various small telecommunications businesses, including women and minority businesses, and provided those businesses with information regarding meetings and events on telecommunication issues and issues before the Commission and has sent them notices of services available to them through the National Call Center. In addition, CIB faxes a "Welcome Letter" to new telecommunications companies listed in local newspaper legal notices, advising that the FCC can assist and answer communications questions. CIB participated in the U.S. General Store for Small Business in Houston, Texas. An initiative by the National Performance Review and spearheaded by the Small Business Administration, with assistance by numerous other federal agencies, the U.S. General Store is a business center that provides at one location all the information necessary to operate a small business. The U.S. General Store also conducted workshops for small business minority entrepreneurs, and CIB provided telecommunications information at those events.

208. CIB has also undertaken many initiatives to disseminate regulatory information and encourage participation in specific sectors of the telecommunications industry. For example, in the broadcasting area, CIB has specifically required state broadcast associations to include non-member licensees, many of which are small businesses, in their Alternative

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<sup>495</sup> The National Call Center can be accessed by dialing 1-888-CALL FCC (1-888-225-5322). See FCC News Release, *FCC's Toll-Free Information Service Expanded* (September 30, 1996). The Call Center has received nearly 160,000 calls. Additional information about CIB resources and the National Call Center is available on the World Wide Web (<http://www.fcc.gov/cib>) (CIB homepage) and (<http://www.fcc.gov/cib/ncc>).

<sup>496</sup> Full Call Center services for the hearing impaired can be accessed through the Telecommunications Device of the Deaf (TTY) by dialing 1-888-TELL-FCC (835-5322).

Broadcast Inspection Program (ABIP).<sup>497</sup> These programs provide comprehensive information on broadcast compliance and no-risk inspection option to facilitate compliance with the Commission's rules. On an continuing basis, CIB notifies radio stations about information regarding various communications-related matters, e.g., spectrum auctions, new pay phone regulations, and cable complaint procedures, etc., for inclusion in stations' public service information programs (PSAs). CIB also made outreach efforts to manufacturers as well as participants to implement the new Emergency Alert System (EAS). AM, FM and TV broadcast stations, Low Power TV stations and cable systems, and other entities and industries will participate in the EAS, which replaced the Emergency Broadcast System (EBS) to provide emergency information to the public at the national, state, and local levels. The EAS requires participants to replace old EBS equipment with new, digital EAS equipment. CIB's outreach efforts resulted in several small businesses receiving certification to manufacture the new EAS equipment. Moreover, in the pending rulemaking concerning EAS participation by cable operators, CIB staff has worked with members of the Small Cable Association, National Cable Television Association, Cable Telecommunications Association and others in the cable industry to ensure that emergency messages will reach as many members of the public as possible without adverse financial impact on small cable operators.

209. Further, CIB has working relationships with various business-oriented entities throughout the country. For example, CIB works closely with local chambers of commerce, and that effort has been particularly effective in reaching small businesses. CIB also has registered with various other entities,<sup>498</sup> made presentations at several workshops, and continuously provides information about new services to the public through various fora targeted to small business ventures.<sup>499</sup> All of these steps serve to promote opportunities for

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<sup>497</sup> CIB also has made presentations to various broadcast associations on current Commission rulemakings and Telecommunications Act implementation.

<sup>498</sup> On an ongoing basis, CIB also maintains a fax-alert list to advise chambers of commerce and telecommunications companies of upcoming spectrum auctions and results. CIB has registered as a contact with the Small Business Administration and various state representatives, as well as with the "Partners in Business" speakers bureau with local schools to present communications business opportunities to graduating students. CIB also maintains regular contact with media outlets to provide information about communications.

<sup>499</sup> For example, on March 19, 1996, the Assistant Bureau Chief for Information was the keynote speaker at the Minority Telecommunications Business Round Table Information Forum at Howard University. The CIB representative addressed PCS auctions, including how to participate in the auction process, how the process applies to small businesses, and what to expect from CIB after starting a business. Approximately 170 people attended the

small businesses by ensuring that, despite limited resources, small businesses have access to the most current information available about new telecommunication policies and services.

#### **IV. *UNIQUE OBSTACLES FOR SMALL BUSINESSES OWNED BY WOMEN OR MINORITIES***

##### **A. *Background***

210. In the *Market Entry Barriers Notice of Inquiry*, we inquired whether small businesses owned by women or minorities<sup>500</sup> encounter unique obstacles in the telecommunications market.<sup>501</sup> We asked parties to submit personal accounts of individual

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event. On July 12, 1996, the Assistant Bureau Chief for Information served as a panel member at "Operation Open Road," a small business information forum at George Washington University sponsored by the Capital Commitment Group Women's Business Development sector. On September 22, 1996, the Assistant Bureau Chief for Information served as a panelist on "Get On Line," a discussion on how to start a small business in the telecommunications industry sponsored by the Department of Commerce, Minority Business Development Agency. On November 7, 1996, the Assistant Bureau Chief for Information served as keynote speaker for the Small Business in Telecommunication Association's Annual convention in Dallas, Texas and discussed how the FCC and CIB can assist small businesses. On February 10, 1997, the Assistant Bureau Chief for Information participated in the Small Business Spectrum Alliance Conference, which was co-sponsored by the U.S. Chamber of Commerce and the Department of Commerce, National Telecommunications and Information Administration. The Assistant Bureau Chief for Information also spoke at a March 1, 1997 conference hosted by the National Small Business Development Council and a March 10, 1997 conference sponsored by the National Paging Association.

<sup>500</sup> We defined minority groups to include African Americans, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders. *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6299 n.88.

<sup>501</sup> As explained in the *Market Entry Barriers Notice of Inquiry*, we explored this area for several reasons: the legislative history of Section 257 suggests Congress was concerned about the underrepresentation of minority and women-owned small businesses in the telecommunications market and sought to increase competition by diversifying ownership, see 142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (statement of Rep. Collins); Section 309(j) requires the Commission to further opportunities for businesses owned by women and minorities in the provision of spectrum-based services; and FCC licensing and other statistical data show that a portion of small communications businesses are owned by

experiences, studies, reports, statistical data, or any other information. We recognized that a prospective barrier is discrimination -- in business, employment, or with respect to communications-related licenses, contracts or other governmental benefits -- and requested evidence of any past or current discrimination or unfavorable treatment.<sup>502</sup> Because governmental action that takes race or gender into account is subject to heightened judicial scrutiny, we sought comment on whether as a legal matter, the obstacles that women and minorities encounter are significant enough to justify special incentives for those groups.<sup>503</sup> We specifically asked whether there is sufficient evidence of discrimination in the communications industry against any particular minority group to support race-based incentives under the strict scrutiny standard.<sup>504</sup> We noted that since *Adarand*, the Supreme Court had not yet ruled on the standard of review for federal gender-based programs, but that a case was pending before the court. Thus, we asked whether there is sufficient evidence to warrant incentives for women under either strict scrutiny (in the event that the Supreme Court raised the gender standard to strict scrutiny) or intermediate scrutiny (in the event that the Court maintained the existing intermediate scrutiny standard).<sup>505</sup>

211. In addition, we sought comment on any nonremedial objectives that would

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women and minorities and there is evidence that these entities encounter unique market barriers. *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6301-6305.

<sup>502</sup> *Id.* at 6305-6307. We suggested that evidence of discrimination could include academic research studies, adjudications, legislative findings, statistical data, and personal accounts. We noted that judicial findings of discrimination are not required, but that the government must have evidence demonstrating the need for remedial action. *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6306 n.112 (citing *City of Richmond v. J.A. Croson*, 488 U.S. 469, 500 (1989)).

<sup>503</sup> *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6308, 6315-6317. In *Adarand*, the Supreme Court held that government classifications based on race must satisfy strict scrutiny. 115 S.Ct. at 2113. For a full discussion of the constitutional standards, see *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6309-6315.

<sup>504</sup> *Id.* at 6308, 6315.

