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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

SECOND ORDER ON RECONSIDERATION

Adopted: April 24, 2012 **Released: April 25, 2012**

By the Commission: Commissioner McDowell approving in part and concurring in part.

1. In this Order, we address several issues raised in petitions for reconsideration of certain aspects of the *USF/ICC Transformation Order*.[1] The *USF/ICC Transformation Order* represents a careful balancing of policy goals, equities, and budgetary constraints. This balance was required in order to advance the fundamental goals of universal service and intercarrier compensation reform within a defined budget while simultaneously providing sufficient transitions for stakeholders to adapt. While reconsideration of a Commission's decision may be appropriate when a petitioner demonstrates that the original order contains a material error or omission, or raises additional facts that were not known or did not exist until after the petitioner's last opportunity to present such matters, if a petition simply repeats

[1] *See In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order* or *Order*); *pets. for review pending sub nom. In re: FCC*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

arguments that were previously considered and rejected in the proceeding, due to the balancing involved in this proceeding, we are likely to deny it.[2]

2. With this standard in mind, in this Order we take several limited actions stemming from reconsideration petitions. We grant a request to permit carriers accepting incremental support in Phase I of the Connect America Fund (CAF) to receive credit for deploying broadband to certain unserved locations in partially served census blocks, and deny a number of other requests to modify the rules governing CAF Phase I. In addition, we also grant in part a request by Frontier-Windstream and the Rural Associations to reconsider the VoIP intercarrier compensation rules adopted in the *USF/ICC Transformation Order*. Specifically, we modify our rules to permit LECs, prospectively, to tariff a transitional default rate equal to their intrastate originating access rates when they originate intrastate toll VoIP traffic until June 30, 2014. This targeted modification is intended to be transitional and temporary and does not alter the overall, uniform, national framework for comprehensive intercarrier compensation reform which was established in the *USF/ICC Transformation Order.*

I. CONNECT AMERICA FUND PHASE I INCREMENTAL SUPPORT

3. In the *USF/ICC Transformation Order*, the Commission adopted a framework for the Connect America Fund that would provide support in price cap territories based on a combination of competitive bidding and a forward-looking cost model. But, as the Commission observed, developing and implementing a new cost model could be expected to take some time.[3] So, in order to immediately accelerate broadband deployment in such areas, the Commission established Phase I of the CAF to begin the process of transitioning high-cost support for price cap carriers to the CAF. In Phase I, the Commission froze current high-cost support for price cap carriers, and, in addition, committed up to $300 million in incremental support to promote deployment of broadband to unserved areas within price cap carriers' service territories and their rate of return affiliates' service territories.[4] The $300 million in incremental support will be allocated among price cap carriers by the use of a simplified forward-looking cost estimate based on the prior high cost proxy model.[5]

4. Participation in CAF Phase I is optional: That is, carriers will be able to choose how much of their allocated incremental support to accept based on the broadband obligations that accompany the support. Each carrier will be required to deploy broadband to a number of locations equal to the amount of incremental support it accepts divided by $775.[6] As the Commission explained, that standard was designed to reach as many locations as possible as cost-effectively as possible—to "spur immediate broadband deployment to as many unserved locations as possible" with the limited funds available by "encourag[ing] carriers to use the support in lower-cost areas where there is [nevertheless] no private sector business case for deployment of broadband."[7] And, to ensure that these deployments reach those who are otherwise unserved and are unlikely to be served in the near future, the Commission required carriers to certify, among other things, that the locations they would deploy to are shown as unserved by fixed broadband with a minimum speed of 768 kbps downstream and 200 kbps upstream on the National

[2] *See* 47 C.F.R. § 1.429.

[3] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17715, para. 132.

[4] *See id*. at 17715, para. 133.

[5] *See id*.

[6] *See id*.

[7] *See id.* at 17715, 17718, paras. 133, 139.

Broadband Map; that, to the best of the carrier's knowledge, the location is not in fact served; and that incremental support would not be used to satisfy merger commitments or similar regulatory obligations.[8]

5. Various parties ask us to reconsider aspects of these rules. Below, we grant in part a request by the Independent Telephone & Telecommunications Alliance (ITTA) that we modify the rules and permit carriers, in certain circumstances, to receive credit in CAF Phase I for deploying to unserved locations based on a certification that they are unserved, even though such locations are identified as served on the National Broadband Map. In addition, we deny requests from Frontier and Windstream, along with the United States Telecom Association (US Telecom), that we reconsider the $775 per-location deployment requirement. We also deny their request that we permit carriers to receive credit in CAF Phase I for improving broadband service to underserved locations—locations where broadband is available, but does not meet the requirements for new CAF Phase I deployments. We also deny Windstream's request, in the alternative, that we permit carriers to use CAF Phase I incremental support to deploy second-mile fiber facilities. Finally, we deny a request by Frontier and Windstream that the $300 million in incremental support be allocated among carriers by calculating distributions "as if" the incremental support mechanism were distributing both incremental support and frozen high-cost support, rather than only incremental support.