<sup>505</sup> *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6313-6317.

justify the use of race and gender-based incentives while furthering the Section 257 mandate.<sup>506</sup> Finally, we asked parties to propose specific licensing incentives to redress any discrimination or to further any nonremedial objectives.<sup>507</sup> We encouraged parties to support their proposals with data and to identify specific provisions of the Act that would authorize us to implement any such proposals.<sup>508</sup>

212. At the *Market Entry Barriers Forum*, which included a panel on "Unique Barriers for Minority or Women-Owned Businesses," several women and minority entrepreneurs described their personal experiences in trying to enter and participate in the telecommunications market,<sup>509</sup> members of the financial industry described lending and advertising practices,<sup>510</sup> and a representative from the Department of Justice addressed the

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<sup>506</sup> *Id.* As stated in the *Market Entry Barriers Notice of Inquiry*, a government may adopt race or gender based programs for reasons other than to remedy discrimination. Such objectives are nonremedial. See *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (*plurality*). We explained for example that nonremedial objectives that could justify taking gender or race into account in Commission programs and also help eliminate market entry barriers might include favoring diversity of media voices as required by Section 257(b), promoting economic opportunity and competition as encouraged in the legislative history of Section 257 and Section 257(b) and as required by Section 309(j), or promoting the public interest. *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6315-6316 and n.161 (quoting legislative history of Section 257: "'[M]inority and women-owned small businesses continue to be extremely under represented in the telecommunications field. . . . Underlying [Section 257] is the obvious fact that diversity of ownership remains a key to the competitiveness of the U.S. communications marketplace.'" 142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (statement of Rep. Collins)).

<sup>507</sup> *Id.* Parties were invited to explain what objective any proposed women or minority-oriented licensing incentive would be intended to achieve and explain how it would be either narrowly tailored (to meet strict scrutiny) or substantially related (to meet intermediate scrutiny) to achieve that objective.

<sup>508</sup> *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6316-6317.

<sup>509</sup> Borland Testimony, Erbe Testimony, Ofori Testimony, Perez Testimony, and Winston Testimony. See also Arellano Testimony and Haycock Testimony.

<sup>510</sup> Cullers Testimony, Johnson Testimony, Gorman Testimony, Barker Testimony, and Williams Testimony.

constitutional standards for race and gender programs.<sup>511</sup>

213. As explained above, the principal purpose of this *Report* is to set forth the Commission's general policies with respect to implementing Section 257 of the Telecommunications Act, describe our progress to date and outline the steps we plan to take in the immediate future.<sup>512</sup> In that regard, most of the issues addressed in this *Report* focus on impediments facing small businesses. Prior to taking any action specifically oriented to women or minorities, we must fully evaluate the Section 257 record according to the constitutional requirements that govern race or gender-based action by the federal government. As part of our effort to fully evaluate unique obstacles for women and minority-owned businesses, as well as our commitment to fulfill our Section 309(j) requirement to issue spectrum licenses to an array of applicants,<sup>513</sup> we are fully engaged in that process and expect to issue a more extensive report on women and minority issues later this year.

214. Although we will address in more detail the comments regarding women and minorities in our subsequent report, we provide below a summary of the principal barriers and proposals raised in the record to date.

***B. Principal Obstacles and Proposals Identified in the Record***

215. Parties to the Section 257 proceeding identify several obstacles that women or minority-owned businesses face based on race or gender. As was the case for small businesses, the predominant impediment to entry identified is access to and cost of capital.<sup>514</sup>

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<sup>511</sup> Small Testimony.

<sup>512</sup> See *supra* ¶ 1.

<sup>513</sup> In adopting the *Competitive Bidding Sixth Report and Order*, we stated that we "emphasize that our action today does not indicate that race- and gender-based provisions at issue here could not be sustained without further development of the record. Nor do we believe that such measures generally are inappropriate for future auction of spectrum-based services. We are considering the means we should take to develop a supplemental record that will support use of such provisions in other spectrum auctions held post-*Adarand*." *Competitive Bidding Sixth Report and Order*, 11 FCC Rcd at 137.

<sup>514</sup> See, e.g., Small Business Administration Comments at 5; National Women's Law Center Comments at 1; American Women in Radio and Television and Women of Wireless Comments at 14-21; National Paging and Personal Communications Association Comments

Many parties cite difficulty in obtaining credit and time-delayed payment options, as well as negative attitudes toward women or minority-owned businesses.<sup>515</sup> Ofori, United Church of Christ and Minority Media and Telecommunications Council assert that minority entrepreneurs often must rely on financiers and venture capitalists that impose unfavorable terms, for example, requiring unreasonable performance goals for returns on investment or advertising revenue.<sup>516</sup> Williams states that traditional sources of capital for minority businesses, such as small business investment companies (SBICs), are inadequate to cover entry costs into telecommunications.<sup>517</sup> Borland, Erbe, Haycock, and Arellano describe accounts of their own difficulty in accessing capital;<sup>518</sup> while Williams and American Women in Radio and Television and Women of Wireless relate accounts of difficulty experienced by others.<sup>519</sup> In addition, some parties contend that historical treatment of minorities and women

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at 2; National Association of Black Owned Broadcasters ReplyComments at 4-5; B.K. McIntyre Comments at 1-2; Zesiger Testimony at 3; Borland Testimony, Erbe Testimony, Williams Testimony at 4.

<sup>515</sup> National Paging and Personal Communications Comments at 2; Kansas Star Comments at 3; Small Businesses in Telecommunications Comments at 65; American Women in Radio and Television and Women of Wireless Comments at 1-2, 17-21; National Association of Black Owned Broadcasters Reply Comments at 4-5.

<sup>516</sup> Ofori Testimony at 4-5; United Church of Christ and Minority Media and Telecommunications Council Comments at 9-12. The parties cite several examples, including venture capital firms imposing "warrant" provisions and "success fees." *Id.* Cullers and National Association of Black Owned Businesses maintain that advertisers do not provide the same opportunities to minority-owned businesses as they do to majority-owned businesses. Cullers Testimony at 1; National Association of Black Owned Businesses Comments at 6. Cullers also states that programs produced by women and minorities have a more difficult time getting advertisers' approval, "even when the programming meet the high quality standards demanded by broadcast outlets and advertisers." Cullers Testimony at 1.

<sup>517</sup> Williams Testimony at 4.

<sup>518</sup> Borland Testimony; Erbe Testimony; Haycock Testimony at 1, 4-5; and Arellano Testimony.

<sup>519</sup> Williams Testimony at 4 (stating that in trying to expand, one minority-owned broadcasting company bid the highest price for the purchase of a major market radio station, but the seller accepted a lower bid from a nonminority company because of that entity's apparent ability to access capital more quickly; and in another case, a minority-owned



has contributed to the difficulty those entities experience in financing small telecommunications ventures.<sup>520</sup> The Center for Training and Careers and Hispanic Chamber claim that women and minorities, especially Latinos, are "out of the picture" because they own very few FCC licenses, especially PCS licenses.<sup>521</sup>

216. Some parties point to other possible barriers. For example, some commenters identify barriers in licensing of specific telecommunications services;<sup>522</sup> numerous parties

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broadcast company tried unsuccessfully to purchase another station in its market when the station for sale refused to accept the direct offer of the minority company, and thereafter, when the minority station retained its nonminority law firm to make a blind offer for the station, that offer was accepted); American Women in Radio and Television and Women of Wireless at 8 (stating that a woman entrepreneur who had obtained an FM radio construction permit was "laughed out" of a banker's office because he did not believe that as a woman she was capable of winning a radio license).

<sup>520</sup> National Association of Black Owned Broadcasters Reply Comments at 4-5 (contending that because African Americans have suffered historical discrimination, African American entrepreneurs have less capital, fewer family and friends with access to capital than non-minority counterparts and, thus, have a greater need for financing and that lenders have discriminated against African-Americans); American Women in Radio and Television and Women of Wireless Comments at 20-24 (asserting that as a result of discrimination against women in employment, particularly in promotion to senior positions, as well as discrimination in technical fields of education, women have limited technical and managerial experience, which is an obstacle in securing bank financing); B.K. McIntyre Comments at 4-5 (claiming that "lack of historical presence" of women- or minority- controlled businesses is a market entry barrier).

<sup>521</sup> Center for Training and Careers Comments at 1; Hispanic Chamber Comments at 1-2.