6. *First*, ITTA asks us to reconsider the rule that carriers receiving CAF Phase I incremental support must deploy broadband to locations shown on the National Broadband Map as unserved by fixed broadband.[9] ITTA argues that the National Broadband Map in some cases "overstates fixed broadband coverage"[10] and that excluding unserved areas from eligibility for CAF Phase I deployment because they appear as served on the Map would mean that consumers in those areas would not benefit from CAF Phase I.[11] ITTA, in an *ex parte* letter joined by several carriers, elaborates on its proposal, asking that we modify the rules to permit carriers to serve additional locations in three different situations.[12]

7. Our analysis of ITTA's petition is informed by a balancing of considerations. On the one hand, CAF Phase I is an interim measure intended to accelerate deployment to those unserved locations that can be reached in the near term. Given our goal of deploying new funding quickly, we believe it is reasonable to focus deployment on areas where it is clear that no broadband exists, rather than to create a potentially burdensome and time-consuming process to identify other areas without service. On the other hand, we do believe that, where adjustments can be made in a way that will not create undue delays, modifying the rules to permit carriers to accept as much incremental support as possible—and thus deploy broadband to more unserved locations—would serve the public interest.

8. ITTA first notes that in some census blocks, the incumbent local exchange provider is the only provider shown by the National Broadband Map as offering fixed broadband services. But, as ITTA explains, the reporting methodology used to create the Map "indicates that an entire census block is served by the [incumbent] LEC even if only a single location in that census block is able to receive broadband."[13] In such situations, ITTA observes, the incumbent LEC knows which locations are actually

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[8] *See id*. at 17720-21, para. 146.

[9] *See* Independent Telephone & Telecommunications Alliance, Petition for Reconsideration, WC Docket No. 10-90, et al., at 3-6 (filed Dec. 29, 2011).

[10] *Id*. at 3.

[11] *Id*. at 4.

[12] *See* Letter from Genevieve Morelli, President, ITTA, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, et al. (filed Mar. 6, 2012) (ITTA Mar. 6 *ex parte*).

[13] *Id*. at 2.

served and which are actually unserved, and it proposes that the carrier should be able to receive credit in CAF Phase I for deploying broadband to locations that it certifies were not, in fact, already served.[14]

9. We conclude that modifying our rule to provide additional flexibility in this situation will promote the goals of CAF Phase I.[15] Accordingly, we will permit carriers accepting CAF Phase I support to satisfy their deployment requirement by deploying to locations identified on the National Broadband Map as served if the Map reflects that the only provider of fixed broadband to the location is the incumbent carrier itself, the locations are in fact unserved by broadband, and the carrier makes the certifications required by section 54.312(b)(3) of our rules.[16]

10. ITTA also argues that some census blocks are shown in some of the tools available on the National Broadband Map website as being served by a carrier other than the incumbent LEC, but that the data underlying the Map "clearly identifies that the non-ILEC provider serves only a part of the census block."[17] This situation can arise in certain situations when, for example, the data underlying the Map show that a cable operator offers broadband to only certain locations within a census block.[18] ITTA proposes that a carrier receiving CAF Phase I support be able to receive credit in CAF Phase I for deploying to locations in such blocks to the extent that the data underlying the Map confirms that the non-ILEC provider does not serve the location.[19]

11. We conclude that no change to the rules is necessary to address this concern. Section 54.312(b)(3) of our rules requires that a carrier certify that the locations to be served to satisfy its deployment requirement "are shown as unserved by fixed broadband on the then-current version of the National Broadband Map."[20] We take this opportunity to clarify that if the data underlying the Map show that a location is not served by a particular provider, then, for the purposes of this rule, the location is "shown as unserved" by that provider.

12. In addition, ITTA claims that there are locations which the National Broadband Map indicates are served by a carrier other than the incumbent LEC, but which the incumbent LEC reasonably believes are not, in fact, served by that other provider.[21] ITTA proposes that carriers receive credit for deploying to such areas, if they provide evidence that there are unserved locations in the area. Specifically, ITTA proposes a CAF Phase I support recipient be permitted to provide a certification that, to the best of the carrier's knowledge, there are unserved locations in a census block notwithstanding that the Map indicates that those locations are served.[22] ITTA proposes that the recipient be permitted to—but not required to—provide "consumer declarations or other supporting evidence" supporting its

[14] *See id*. at 2-3.