<sup>522</sup> See, e.g., Williams Testimony at 2 (stating that most cellular licenses were granted to nonminorities, consequently, the only means for minorities to obtain a cellular license is to purchase one from an existing licensee); American Women in Radio and Television and Women of Wireless Comments at 20 (claiming that women owners seeking financing to purchase spectrum licenses reported that the inability to use an FCC license as collateral was a funding obstacle); James Testimony (stating that minority ownership of commercial broadcast entities declined substantially after enactment of new broadcast ownership provisions of Telecommunications Act). *But see* American Mobile Telecommunications Association Comments at 3-4 (stating that although it "recognizes that women and minorities

assert that employment and management experience is valuable for ownership in telecommunications and that lack of employment opportunity or employment discrimination is a barrier;<sup>523</sup> several commenters advocate stronger enforcement of the Commission's EEO

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are underrepresented in terms of the specialized wireless communications community, and in telecommunications services generally, it believes the cause to be broadly societal, rather than specifically discriminatory in this marketplace" and contending that regulatory measures crafted to enhance small business participation in the telecommunications industry can also promote increased ownership by women and minorities).

<sup>523</sup> See, e.g., Small Business in Telecommunications Comments at 3 n.3 (stating that it "agrees with the Commission's conclusion that the existing lack of minority participation in the industry arises out of a lack of equal employment of women and minorities in positions of responsibility throughout the telecommunications industry. . . . and that much effort will be necessary to attain status which demonstrates parity with men. . . . [and that the] problem of equality of opportunity is even more pronounced for minorities"); American Women in Radio and Television and Women of Wireless Comments at 24-26, 37-38 and Exhibits 1-5 (claiming that women have been discriminated against in employment, such discrimination effects ownership opportunities in telecommunications, and that FCC policies to promote women ownership of communications companies are appropriate to redress discrimination against women in employment and quoting study cited by the Department of Justice that employment discrimination "still reduces the pay and prospects of workers who are not white or male"); National Association of Black Owned Broadcasters Reply Comments at 5 (asserting that African Americans have been discriminated against in all aspects of the telecommunications industry, are rarely employed in senior management positions, and have few opportunities to obtain senior management experience which financial institutions seek when making investment and lending decisions); B.K. McIntyre Comments at 4 (claiming that lack of employment opportunities has impacted small business participation in the communications market because women and minorities have had less opportunity for training and networking). See also Gorman Testimony (stating that lenders consider management experience in assessing loan risks); American Women in Radio and Television and Women of Wireless Comments at 6 & n.6 (contending that women are excluded from important business networks and citing Congressional hearings and Department of Justice finding of discrimination by business networks as one form of discrimination that has impeded minority participation in federal contracting, United States Department of Justice, *Proposed Reforms to Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26042, 26062 (May 23, 1996) (*Department of Justice Federal Procurement Proposal*)).

rules<sup>524</sup> or preference policies;<sup>525</sup> some parties contend that women and minorities are excluded from government procurement, which impedes participation in the

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<sup>524</sup> See, e.g., United Church of Christ and Minority Media and Telecommunications Council Comments at 3-7 (arguing that with respect to common carrier EEO rules, the Commission has failed "to deliver on its promise to maintain an up-to-date computerized database," and to undertake an aggressive EEO program, and that thus, the Commission has become "a partner in the establishment of barriers to ownership by minorities and women;" that streamlining broadcast EEO regulation will create another barrier to market entry because jobs in larger markets are routinely made available to applicants that have developed skills at smaller market stations; and recommending, *inter alia*, revising job categories on Form 395; developing a computerized database for information contained on Form 395; and promoting and monitoring executive level training for minorities and women); American Women in Radio and Television and Women of Wireless Comments at 26 and 41 (claiming that the FCC's EEO policies have increased female participation in the communications industry and asserting that the FCC should stringently enforce its EEO rules (even if streamlined) to ensure women are permitted nondiscriminatory access to senior management positions). See also Brown-Blackwell Comments at 8 (claiming that the FCC has "taken measures in the opposite direction" of Section 257 in part by "revamping" its EEO rules).

The comments regarding the Commission's EEO rules for broadcasters relate to a pending proceeding and will be addressed in that proceeding. See *Streamlining Broadcast EEO Rules and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include Forfeiture Guidelines*, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 5154 (1996).

<sup>525</sup> See, e.g., Brown-Blackwell Comments at 1-6, 10-11 (contending that the Commission should investigate possible "shams" that take advantage of the Commission's broadcast preference policies for minorities or women); Romar Comments at 9 (claiming that the Commission should police against abuse of preferences, i.e., where, the interest of a minority or female is transferred after issuance of a construction permit, and recommends that the Commission impose a minimum ownership period for any entity that claims a female or minority preference during comparative review). We note that the Commission investigates whether our rules are being followed. For example, the Compliance and Information Bureau audited the narrowband PCS winners that claimed minority and women preferences to determine compliance with our auction rules for those groups.

telecommunications market,<sup>526</sup> and one party cites political changes as barring entry.<sup>527</sup> American Women in Radio and Television and Women of Wireless also claim that market entry barriers for women are not limited to small businesses.<sup>528</sup> In contrast, B.K. McIntyre contends that the Commission should distinguish between small start-up firms that face barriers and established small firms (regardless of race or gender ownership) that may not need assistance.<sup>529</sup> Finally, the Small Business Administration maintains that beyond all the general barriers that small businesses encounter, "women and minorities also face an entirely different set of market entry barriers that result in a disproportionately low rate of ownership and participation in virtually every telecommunications field."<sup>530</sup>

217. To address these possible barriers, numerous parties advocate adoption of licensing incentives for women and minorities.<sup>531</sup> The Small Business Administration "strongly encourages the Commission to take concrete steps" to improve opportunities for

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<sup>526</sup> See, e.g., American Women in Radio and Television and Women of Wireless Comments at 5 and 27-31; Integrated Communications Group Comments at 2-3 (contending that a General Services Administration contract for wireless telecommunications devices for federal agencies and state governments contains no incentives for small businesses); National Women's Law Center Comments at 1. *But see* Pacific Bell Reply Comments at 4-5 (rebutting other commenters' claims of low representation of women in procurement in California and asserting that its record of 8% procurement from women-owned firms exceeds state figures).

<sup>527</sup> Brown-Blackwell Comments at 8 (citing *Adarand*, party asserts that the "changing political mood of our legislative, executive and judicial branches is a "much more formidable barrier" than "Commission apathy" or lack of access to capital).

<sup>528</sup> American Women in Radio and Television and Women of Wireless Comments at 19-20.

<sup>529</sup> B.K. McIntyre Comments at 5-6.

<sup>530</sup> Small Business Administration Comments at 4-5. *Accord* Zesiger Testimony at 3.

<sup>531</sup> See, e.g., American Women in Radio and Television and Women of Wireless Comments at 32-41; PCS Alliance Comments at 1-2; Thompson PCS Systems Comments at 2; Williams Testimony at 3-4; Kansas Star Comments at 3; Center for Training and Careers Comments at 1; B.K. McIntyre Comments at 5-6.

women and minorities.<sup>532</sup> Williams states that without specific measures designed to level the playing field, small and minority businesses are at a significant disadvantage.<sup>533</sup> American Women in Radio and Television and Women of Wireless recommend that the Commission adopt gender-based policies for both remedial and nonremedial purposes -- to redress prior and ongoing discrimination against women; to foster diversity in media voices under Section 257(b); and to widely disseminate spectrum licenses under Section 309(j).<sup>534</sup> The National Women's Law Center and others assert that the appropriate constitutional standard for gender-based incentives is intermediate scrutiny,<sup>535</sup> claiming that after *United States v. Virginia*, "it is clear that federal programs that are carefully crafted to remedy past or present discrimination against women are constitutional. In light of the extensive evidence that women in business generally, and in communications specifically, have suffered and continue to suffer discrimination based on their sex," it urges the FCC to retain -- and indeed to strengthen where necessary -- its efforts to eliminate such discrimination."<sup>536</sup>

218. National Black Caucus of State Legislators argues that the *Adarand* decision, coupled with Congressional repeal of the tax certificate program, and the FCC's response to *Adarand* demonstrates that the federal government fails to address the "growing erosion of economic opportunity on the part of African-Americans."<sup>537</sup> Brown-Blackwell contends that

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<sup>532</sup> Small Business Administration Comments at 5.