[15] *See* Letter from Jeffrey S. Lanning, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, et al., attachment at 2 (filed Feb. 27, 2012) (arguing that permitting CenturyLink to deploy to unserved locations in census blocks marked as served on the National Broadband Map would enable to carrier to add more locations to its build plan).

[16] Section 54.312(b)(3) requires the carrier to certify, among other things, that, to the best of the carrier's own knowledge, the location is not in fact served. *See* 47 C.F.R. § 54.312(b)(3). Accordingly, the carrier will be certifying that it does not, in fact, already serve the location.

[17] *See* ITTA Mar. 6 *ex parte* at 3.

[18] The data underlying the National Broadband Map are available at http://www.broadbandmap.gov/data-download.

[19] *See* ITTA Mar. 6 *ex parte* at 3

[20] 47 C.F.R. § 54.312(b)(3).

[21] *See* ITTA Mar. 6 *ex parte* at 3.

[22] *See id*.

certification.[23] If it does, the certification would not be subject to rebuttal.[24] On the other hand, if the carrier does not provide any declarations or other supporting evidence, other broadband providers in the area would have up to 30 days to respond to the certification.[25] To rebut the CAF Phase I recipient's certification, ITTA proposes that those other providers would be required to certify that they can provide service throughout the relevant area and would be required to provide one or more consumer declarations from customers who either currently or in the past have subscribed to the provider's service within the relevant area.[26] If no provider rebutted the CAF Phase I recipient's certification, the CAF Phase I recipient would be permitted to deploy to unserved locations in the census block at issue.[27]

13. We decline to adopt this aspect of ITTA's proposal.[28] ITTA does not explain how a CAF Phase I recipient would know which locations—other than any locations for which it has obtained a consumer's declaration—in a census block are actually unserved by any other carrier. In addition, we observe that ITTA's proposal would require a provider wishing to challenge the CAF Phase I recipient's certification to provide a declaration within 30 days from a customer or former customer in the census block. That task might be quite time consuming given limited resources. Worse, it might not be possible, because a provider may have no customers in a particular census block, even though it offers service there. Yet ITTA would apparently have us provide CAF Phase I incremental support to incumbents to deploy in such locations. On balance, we cannot conclude on the record before us that adopting ITTA's proposed process, which may not significantly increase the number of locations that are likely to receive new broadband,[29] would serve the public interest.

14. ITTA, joined by several carriers, also asks that we permit carriers receiving CAF Phase I incremental support to deploy broadband to locations that are served by another broadband provider but where the service offered by that other provider does not meet defined service characteristics.[30] They propose that the other provider offer service of at least 768 kbps sustained download speed, with a usage limit no lower than 53 gigabytes per month, all at a price no higher than the month-to-month price of the highest price for a similar product from a wireline provider in the state.[31]

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[23] *Id*.

[24] *See id*.

[25] *See id*. at 4.

[26] *See id*.

[27] *See id*.

[28] The Wireless Internet Service Providers Association (WISPA) opposes the ITTA proposal. *See* Letter from Stephen Coran to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, et al. (filed Mar. 15, 2012). WISPA argues that parties should work "to address any inaccuracies [with the National Broadband Map], not burden the CAF Phase I process with post-mapping procedures that are one-sided in favor of the CAF recipient, or which invite challenge and dispute that will delay provision of funding to unserved areas." *Id*. at 4. The American Cable Association (ACA) and the National Cable Telecommunications Association (NCTA) also oppose the proposal. *See* Letter from Ross J. Lieberman, American Cable Association, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, et al. (filed Mar. 30, 2012). ACA and NCTA argue that ITTA's proposal raises a number of evidentiary issues and would also increase the likelihood that support would go to areas where a competitor already provides, or plans to provide, service. *See id*. at 2.

[29] Indeed, by shifting deployments to areas where others *do* serve, ITTA's proposal might lead to *fewer* previously unserved locations receiving service.

[30] *See* Letter from Melissa Newman, CenturyLink, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, et al. (filed Mar. 30, 2012).

[31] *See id*.

15. We decline to adopt this proposal for several reasons. We acknowledge that some consumers may live in areas ineligible for CAF Phase I support even though the broadband available to them does not currently meet our goals. The Commission chose in CAF Phase I, however, to focus limited resources on deployments to extend broadband to some of the millions of unserved Americans who lack access to broadband entirely, rather than to drive faster speeds to those who already have service.[32] We are not persuaded that the decision about the more pressing need was unreasonable. Moreover, we are not persuaded that permitting CAF Phase I recipients to overbuild other broadband providers represents the most efficient use of limited CAF Phase I support. In addition, we conclude that we do not have an adequate record at this time to make a determination about how high a competitor's price must be—either alone or in combination with usage limits—before we would support overbuilding that competitor, a critical component of petitioners' request.

16. *Second*, Frontier, Windstream and USTelecom seek reconsideration of the requirement that a carrier accepting incremental support in CAF Phase I deploy broadband to a number of unserved locations equal to the amount each carrier accepts divided by $775.[33] In particular, these parties take issue with the use of $775 as a nationwide estimate for the appropriate amount of per-location support.

17. In adopting the $775 figure, the Commission recognized that, in the absence of a fully developed cost model, the choice of a per-location support amount necessarily involved an exercise of judgment. The Commission weighed a variety of considerations, including the fact that resources for this interim mechanism were limited and the goal to "spur immediate broadband deployment to as many unserved locations as possible."[34] The Commission also considered several sources of data, including deployment projects undertaken by a mid-size price cap carrier under the Rural Utilities Service's Broadband Initiatives Program, data from analysis done as part of the National Broadband Plan, and an analysis performed using the ABC plan cost model, submitted by a group of price cap carriers.[35]

18. Petitioners argue that the comparison with the BIP deployments (which showed an average per-location cost of $557) was faulty, because, "[a]s the Commission acknowledges in the *Order*, BIP was aimed at improving service to *under*served locations as well as deploying to *un*served locations" and only deployments to the unserved count toward satisfaction of the CAF Phase I requirement.[36] But as petitioners concede, the Commission acknowledged this concern in the *Order*, and took it into account. Petitioners also complain that the analysis based on the National Broadband Plan and the ABC plan cost model focuses on deployment costs and fails to account for the cost of maintaining and operating existing networks.[37] That complaint misses the mark, however, because the goal of CAF Phase I is to provide one-time support to spur broadband deployment, not to create a new source of ongoing support.[38] Moreover, as the Commission explained in the *Order*, one part of the analysis Commission staff performed suggested that there were approximately 1.75 million unserved locations served by price cap

[32] *See, e.g.*, *USF/ICC Transformation Order*, 26 FCC Rcd at 17712, para. 127.

[33] *See* Frontier Communications Corp. and Windstream Communications, Inc., Petition for Reconsideration and/or Clarification, WC Docket Nos. 10-90, et al., at 12-20 (filed Dec. 29, 2011) (Frontier-Windstream Petition); United States Telecom Association, Petition for Reconsideration, WC Docket Nos. 10-90, et al., at 3-5 (filed Dec. 29, 2011) (US Telecom Petition).

[34] *See USF/Transformation Order*, 26 FCC Rcd at 17718, para. 139.

[35] *See id.* at 17718-19, paras. 140-42.

[36] Frontier-Windstream Petition at 13.

[37] *See id*. at 14, 16.

[38] *See USF/Transformation Order*, 26 FCC Rcd at 17719, para. 142 n.227 (noting that because CAF Phase I is targeted at lower-cost areas, Commission staff assumed that end-user revenue would meet or exceed ongoing costs for such deployments).

carriers with costs below \$765.[39] Even if all \$300 million available in Phase I were accepted, carriers would be required to deploy to only 387,096 locations in total. In other words, the Commission's analysis indicates that, nationwide, there are far more unserved locations with costs below our deployment requirement than will be reached in Phase I. No party disputed the Commission's analysis on this point. In sum, nothing in the petitions for reconsideration calls the Commission's conclusion into question or suggests that any other nationwide number would be more appropriate.

19. In any event, the heart of Frontier, Windstream and USTelecom's argument is that the Commission should adopt carrier-specific deployment requirements for CAF Phase I rather than use a nationwide figure for the per-location support offered.[40] As Frontier and Windstream explain: "The fact that some locations within another carrier's territory might be served for \$400 or less does nothing for another carrier's consumers when that carrier's least-expensive unserved locations would cost \$1,000 or more to serve."[41] They assert that they are in the latter situation: because of their history of aggressively deploying broadband, "there are relatively few, if any, unserved areas left in Petitioners' service areas that can be reached for \$775 or less."[42] Petitioners propose that we develop a carrier-specific requirement by using the CostQuest Broadband Analysis Tool (CQBAT), a cost model submitted as part of a proposal by several large carriers for reform of the high-cost universal service support mechanism.[43]

20. We decline to adopt the proposed carrier-by-carrier approach. Petitioners may have deployed to many or all of the locations in their territories for which \$775 represents an adequate subsidy, but CAF Phase I incremental support, as established in the *USF/ICC Transformation Order*, was designed to reach a significant number of relatively low-cost locations, not to ensure that the entire \$300 million offered for Phase I is accepted.[44] Indeed, the Commission recognized that some incremental support would likely be declined, and explained that declined support "may be used in other ways to advance our broadband objectives pursuant to our statutory authority."[45] To the extent carriers have already deployed to the low-cost areas in their territories, then those carriers' remaining unserved areas may be better candidates for CAF Phase II, which will be identified, using an updated model, along with the appropriate ongoing subsidy amounts for areas with costs above a specified benchmark.[46] Further, we note that in the *Order*, the Commission expressly declined to adopt the CQBAT model, explaining that it would be premature to rely on it in light of the limited opportunity the public had then had to review it.[47] Instead,

[39] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17718-19, para. 142.