<sup>533</sup> Williams Testimony at 4.

<sup>534</sup> American Women in Radio and Television and Women of Wireless Comments at 1-2 and 32-41. See also Small Business Administration Comments at 4-5 and Zesiger Testimony at 3 (based on Congress' mandate, it is "essential" that the FCC address diversity of media voices).

<sup>535</sup> National Women's Law Center Comments at 2; American Women in Radio and Television and Women of Wireless Comments at 32-33. American Women in Radio and Television and Women of Wireless also assert that gender-oriented programs would be supported under the higher strict scrutiny standard. *Id.* at 34-35 (citing finding in *Department of Justice Federal Procurement Proposal* that there is a compelling governmental interest in remedying discrimination against minorities in federal procurement).

<sup>536</sup> National Women's Law Center Comments at 2.

<sup>537</sup> National Black Caucus of State Legislators Comments at 3-4. See also MMTC Supplemental Request at 1-3 ("Commission action to stimulate minority ownership can wait no longer").

rather than "attempting to justify race-based programs," we should "simply reactivate some of the provisions the Commission itself already has determined are effective at increasing participation," and that will give women and minorities "a fighting chance to compete."<sup>538</sup> Some commenters suggest that the Commission encourage industry to establish partnerships with women or minority-owned companies, and to provide training programs, business opportunities, or mentoring programs to assist such groups in developing skills and becoming successful telecommunications entrepreneurs.<sup>539</sup>

219. Some parties recommend specific auction-related provisions.<sup>540</sup> American Women in Radio and Television, Women of Wireless, Thompson PCS Systems and Williams contend that the FCC's licensing incentives for women and minority-owned businesses increased participation by those groups in FCC spectrum auctions.<sup>541</sup> After *Adarand*, however, based on consideration of the legal requirements imposed by that decision, the record at that time, the risk of protracted litigation, and its concomitant effect on investment decisions and potential delay in issuing licenses, the Commission suspended its Section 309(j)

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<sup>538</sup> Brown-Blackwell Comments at 9 (claiming that without distress sales, tax certificates and comparative hearings, "the broadcast ownership statistics are destined to look much as they did before the incentives were employed -- predominantly white male").

<sup>539</sup> American Women in Radio and Television and Women of Wireless Comments at 41; B.K. McIntyre Comments at 5.

<sup>540</sup> See, e.g., American Women in Radio and Television and Women of Wireless Comments at 41-42 (favoring financing incentives and relaxed attribution thresholds for women-owned businesses in spectrum auctions); Thompson PCS Systems Comments at 4 (arguing that the FCC should not modify provisions for designated entities); Williams Testimony at 5 (stating that the FCC must preclude strategic alliances between large companies before auctions commence and expand its financing policy to include provision of capital needed by small businesses); Integrated Communications Group Comments at 2 (suggesting that the FCC develop incentives to motivate PCS licensees to sell spectrum or partition licenses with first priority given to minorities, women, and very small businesses). See also American Women in Radio and Television and Women of Wireless Comments at 41 (recommending that broadcast spectrum (digital or analog) should be licensed through a process other than comparative hearings).

<sup>541</sup> American Women in Radio and Television and Women of Wireless Comments at 3-6; PCS Systems Comments at 1-2 & 4; Williams Testimony at 3 & 5.

preference provisions for women and minorities.<sup>542</sup> Some parties argue that the FCC should reinstate its pre-*Adarand* PCS incentive policies for women and minorities,<sup>543</sup> while others raise Section 309(j) issues.<sup>544</sup>

220. Many parties urge the FCC to conduct a study of the participation of women and minorities in the telecommunications industry and market entry barriers.<sup>545</sup> American

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<sup>542</sup> *C Block Sixth Report and Order*, 11 FCC Rcd at 136-137.

<sup>543</sup> Thompson PCS Systems Comments at 2; Williams Testimony at 5. In addition, several commenters claim that some auction applicants lost investors when the Commission amended its rules to comply with *Adarand* because investors were unwilling to enter partnerships subject to potential litigation. Kansas Star Comments at 1-3; American Women in Radio and Television and Women of Wireless Comments at 6-8; PCS Alliance Comments at 1; Thompson PCS Comments at 1.

<sup>544</sup> See, e.g., Small Business in Telecommunications Reply Comments at 11 (claiming that the FCC has ignored its Section 309(j) mandate regarding small businesses and rural telcos); Hispanic Chamber Comments at 1 (alleging that the FCC has not provided sufficient opportunities for Hispanics, other minorities and women in implementing its Section 309(j) authority); Williams Testimony at 7 (stating that FCC must advise the administration, Congress and the Supreme Court on policies and legal procedures to implement its Section 309(j) mandate).

<sup>545</sup> See, e.g., Kansas Star Comments at 3; National Association of Black Owned Broadcasters Reply Comments at 1; B.K. McIntyre Comments at 2, 5-6; American Women in Radio and Television and Women in Wireless Comments at 11-14 (noting that it first requested that the FCC conduct such a study in 1991 and has done so continuously since); Letter from Shelley Spencer, Director, American Women in Radio and Television to William Caton, Secretary, FCC (November 20, 1996) (American Women in Radio and Television *Ex Parte* Filing) (submitting October 1996 report by the National Foundation of Women Business Owners on financing for women business owners); MMTC Supplemental Request at 1-3 (expressing regret that a disparity study regarding minority ownership in broadcast has not yet begun). Cf. Brown-Blackwell Comments at 8-9 (contending that "record evidence" of discrimination is "not always available" and asking how studies can be more convincing "than the Commission's own recognition that participation in the marketplace is greater by minorities and women when incentives are in place than when they are not").

In addition, parties to some Section 309(j) proceedings have recommended that the FCC commence a study to further examine the participation of women and minorities in

Women in Radio and Television asserts that the results of a new October 1996 report by the National Foundation of Women Business Owners, which shows some improvement for financing of women businesses in general "demonstrate the continued need for a study of women-owned companies in communications . . . to determine whether the dramatic growth of women-owned businesses in general is mirrored in the communications industry."<sup>546</sup> For example, B.K. McIntyre states that she is an African American woman with ten years experience as a state public utility regulator and over twenty years of management experience, yet claims that she has had difficulty obtaining sufficient capital to become an active provider of other communications services or to participate in spectrum auction. She asserts that other minorities and women with comparable expertise experience similar impediments. B.K. McIntyre acknowledges that to prove whether this fact is related to race or gender is difficult, but claims that a study and comparison of minorities and women to their majority counterparts "may offer further evidence of the subtle barriers that exist to creating the level of wealth and expertise that is necessary to fully participate in the communications industry."<sup>547</sup> Two parties assert that, as the licensing agency, the FCC, more than any other agency or independent organization, has the data required to complete

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telecommunications. See, e.g., *Competitive Bidding Sixth Report and Order*, 11 FCC Rcd at 137 n.6 (citing Allied Communications Group, Inc. Comments, which recommended comprehensive formal study; Minority Business Enterprise Comments, which suggested disparity study; General Wireless Comments, which identified hearings, studies or other methods to develop a supplemental record; Chase Telecommunications Comments, which recommended examination of how past discrimination denies minorities access to capital).

<sup>546</sup> American Women in Radio and Television Ex Parte Filing at 1. National Association of Black Owned Broadcasters claims that the results of a study by the United States Department of Commerce, National Telecommunications and Information Administration, provide additional evidence of the need for governmental action to promote minority business opportunities in the telecommunications industry. National Association of Black Owned Broadcasters Reply Comments at 9-10 (citing U.S. Department of Commerce, National Telecommunications and Information Administration, Office of Policy Analysis and Development study, *Capital Formation and Investment in Minority Business Enterprises in the Telecommunications Industry* (Apr. 1995), and specific findings, including: Banks provide White borrowers with \$1.83 in debt for each dollar of equity capital they invest in their businesses, but provide African American borrowers only \$1.16 for each dollar of equity capital invested; and that African Americans own only 193 (1.7%) of the total commercial broadcast stations in the United States).