[40] *See* Frontier-Windstream Petition at 14-29; US Telecom Petition at 3-4.

[41] Frontier-Windstream Petition at 15. *See also* CenturyLink, Opposition, WC Docket Nos. 10-90, et al., at 13-16 (filed Feb, 9, 2012) (CenturyLink Opposition).

[42] Frontier-Windstream Petition at 17. *See also* CenturyLink Opposition at 15 (noting that the \$775 requirement makes it unlikely that CenturyLink will be able to accept funding to deploy to many homes in its former Qwest territory, where it has already committed to deploying broadband to 92.7 percent of living units without such funding).

[43] *See* Frontier-Windstream Petition at 18.

[44] *See also USF/ICC Transformation Order*, 26 FCC Rcd at 17719, para. 142 n.227 ("Because CAF Phase I is structured to provide one-time support, rather than ongoing support, Commission staff [in developing the \$775 figure] focused on the modeled costs in the ABC plan cost model for areas where the cost to provide service is lower . . . . As proposed by the proponents of the ABC plan . . . these areas would not be eligible for ongoing support.").

[45] *See id.* at 17717-18, para. 138 & n.221. For example, there is a possibility that some of the unobligated CAF Phase I funds could be rolled over for use in the CAF Phase II.

[46] *See id*. at 17725 para. 156. *Compare* Frontier-Windstream Petition at 18 (proposing we use such an approach for CAF Phase I).

[47] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17735, para. 185.

the Commission initiated an open process to develop a robust cost model for the Connect America Fund, a process that is now underway. We are not persuaded that we should, at this early stage in that ongoing process, prejudge the merits of the CQBAT model and adopt it for use in CAF Phase I. Accordingly, we decline to relax the nationwide deployment requirement and decline to establish carrier-specific requirements.

21. *Third*, several parties ask us to modify the broadband deployment requirement for CAF Phase I to permit carriers to meet their obligations not just by deploying broadband to previously unserved locations, but also by upgrading service to locations that are "underserved"—locations, for example, that are served by broadband at speeds less than the 4 megabits downstream required for new deployments in CAF Phase I.[48] Frontier and Windstream argue that underserved areas should be eligible for support in CAF Phase I because, in order to deploy broadband to unserved locations, "facility upgrades in *under*served areas may be required," and, what is more, those investments may be "very significant."[49] As explained above, however, the Commission's focus in CAF Phase I was to spur broadband deployment to consumers who lack access to broadband, not to improve service for those who already have access to some form of high-speed Internet access.[50] We recognize that as they extend broadband to previously unserved areas, carriers may need to upgrade network facilities shared by both served and unserved locations. However, we believe the $775 per newly served location appropriately takes account of the cost of these upgrades. That is, we conclude it is only appropriate to support such shared investments through CAF Phase I to the extent that they do not drive the required subsidy per unserved location above $775.

22. *Fourth*, in an *ex parte* letter, Windstream offers a further alternative to the nationwide deployment requirement.[51] Windstream proposes that carriers should be permitted to use CAF Phase I support to deploy second-mile fiber in areas not currently served by fiber.[52] Windstream argues that the existing rules will penalize the customers of those carriers, like Windstream, that have already deployed Digital Subscriber Line Access Multiplexers (DSLAMs) fed by existing copper facilities to provide at least some level of broadband service in some of their most rural areas, even where there is no business case to deploy fiber to the DSLAM.[53] As Windstream observes, residential broadband bandwidth demand has increased substantially in recent years.[54] Providing support for fiber in such areas, Windstream argues, is essential to maintain existing service levels for their consumers; driving fiber deeper into the network would also reduce the cost of connecting rural wireless cell sites to fiber facilities.[55]

23. We decline to adopt Windstream's proposal for second-mile fiber support. While we agree with Windstream that deploying second-mile fiber facilities is a worthwhile endeavor, we reiterate

[48] *See* Frontier-Windstream Petition at 19; US Telecom Petition at 4-5.

[49] Frontier-Windstream Petition at 19.

[50] *See, e.g.*, *USF/ICC Transformation Order*, 26 FCC Rcd at 17712, para. 127.

[51] *See* Letter from Jennie Chandra, Windstream Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed Mar. 21, 2012) (Windstream Mar. 21 *ex parte*). *See also* Letter from Jennie Chandra, Windstream Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed Apr. 16, 2012).

[52] *See* Windstream Mar. 21 *ex parte*. *See also* Letter from Tom Stanton, Chairman and Chief Executive Officer, Adtran, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed March 28, 2012) (supporting Windstream's proposal).

[53] *See* Windstream Mar. 21 *ex parte*.

[54] *See id*. at 2.

[55] *See id*.

that the focus of CAF Phase I is a relatively narrow one: to spur deployment of broadband to relatively low-cost locations that nevertheless currently have no service at all, while we implement CAF Phase II. It is not intended to be a long-term program or to serve all broadband deployment needs, such as the need to eventually replace existing broadband facilities to meet projected demand. Instead, the need for such investments is more appropriately considered in the broader context of the CAF Phase II mechanism.

24. *Finally*, Frontier and Windstream request that we clarify or reconsider how the $300 million allocated to CAF Phase I will be distributed among carriers. The *USF/ICC Transformation Order* freezes existing high cost support and uses the CAF Phase I incremental support mechanism to allocate an additional $300 million. Frontier and Windstream assert that there are two different ways that this $300 million could be distributed through the incremental support mechanism. In the first, the incremental support allocation mechanism could be applied only to the $300 million in incremental support. In the second, preferred by petitioners, all high-cost support, both frozen support and the $300 million incremental support, would be distributed "as if" it were allocated using the new mechanism, subject to a "hold harmless" rule that would ensure no carrier would receive less support than it previously received.[56]

25. According to Frontier and Windstream, the two approaches "differ markedly in how they allocate the incremental $300 million."[57] That is so because the CAF Phase I incremental support allocation mechanism allocates support "from the top down." Specifically, a per-location cost is calculated for each wire center; support is then calculated for the carrier serving that wire center based on the amount by which that per-location cost exceeds a funding threshold, multiplied by the total number of locations in the wire center.[58] The funding threshold is set so that the specified amount of support, either $300 million or $1.3 billion, is allocated.[59] Setting the funding threshold to distribute $1.3 billion would of course result in a lower threshold than setting it to distribute $300 million, and a lower threshold would mean that more wire centers have per-location costs above the threshold. Petitioners argue that spreading incremental support based on a broader range of high-cost wire centers (those above the threshold set with $1.3 billion) "would be far more equitable" than the alternative approach.[60] In addition, they argue, their proposal is more consistent with the support framework that will be in place during CAF Phase II, when the very highest-cost census blocks will likely be served through satellite, fixed wireless, or other technologies rather than wireline broadband provided by incumbent carriers.[61] CenturyLink opposes these petitioners' proposal, arguing that the Commission's "straightforward calculation" was "sensible and justified," as compared to the multi-stage, more complex calculation advocated by Frontier and Windstream.[62]

26. We decline to change the CAF Phase I support calculation as advocated by Frontier and Windstream. We remain unconvinced that it would be reasonable to allocate the $300 million in incremental CAF Phase I support "as-if" a different amount of support were being allocated.[63] CAF

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[56] *See* Frontier-Windstream Petition at 4-9.

[57] *Id*. at 8.

[58] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17716, para. 135.

[59] *See id*. at 17716, para. 136.

[60] Fronter-Windstream Petition at 9.

[61] *Id*. at 10.

[62] CenturyLink Opposition at 12.

[63] Petitioners do not ask us to *actually* allocate the full $1.3 billion through the CAF Phase I incremental support mechanism. Nor would we be inclined to do so, given the significant disruptions in support flows that would cause. For example, even a carrier that received additional funding under such an approach might receive that support for wire centers in different states than it currently receives funding.

Phase I is an interim support mechanism, designed to be a simple, easily administered tool to provide a boost to broadband deployment in the near term while the Wireline Competition Bureau develops a support model for CAF Phase II. We acknowledge that there were other ways the Commission could have established the amounts of support each carrier would be eligible for in this interim mechanism. But Frontier and Windstream have not shown that their proposed methodology, which would add a degree of complexity for an uncertain benefit,[64] would likely serve the goals of CAF Phase I more effectively than the methodology adopted in the *Order*, and we decline to adopt it.

II. INTERCARRIER COMPENSATION FOR VOIP TRAFFIC

27. *Background*. The *USF/ICC Transformation Order* comprehensively reformed the intercarrier compensation system.[65] Significantly, the Commission launched long-term intercarrier compensation reform by adopting a bill-and-keep methodology as the ultimate uniform, national methodology for all telecommunications traffic exchanged with a local exchange carrier (LEC). The *USF/ICC Transformation Order* began this transition to bill-and-keep with terminating switched access rates. In addition, the Commission addressed specific intercarrier compensation issues involving commercial mobile radio service (CMRS)-LEC compensation and made clear the prospective payment obligations for certain "VoIP" traffic, referred to in the *USF/ICC Transformation Order* as "VoIP-PSTN" traffic.[66]