<sup>547</sup> B.K. McIntyre Comments at 2.



an academically rigorous review of women ownership of communications companies.<sup>548</sup> They also recommend that the FCC amend the Annual Ownership Report Form 323 and require all licensed communications companies to submit a current Form 323 as soon as possible.<sup>549</sup>

### C. Ongoing Commission Evaluation

221. There is a long history of recognition by this agency, as well as by courts, Congress, and the public, that minorities and women have experienced serious obstacles in attempting to participate in the telecommunications industry and that their greater participation would enhance the public interest.<sup>550</sup> Since the late 1960's, the Commission has addressed women and minority access to employment and ownership opportunities in the

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<sup>548</sup> American Women in Radio and Television and Women of Wireless Comments at 11. American Women in Radio and Television and Women of Wireless propose that the study include: (1) definition of the communications industry; (2) historical growth of the communications industry in relation to the growth of industry generally; (3) historical employment growth by gender in the communications industry versus industry as a whole; (4) historical employment growth of women in the communications industry (by review of licensing by the FCC and survey of current licensees) versus industry as a whole; (5) detailed analysis of the communications industry with special emphasis on the role of women in the industry using historical data and other contemporary factors; (6) general requirements for entry into the industry, i.e., capital requirements, ownership experience, technical or sales experience; (7) analysis of the participation by women-owned companies in spectrum auctions, including the number of applicants, amount of upfront payments submitted, round-by-round bidding activity (when did women leave the auction or win licenses), licenses acquired and downpayments submitted; (8) barriers to capital and other institutional factors that negatively affect women's participation in the industry, e.g., financing terms, equity investments, capital intensive nature of the industry, discrimination against women); (9) empirical study on the nexus between women's ownership of mass media facilities and content diversity (e.g., news, editorial content) and diversity of workforce (hiring and advancement), communications access and products targeted towards women. American Women in Radio and Television and Women of Wireless Comments at 12.

<sup>549</sup> *Id.* at 13. The parties state that although the Form change would require approval from the Office of Management and Budget (OMB), OMB could do so on an expedited basis under 5 C.F.R. § 1320.18. *Id.*

<sup>550</sup> See *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6293-6298 (describes various findings and initiatives regarding women and minorities).

telecommunications area. Almost thirty years ago, in 1969, the Commission first established equal employment opportunity (EEO) policies. In 1973, in *TV 9, Inc. v. FCC*,<sup>551</sup> the United States Court of Appeals for the District of Columbia Circuit noted the low rate of minority ownership of radio and television stations and stated that minority ownership and participation in station management is in the public interest.<sup>552</sup> Thereafter, we instituted various FCC broadcast ownership preference policies for women and minorities,<sup>553</sup> and the Supreme Court subsequently upheld our minority ownership policies.<sup>554</sup> In 1982, Congress observed that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications" and enacted Section 309(i)(3)(A) of the Communications Act, authorizing the Commission to provide minority preferences in awarding spectrum licenses by lottery.<sup>555</sup> More recently, in 1993, Congress reached beyond broadcast services to wireless spectrum-

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<sup>551</sup> 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 418 U.S. 986 (1974) (rejecting view that mutually exclusive applicants for broadcast construction permits should not receive comparative credit for minority ownership).

<sup>552</sup> *Id.* at 937 n.28.

<sup>553</sup> See, e.g., *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979, 983 (1978) (adopting minority distress sales and tax certificate policies); *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, Memorandum Opinion and Order, 100 FCC 2d 74, 94 (1985) (adopting minority multiple ownership rules). See also *Policies and Rules Regarding Minority and Female Ownership NPRM*, 10 FCC Rcd at 2789-2790 (stating that "women and minorities face economic disadvantages when they attempt to enter the mass media industry" and seeking comment on whether women and minorities encounter greater cost of capital and other types of disadvantages in acquiring mass media facilities).

<sup>554</sup> *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990).

<sup>555</sup> H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 43 (1982). See also 47 C.F.R. § 1.1622 (codification of rules regarding minority preferences in mass media lottery proceedings). In addition, in the 1984 Cable Act, Congress affirmed the Commission's equal employment opportunity rules for cable and stated that a "strong EEO policy is necessary to assure that there are sufficient numbers of minorities and women with professional and management level experience" who will be able to take advantage of ownership opportunities. H.R. Rep. No. 934, 98th Cong., 2d Sess. 4723 (1984). In 1988, Congress enjoined the Commission from narrowing or eliminating our broadcast ownership policies. *Continuing Appropriations Act for Fiscal Year 1988*, Pub. L. 100-202, 101 Stat. 1329-31.

based services and enacted Section 309(j), which requires the Commission to adopt competitive bidding procedures that promote economic opportunity to a wide variety of applicants, including minorities and women.<sup>556</sup> In implementing Section 309(j), the Commission designed rules to assist small, rural, women, and minority-owned businesses "to overcome barriers that have impeded these groups' participation in the telecommunications arena, including barriers related to access to capital."<sup>557</sup> Although the specific auction rules we adopted for businesses owned by women and minorities were held in abeyance after *Adarand*,<sup>558</sup> since then, we have continued to request comment on the effect of *Adarand* on our policies and to seek evidence of discrimination against women or minorities in telecommunications services.<sup>559</sup> Later, in enacting Section 257 of the 1996 Act, one member of Congress noted that women and minorities are "extremely under represented" in the telecommunications industry.<sup>560</sup>

222. Thus, our Section 257 mandate continues a succession of measures over several decades to enhance opportunities for women and minorities. The goal in this aspect of the Section 257 proceeding is to identify the specific obstacles that women and minorities face and to determine whether they are of the nature that will satisfy heightened judicial scrutiny. As a federal government agency, our ability to adopt race or gender based incentives is limited by constitutional requirements.<sup>561</sup> Under *Adarand*, any governmental classification based on race must satisfy strict scrutiny: it must be narrowly tailored to

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<sup>556</sup> 47 U.S.C. § 309(j).

<sup>557</sup> *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2388 (1994).

<sup>558</sup> *Competitive Bidding Sixth Report and Order*, 11 FCC Rcd 136.

<sup>559</sup> See, e.g., *Amendment of Part 20 and Part 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Radio Service Spectrum Cap*, Notice of Proposed Rulemaking, 11 FCC Rcd 15052 (1996) (*Competitive Bidding D, E & F Notice*); *D, E & F Block Competitive Bidding Report and Order*, 11 FCC Rcd 7824.

<sup>560</sup> 142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (statement of Rep. Cardiss Collins).

<sup>561</sup> In addition to considering legal constraints, we also desire to maximize the utility of any incentives by minimizing litigation risks.

further compelling governmental interests.<sup>562</sup> Remedying discrimination against a particular racial group in a specific field has been recognized as a compelling government interest.<sup>563</sup> Thus, for us to adopt race-based incentives, there must be an appropriate record of discrimination against minorities in telecommunications. After we released the *Market Entry Barriers Notice of Inquiry*, the Supreme Court clarified the applicable constitutional standard for classifications regarding gender. In *United States v. Commonwealth of Virginia*, the Court affirmed and applied its pre-existing standard for reviewing gender classifications -- intermediate scrutiny -- to hold that a state male-only military college violated the Equal Protection Clause.<sup>564</sup> Under intermediate scrutiny, a government's justification for gender-based classifications must be "exceedingly persuasive" and specifically, the government must show at least that the classification serves important governmental objectives and is substantially related to those objectives.<sup>565</sup>

223. The record in this proceeding, including comments on the *Market Entry*

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<sup>562</sup> In *Adarand*, 115 S.Ct. at 2113, the Supreme Court held that the federal government's use of race-based criteria for decisionmaking must satisfy the requirements of strict scrutiny. For a full discussion of the constitutional standards, see *Market Entry Barriers Notice of Inquiry*, 11 FCC Rcd at 6309-6315.