28. In light of new evidence in the record,[67] we reconsider an aspect of the transitional intercarrier compensation framework adopted for originating VoIP traffic.[68] For purposes of the *USF/ICC Transformation Order*, VoIP-PSTN traffic "is 'traffic exchanged over PSTN facilities that originates and/or terminates in IP format.' In this regard, we focus specifically on whether the exchange of traffic between a LEC and another carrier occurs in Time-Division Multiplexing (TDM) format (and not in IP format), without specifying the technology used to perform the functions subject to the associated intercarrier compensation charges."[69] As with the *USF/ICC Transformation Order* more

[64] While we agree that their proposal would allocate funding differently than the mechanism the Commission adopted, we are not persuaded that it such an alternative allocation would be better. In particular, we do not think petitioners have adequately explained why they believe their proposal results in a more equitable distribution. Nor are we persuaded by petitioners' claim that their proposal is more consistent with the support framework for CAF Phase II, when the costliest census blocks will likely be served through technologies other than wireline broadband provided by incumbent carriers. Such very-high-cost census blocks might or might not be in the highest cost wire centers.

[65] *See generally USF/ICC Transformation Order,* 26 FCC Rcd at 17872-44, paras. 648-1008.

[66] In this Order we use the term "VoIP traffic" or the like as synonymous with the terms "VoIP-PSTN traffic," or "VoIP-PSTN intercarrier compensation," or the like as used in the *USF/ICC Transformation Order*. *USF/ICC Transformation Order*, 26 FCC Rcd at 18005-06, para. 940. We do so to avoid potential confusion given some commenters' use of terms like "PSTN-originated" VoIP traffic or "PSTN-VoIP" when all such traffic falls under the definition of VoIP traffic as defined in the *USF/ICC Transformation Order. See id.* at 18005-06, para. 940 n.1891.

[67] For the reasons described below, we find it in the public interest to rely on this evidence and the associated arguments. *See* 47 C.F.R. § 1.429(b)(3).

[68] *USF/ICC Transformation Order*, 26 FCC Rcd at 18002-30, paras. 933-75; 47 C.F.R. §§ 51.701(b)(3), 51.703(c), 51.913. The VoIP intercarrier compensation rules subsequently were clarified in certain respects. *See Connect America Fund* et al., WC Docket No. 10-90 et al., Order, DA 12-147 (Wir. Comp. Bur. rel. Feb. 3, 2012) (*First Bureau Clarification Order*); *Connect America Fund* et al., WC Docket No. 10-90 et al., Order, DA 12-298 (Wir. Comp. Bur. rel. Feb. 27, 2012) (*Second Bureau Clarification Order*).

[69] *USF/ICC Transformation Order*, 26 FCC Rcd at 18005-06, para. 940 (citations omitted). *See also id*. at 18005-07, paras. 940 n.1891, 941 (further discussing the scope of what we refer to here as "VoIP" traffic, which includes traffic that originates in IP, terminates in IP, or both). Pursuant to that definition, traffic that terminates in IP format

(continued....)

broadly, the VoIP intercarrier compensation framework weighed the benefits of "a more measured transition away from carriers' reliance on intercarrier compensation as a significant revenue source."[70] The Commission also found, however, that VoIP traffic had been a particular source of intercarrier compensation disputes and litigation. As a result, "carriers may receive some intercarrier compensation payments at something less than the full intercarrier compensation rates charged in the case of traditional telephone service" or, in some cases, no payment at all.[71] Balancing these and additional considerations led the Commission to adopt a middle ground that, prospectively, neither "subject[ed] VoIP traffic to the pre-existing intercarrier compensation regime that applies in the context of traditional telephone service, including full interstate and intrastate access charges,"[72] nor "immediately adopt[ed] a bill-and-keep methodology for VoIP traffic" or a very low rate.[73] Instead, the Commission's approach permitted LECs, starting December 29, 2011, to tariff default intercarrier compensation for both originating and terminating toll VoIP traffic at rates equal to interstate access rates, with default intercarrier compensation for other VoIP traffic at the otherwise-applicable reciprocal compensation rates.[74] The Commission also adopted measures to ensure that its approach to VoIP intercarrier compensation was symmetrical to minimize marketplace distortions.[75] This symmetrical approach seeks to provide all LECs the opportunity to collect intercarrier compensation under the same VoIP intercarrier compensation framework for the functions they (and/or their retail VoIP provider partner) perform in originating and/or terminating VoIP traffic.[76]

29. Frontier and Windstream and certain rural associations filed petitions, seeking, among other things, clarification that originating intrastate toll VoIP traffic was subject to default rates equal to intrastate originating access under the *USF/ICC Transformation Order*.[77] If the Commission instead concludes that default rates equal to interstate originating access rates applied to all originating toll VoIP traffic under the *USF/ICC Transformation Order*, those petitioners advocate that the Commission reconsider that decision.[78] In light of both Petitions' focus on VoIP traffic that originates in TDM format, some commenters expressed concern that the resulting approach would undermine the symmetry of the VoIP intercarrier compensation framework adopted in the *USF/ICC Transformation Order*.[79] Other commenters opposed the Petitions more broadly, arguing that the *USF/ICC Transformation Order*

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is VoIP traffic regardless of whether it originates in IP or TDM format, so long as it otherwise meets the definition of VoIP traffic. *Id.*; 47 C.F.R. §§ 51.701(b)(3), 51.913.