<sup>563</sup> *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J. dissenting); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-500 (1989). In its procurement reform proposals, which cover contracts for the entire federal government, including the Department of Defense, the Department of Justice found that "there is today a compelling interest to take remedial action in federal procurement." *DOJ Procurement Reform Proposals*, 61 FR 26042, 26050. Noting that its collection of evidence of discrimination is on-going, DOJ found that "evidence indicates that racially discriminatory barriers hamper the ability of minority-owned businesses to compete with other firms on an equal footing in our nation's contracting markets." *Id.* DOJ explained that its finding was based on: (1) Congressional hearings and reports relating to the effect of discrimination on minority opportunities; (2) studies documenting the effects of racial discrimination on the procurement opportunities at the state and local level; and (3) works by social scientists, economists, and other academic researchers regarding the manner in which various forms of discrimination restrict business opportunities for minorities. *Id.* at 26050-26051.

<sup>564</sup> *United States v. Virginia*, 116 S.Ct. 2264, 2274-2276 (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136-137 & n.6 (1994) and *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

<sup>565</sup> *Id.*

*Barriers Notice of Inquiry* and the testimony at the *Market Entry Barriers Forum*, supplemented by the record in various other proceedings, strongly indicates that minorities and women have experienced tremendous obstacles in participating in the telecommunications industry. To satisfy our statutory obligations under both Section 257 and Section 309(j), we are commencing a comprehensive study to further examine the role of small businesses and businesses owned by minorities or women in the telecommunications industry and the impact of our policies on access to the industry for such businesses. In addition to furthering the requirements of Section 257, the study will assist us in fulfilling our Section 309(j) mandates and in determining whether there are constitutionally-sound bases for adopting licensing incentives for women or minorities.

224. As to Section 257, the study will provide data and information to help us identify and eliminate market entry barriers for small businesses in the telecommunications market as the statute requires. In addition, the study will assist the Commission in reporting to Congress on our implementation of Section 257, as the statute also requires.<sup>566</sup> As to Section 309(j), the study will be useful in comparing the effectiveness of auction and non-auction methodologies, and in assessing entry of new companies into the market, prompt delivery of service to rural areas, and the participation and success of small businesses and businesses owned by minorities or women in the competitive bidding process,<sup>567</sup> as well as reporting to Congress on the auction process as required.<sup>568</sup>

225. The study will be conducted by an external contractor. It will focus on two types of communications services, the oldest and the newest -- broadcast and wireless.<sup>569</sup> Specifically, the study will develop a profile of applicants and participants in broadcast licensing and the licensing of certain wireless services, both by auction and other previously

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<sup>566</sup> 47 U.S.C. § 257(c). Section 257(c) requires the Commission to report to Congress every three years following completion of the proceeding on regulations that have been issued to eliminate barriers and any statutory barriers that the Commission recommends be eliminated.

<sup>567</sup> See 47 U.S.C. § 309(j)(12)(D)(ii)-(iv).

<sup>568</sup> See 47 U.S.C. § 309(j)(12)(D)(iv)-(E).

<sup>569</sup> An analysis of broadcast licensing also will assist the Commission's analysis of auction participation. Many auction participants and investors are broadcast licensees. For example, the study will examine the impact of incumbency and the regulatory structure the FCC established for the licensing of broadcast spectrum on auction bidding.

used methods.<sup>570</sup> It will analyze participation rates of small businesses, minority-owned businesses, women-owned businesses, and the difference between participants and potential participants. The study will identify and evaluate the effect of any market entry barriers and other impediments on participation and attainment of licenses, the impact of incumbency in the telecommunications industry, the effect of previous FCC licensing proceedings, the effect of the presence, absence and removal of race and gender-based provisions, and the effect of past employment or management experience in the communications industry on auction participation and success.

## **V. CONCLUSION**

226. This *Report*, we believe, demonstrates our implementation of Section 257. As described above, the Commission has taken numerous steps to eliminate regulatory and other impediments to entry for small businesses in the telecommunications market and will continue to do so.

## **VI. ORDERING CLAUSES**

227. The motion of Blab Television to accept late-filed comments in this proceeding is GRANTED.

228. The motion of National Association of Black Owned Broadcasters to accept late-filed comments in this proceeding is GRANTED.

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<sup>570</sup> For example, the study will analyze licensing of PCS, Specialized Mobile Radio, cellular, and paging services.

## **APPENDIX A**

### **Parties Filing Comments**

Abacus Television (Abacus Television)

Sandra Abalos, filing jointly with Patsy Bakunin, Joan Frentz, Whitney Johns, Jaymie McMullin, Vivian Shimoyama, Carolyn Stephens, Sandy Adams, Janet Harris-Lange, Carol Johnson, Bren Norris, Barbara Solomon, Terry Neese (Abalos et al.)

American Mobile Telecommunications Association, Inc. (American Mobile Telecommunications Association)

American Women in Radio and Television, Inc. and Women of Wireless (American Women in Radio and Television and Women of Wireless)

America's Carriers Telecommunication Association

Association of Directory Publishers

AT&T Corp. (AT&T)

Big Sky Teleconferencing, Ltd./SaMComm, Inc. (Big Sky Teleconferencing)

Broadcast Data Corp. filing jointly with Chicago MDS Co., DCT Communications, Inc., Indianapolis MDS Co., Lakeland BDC-MMDS Co., Milwaukee MDS Co., Minneapolis MDS Co., Multipoint Information Systems, Inc., Orlando BDC-MMDS Co., Phoenix MDS, Co., and Private Networks, Inc. (Broadcast Data Corp. et al.)

Faye Brown-Blackwell (Brown-Blackwell)

Cable Telecommunications Association

Celltech Information Systems, Inc. (Celltech)

Center for Training and Careers

Gwendolyn A. Christopher (Moore Broadcasting)

Columbia Communications Corp. (Columbia Communications)

Community Broadcasters Association

Competitive Telecommunications Association (CompTel)

Independent Telephone and Telecommunications Alliance

Integrated Communications Group Corporation (Integrated Communications Group)

Integration Communications International, Inc. filing jointly with Digital and Wireless Television, L.L.C. and Golden Bear Communications, Inc. (Integration Communications International et al.)

Kansas Star Communications (Kansas Star)

Henry Mayfield

B.K. McIntyre & Associates, Inc. (B.K. McIntyre)

Metricom, Inc. (Metricom)

Mike McCarroll (McCarroll)

M.L.T. Productions

Mobile Communications Holdings, Inc. (Mobile Communications Holdings)

National Association of Women Business Owners

National Association of Women Business Owners -- Greater Detroit Chapter

National Black Caucus of State Legislators -- Telecommunications & Energy Committee  
(National Black Caucus of State Legislators)

National Black Chamber of Commerce

National Cable Television Association, Inc. (National Cable Television Association)  
National Paging and Personal Communications Association  
National Telephone Cooperative Association  
National Wireless Resellers Association  
National Women's Law Center  
Nevadacom  
NextWave Telecom, Inc. (NextWave)  
Optel, Inc. (OpTel)  
Orion Network Systems, Inc. (Orion)  
PCS Alliance Group, Inc. (PCS Alliance)  
Romar Communications, Inc. (Romar)  
Rural Telecommunications Group  
Small Business in Telecommunications  
Small Cable Business Association  
Southwest Missouri Cable TV, Inc. (Southwest Missouri Cable)  
Telecommunications Resellers Association  
TelQuest Ventures, L.L.C. (TelQuest)  
TRA Communications Consultants, Inc. and J. Rodger Skinner, Jr.  
(TRA Communications Consultants)  
Thompson PCS Systems, Inc. (Thompson PCS)  
United Church of Christ Office of Communications/Minority Media  
Telecommunications Council (United Church of Christ and Minority Media  
Telecommunications Council)  
United States Hispanic Chamber of Commerce (Hispanic Chamber)  
United States Small Business Administration, Chief Counsel for Advocacy (Small Business  
Administration)  
Voice-Tel, Inc. (Voice-Tel)  
Watson Cable Co. (Watson Cable)  
Wireless Cable Association International, Inc. (Wireless Cable Association International)  
Working Assets Funding Service, Inc. (Working Assets Funding)  
Yellow Pages Publishers Association (Yellow Pages Publishers)

#### **Parties Filing Reply Comments**

AT&T  
L/Q Licensee, Inc. (L/Q Licensee)  
Motorola Satellite Communications  
National Association of Black Owned Broadcasters  
National Cable Television Association  
Optel  
Pacific Bell  
Press Broadcasting Company  
Small Business in Telecommunications  
Small Cable Business Association



Tele-Communications, Inc.  
United States Telephone Association

**Panelists at Public Forum (September 24, 1996)**

David W. Zesiger  
Assistant Chief Counsel  
Office of Advocacy, U.S. Small Business Administration  
(Zesiger Testimony)

LaVern D. James  
Telecommunications Policy Analyst  
National Telecommunications and Information Administration  
U.S. Department of Commerce  
(James Testimony)

Sherwin Grossman  
President  
Sherjan Broadcasting Co., Inc.  
(Grossman Testimony)

Matthew M. Polka  
Vice President & General Counsel  
Star Cable Associates  
(Polka Testimony)

Kathryn L. Haycock  
President & CEO  
Call-America  
(Haycock Testimony)

Lonnie Pederson  
President & Manager  
Telephone Service Company  
(Pederson Testimony)

Cliff Arellano  
CPI Communications Products, Inc.  
(Arellano Testimony)

Alan R. Shark  
President & CEO  
American Mobile Telecommunications Association  
(Shark Testimony)

Michael C. Small  
Deputy Associate Attorney General  
U.S. Department of Justice  
(Small Testimony)

Gloria Borland  
Chairman & CEO  
Gloria Borland Hawaii PCS  
(Borland Testimony)

Kofi A. Ofori  
Counsel  
Office of Communication, United Church of Christ  
(Ofori Testimony)

Bonnie Erbe  
Chief Executive Officer  
Peresphone Productions, Inc.  
(Erbe Testimony)

Benjamin Perez  
Managing Partner and Senior Consultant  
Abacus Communications Company  
(Perez Testimony)

James L. Winston  
Executive Director  
National Association of Black-Owned Broadcasters  
(Winston Testimony)

Gregg E. Johnson  
President  
BIA Capital Corporation  
(Johnson Testimony)

Gerald Gorman  
Managing Director  
Donaldson, Lufkin & Jenrette  
(Gorman Testimony)

Anthony L. Williams  
President  
Broadcast Capital Fund, Inc.  
(Williams Testimony)

**William E. Barker**  
**President**  
**GE Capital Communications Services, Inc.,**  
**Unit of General Electric Capital Corporation**  
**(Barker Testimony)**

**Jeffrey B. Cullers**  
**President & Group Account Manager**  
**Vince Cullers Advertising Inc.**  
**(Cullers Testimony)**

## **APPENDIX B**

1. On February 13, 1996, the Wireless Telecommunications Bureau held a public forum to discuss FCC Telecommunications Act of 1996 Implementation Schedule, Public Notice (February 12, 1996).
2. On February 23, 1996, the Common Carrier Bureau held a public forum to discuss FCC Telecommunications Act of 1996 Implementation Schedule, Public Notice (February 20, 1996).
3. On February 27, 1996, the Cable Services Bureau held a public forum to discuss FCC Telecommunications Act of 1996 Implementation Schedule, Public Notice (February 23, 1996).
4. On March 6, 1996, the Office of Engineering and Technology presented tutorial on Smart Antennas, Public Notice (February 27, 1996).
5. On March 11, 1996, the Office of Communications Business Opportunities hosted the Auction 1996 Conference, a one-day seminar to discuss emerging technologies, spectrum licensing and auctions proposed for 1996. Officials from the Commission's Office of Engineering and Technology, as well as the Wireless Telecommunications Bureau, and industry representatives shared their views on technological developments and market opportunities.
6. On March 13, 1996, the Cable Services Bureau staff participated in Federal Communications Bar Association cable practice committee luncheon to discuss FCC implementation of the Telecommunications Act of 1996.
7. On March 13, 1996, Cable Services Bureau conducted public briefing to discuss Open Video Systems.
8. On March 15, 1996, the Office of General Counsel held a public forum to discuss legal issues relating to Sections 251 and 252 of the Telecommunications Act of 1996, Public Notice (March 11, 1996).
9. On March 19, 1996, the Assistant Bureau Chief for Information was the key note speaker at the Minority Telecommunications Business Round Table Information Forum at Howard University. The CIB representative addressed PCS auctions, including how to participate in the auction process, how the process applies to small businesses, and what to expect from CIB after starting a business. Approximately 170 people attended the event.

10. On March 24, 1996, the Director of the Office of Communications Business Opportunities was a panelist at the CTIA Wireless '96 Conference in Dallas, Texas.
11. On April 11, 1996, the Director of the Office of Communications Business Opportunities was a panelist at America's Carrier Telecommunications Association (ACTA), which discussed the "1996 Telecommunications Reform Act and Expansion Capital," Phoenix, Arizona.
12. On April 12, 1996, the Initial Meeting of the Federal-State Joint Board on Universal Service was held, Public Notice 96-564 (CC Docket No. 96-45) (April 10, 1996).
13. On April 23, 1996, the Wireless Telecommunications Bureau held consumer outreach forum to discuss consumer issues raised by the Telecommunications Act of 1996.
14. On May 16, 1996, the Office of Legislative and Intergovernmental Affairs conducted round table discussion with representatives of local and state government representatives to facilitate their participation in proceedings under the Telecommunications Act of 1996.
15. On May 20, 1996, the Office of Public Affairs held economics forum to discuss on interconnection with top economists and FCC Chief Economist.
16. On May 31, 1996, the FCC held public forum, "Learn Your NOI's: FCC Open Forum on How to Participate in the FCC Process," News Release (May 2, 1996).
17. On June 5, 1996, the Federal-State Joint Board on Universal Service convened an open meeting, Public Notice 96-886 (June 3, 1996).
18. On June 19, 1996, the Federal-State Joint Board on Universal Service convened an open meeting, Public Notice 96-926 (June 12, 1996).
19. On June 24, 1996, the Office of Public Affairs conducted an open forum on how to find FCC information on the Internet, News Release (June 13, 1996).
20. On June 25, 1996, the Director of the Office of Communications Business Opportunities was a speaker at the NPPCA Conference in Chicago, Illinois and discussed the D, E, & F Block Rules and Market Entry Barriers Notice of Inquiry.
21. On July 9, 1996, the Common Carrier Bureau and the Office of General Counsel held a public forum to discuss the implementation of Section 271 of the Telecommunications Act of 1996, Public Notice 96-1032 (June 26, 1996).
22. On July 17, 1996, the FCC held economic speaker series featuring Dr. Jeffrey Mackie-Mason, "Layering and Vertical Integration: Applications to Telecom

Microsoft,"  
News Release (July 8, 1996).

23. On July 12, 1996, the Assistant Bureau Chief for Information served as a panel member at "Operation Open Road," a small business information forum at George Washington University sponsored by the Capital Commitment Group Women's Business Development sector.
24. On July 23, 1996, the FCC held a public forum to discuss Antitrust and Economics Issues involved in Bell Operating Company InterLATA Entry, News Release (July 15, 1996).
25. On August 6, 1996, a representative from the Office of Communications Business Opportunities served as a panelist at the National Black Chamber of Commerce in Chicago, Illinois.
26. On August 27, 1996, the FCC held Brown Bag briefing on Fee Filing Procedures, News Release (August 19, 1996).
27. On August 27, 1996, the Director of the Office of Communications Business Opportunities served as a panelist at the Telegresso '96 Conference in Rio De Janeiro, Brazil and discussed, "Preparing for PCS: How it will re-shape Telecommunications."
28. On September 4, 1996, the FCC held economic speaker series featuring, Dr. Steven Wildman, "Media Competition," News Release (August 29, 1996).
29. On September 9, 1996, the Director of the Office of Communications Business Opportunities served as a panelist at America's Carriers Telecommunications Association (ACTA) in Hilton Head, South Carolina.
30. On September 12, 1996, the Common Carrier Bureau held public forum to discuss access charge reform and universal service issues raised by the Telecommunications Act of 1996, Public Notice 96-1504 (September 9, 1996).
31. On September 12, 1996, the Director of the Office of Communications Business Opportunities served as a panelist at the First Latin Communications Conference in New York City, New York.
32. On September 13, 1996, the Federal-State Joint Board on Universal Service convened an open meeting, Public Notice 96-1432, (August 27, 1996); Public Notice 96-1505 (September 9, 1996).
33. On September 17, 1996, the Common Carrier Bureau and Office of General Counsel held a public forum to discuss enforcement issues raised by the Telecommunications

34. On September 22, 1996, the Assistant Bureau Chief for Information served as a panelist on "Get On Line," a discussion on how to start a small business in the telecommunications industry sponsored by U.S. Department of Commerce, Minority Business Development Agency.
35. On September 23, 1996, a representative from the Office of Communications Business Opportunities served as a speaker at CATA in Atlanta, Georgia.
36. On September 24, 1996, the Office of General Counsel and Office of Communications Business Opportunities held public forum on small business market entry barriers, Public Notice (September 5, 1996).
37. On September 25, 1996, the Deputy Director of the Office of Communications Business Opportunities served as a speaker at the Commercialization of Defense Technology Conference in Austin, Texas and discussed opportunities for small businesses.
38. On October 2, 1996, the Office of General Counsel held public forum/brown bag lunch to discuss key issues stemming from implementation of Section 103 of the Telecommunications Act of 1996, Public Notice 96-1581 (September 19, 1996).
39. On October 7, 1996, the Deputy Director of the Office of Communications Business Opportunities served as a speaker at the Competitive Telecommunications Association (COMPTEL) convention in Ft. Lauderdale, Florida.
40. On October 8, 1996, the Director of the Office of Communications Business Opportunities served as a speaker at the Minority Ownership Conference in Los Angeles, California.
41. On October 17, 1996, the Federal-State Joint Board held open meeting, Public Notice 96-1679 (October 10, 1996).
42. On October 22, 1996, the Office of Public Affairs conducted open forum on how to find FCC information online on the Internet.
43. On November 1, 1996, the Mass Media Bureau and the Office of Engineering and Technology convened public forum on the Economics of Mandated Standards for Digital Television, News Release (October 25, 1996).

44. On November 1, 1996, the Mass Media Bureau and the Office of Engineering and Technology convened a public forum on the economics of mandated standards for digital television, News Release (October 25, 1996).
45. On November 7, 1996, the Assistant Bureau Chief for Information served as keynote speaker for the Small Business in Telecommunication Association's Annual convention in Dallas, Texas and discussed how the FCC and CIB can assist small businesses.
46. On November 7, 1996, the Federal-State Joint Board held an open meeting (CC Docket 96-45).
47. On November 12, 1996, the Office of Engineering and Technology conducted a tutorial, "Progress in Optical Communications," Public Notice (September 27, 1996).
48. On November 19, 1996, the Office of Engineering and Technology and Computer Based Systems Incorporated held an open forum on Electronic Data Exchange, Public Notice (November 8, 1996).
49. On December 6, 1996, the FCC held economic speakers series featuring, Dr. Michael Salinger, "Leveling the Playing Field of Local Competition," News Release (November 27, 1996).
50. On December 16, 1996, the Cable Services Bureau, Common Carrier Bureau, Wireless Bureau and the Office of General Counsel held a public forum on issues concerning the use and management of public rights-of-ways, Public Notice (November 26, 1996).
51. Office of General Counsel released a Public Notice requesting nominations for membership on the Local and State Government Advisory Committee, Public Notice, (January 13, 1997).
52. On January 14 and 15, 1997, staff of the Federal-State Joint Board on Universal Service conducted workshops relating to the selection of a proxy cost model for determining the cost of providing the service supported by the universal service support mechanism, Public Notice (December 12, 1996; January 9, 1997; January 15, 1997).
53. On January 23, 1997, the Wireless Telecommunications Bureau held a forum on financing issues affecting the wireless industry.



54. The FCC released a Public Notice identifying frequently asked questions on Universal Service and the Snowe-Rockefeller Amendment, Public Notice (February 3, 1997)
55. On February 10, 1997, the Wireless Telecommunications Bureau, Office of General Counsel, Compliance and Information Bureau and the Office of Engineering and Technology co-hosted a Public Forum on zoning and land use issues as they relate to siting of antenna facilities for providing wireless services, Public Notice (January 21, 1997; February 6, 1997).
56. On February 10, 1997, the Assistant Bureau Chief for Information, Compliance and Information Bureau, participated in the "Small Business Alliance Conference" at the U.S. Chamber of Commerce, which was cosponsored by the National Telecommunications and Information Administration, "Networking the Spectrum, Contracts for Connection."
57. On February 19, 1997, the Office of Communications Business Opportunities, together with the Wireless Telecommunications Bureau held a one-day seminar to discuss spectrum licensing and auctions proposed for 1997. Industry representatives FCC officials, entrepreneurs and financial experts shared their views on technological developments and market opportunities.
58. On February 27, 1997, the Wireless Telecommunications Bureau held a small business financing forum focusing on issues associated with small wireless business.
59. Office of General Counsel released a Public Notice announcing the appointment of 13 members to the Local and State Government Advisory Committee, Public Notice (February 28, 1997).
60. On March 1, 1997, the Assistant Bureau Chief for Management, Compliance and Information Bureau participated in the National Small Business Development Council for Women's Organization of Resource Training (ORT), which discussed, "Access to the Internet of Business Opportunities," Washington D.C.
61. On March 10, 1997, the Assistant Bureau Chief for Management, Compliance and Information Bureau participated in the National Paging Association, which discussed, "The FCC, a New Information Resource," Highlighting the National Call Center and the new CIB, Washington D.C.
62. On March 20-21, 1997, the Deputy Director of the Office of Communications Business Opportunities served as a panel member at "Telecommunications 1997: Diversity, Economic Empowerment and Opportunities" Conference at Fayetteville State University. The OCBO representative discussed business opportunities for minorities.

63. On May 15, 1997, the Office of Communications Business Opportunities, together with Bowie State University will co-sponsor a one-day conference to discuss universal service and access reform.
64. On June 24, 1997, the Enforcement Division of the Common Carrier Bureau will sponsor a public forum to discuss Local Exchange Carrier billing issues.

SEPARATE STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

Re: *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses: GN Docket 96-113, Report*

In our Report today, we reaffirm our commitment to identifying and removing impediments experienced by women or minorities in the telecommunications market. In addition, we announce that we plan to conduct a comprehensive study of the participation of women and minority-owned businesses in the telecommunications market. Such a study is necessitated by the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, in which the Court held that the federal government's use of race-based criteria for decision-making must satisfy the requirements of strict scrutiny.<sup>1</sup>

Although I am pleased to see that we are once again pledging to proceed with this *Adarand* study, I am concerned about the length of time that it has taken to get the study underway. In July 1995, when we eliminated our race and gender-based bidding preference for the PCS C Block auctions, we said that we were considering the means that we should take to develop a supplemental record that would support the use of race or gender based preferences.<sup>2</sup> Since then, we have stated in a number of decisions that we were working to develop this record.<sup>3</sup>

In this Report, we have committed to complete the auction related portion of this study in time for our September 1997 section 309(j) report on auctions to Congress and to release the study findings later this year. I urge my colleagues to join with me in making efforts to get this important study underway and completed without further delay.

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<sup>1</sup> 115 S. Ct. 2097. As we recognized in the Notice in this proceeding, because a federal minority program has not been subject to strict scrutiny pursuant to *Adarand*, judicial guidance regarding the strict scrutiny standard thus far is limited to the decision in *Richmond v. J.A. Croson Co.*, in which a state program was evaluated under strict scrutiny. 488 U.S. 469 (1989). Under *Croson* remedial relief is permitted on the basis of "evidence of a pattern of individual discriminatory acts . . . supported by appropriate statistical proof." 488 U.S. at 499.

<sup>2</sup> *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Sixth Report and Order*, 11 FCC Rcd 136, 137 (1995).

<sup>3</sup> See, e.g., *Amendment of Parts 20 and 24 of the Commissions Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Cap, Report and Order*, 11 FCC Rcd 7824, 7834 (1996).