[70] *USF/ICC Transformation Order,* 26 FCC Rcd at 18012, para. 952.

[71] *Id.* at 18003-05, paras. 937-38.

[72] *Id.* at 18009, para. 948.

[73] *Id.* at 18012-13, paras. 952-53.

[74] *Id.* at 18002, 18008, 18011, 18017-18025, paras. 933, 944, 949 n.1919, 959, 961-67; 47 C.F.R. §§ 51.701(b)(3), 51.703(c), 51.913.

[75] *USF/ICC Transformation Order,* 26 FCC Rcd at 18007-08, 18025-28, paras. 942, 968-71; 47 C.F.R. §§ 51.703(c), 51.913(b); *Second Bureau Clarification Order* at paras. 2-5.

[76] *USF/ICC Transformation Order,* 26 FCC Rcd at 18007-08, 18025-28, paras. 942, 968-71; 47 C.F.R. §§ 51.703(c), 51.913(b); *Second Bureau Clarification Order* at paras. 2-5.

[77] Frontier–Windstream Petition at 21-29; NECA et al. Petition for Reconsideration and Clarification, WC Docket No. 10-90 et al. at 34 (filed Dec. 29, 2011) (Rural Associations Petition).

[78] Frontier-Windstream Petition at 21, 27; Rural Associations Petition at 34-35.

[79] *See, e.g.*, Comcast Comments (filed Feb. 9, 2012) at 8-9; NCTA Comments (filed Feb. 9, 2012) at 14-15; Cox Reply (filed Feb. 21, 2012) at 7-8.

established default rates equal to interstate originating access for originating intrastate toll VoIP traffic, and that the Commission should not deviate from the policy balance underlying that approach.[80]

30. *Discussion*. As discussed below, we do not adopt the Frontier-Windstream Petition's and Rural Associations Petition's interpretation of the VoIP intercarrier compensation rules adopted in the *USF/ICC Transformation Order*. However, arguments and evidence from those parties and supporting commenters, persuade us to modify the VoIP ICC rules on reconsideration in one respect: we permit LECs to tariff default charges equal to intrastate originating access for originating intrastate toll VoIP traffic (including traffic that originates in IP, terminates in IP, or both)[81] at intrastate rates until June 30, 2014. For all interstate toll VoIP traffic, interstate access rates continue to apply consistent with the default rates adopted in the *USF/ICC Transformation Order.*

31. The record reveals that there has been some uncertainty regarding the default origination charges for intrastate toll VoIP traffic under the framework adopted in the *USF/ICC Transformation Order*.[82] However, we ultimately are unpersuaded by the Frontier-Windstream Petition's and Rural Associations Petition's rationales for interpreting the *USF/ICC Transformation Order* to apply default origination charges equal to intrastate—rather than interstate—originating access for intrastate toll VoIP traffic. We disagree with claims that statements in other sections of the *USF/ICC Transformation Order* discussing, for example, the Commission's general intent to address reductions to originating access in the FNPRM, imply that the Commission took a particular approach to origination charges for VoIP traffic.[83] The *USF/ICC Transformation Order* adopted a distinct prospective intercarrier compensation framework for VoIP traffic based on its findings specific to that traffic.[84] Contrary to the Petitions' claims, the *USF/ICC Transformation Order*'s treatment or discussion of originating access charges in other contexts do not constrain the interpretation of permissible origination charges for toll VoIP traffic.[85]

[80] *See, e.g.*, AT&T Comments (filed Feb. 9, 2012) at 38-39; Level 3 Opposition (filed Feb. 9, 2012) at 5-6; Verizon Opposition (filed Feb. 9, 2012) at 7-11.

[81] *See supra* note 69.

[82] *See, e.g.*, Verizon Opposition (filed Feb. 9, 2012) at 10 (observing that "parties are not consistently implementing the new [VoIP] rates with respect to originating charges in state tariffs" and thus "disputes are popping up all over the country").

[83] *See, e.g.*, Frontier-Windstream Petition at 21-25; Rural Associations Opposition (filed Feb. 9, 2012) at 20-21.

[84] *See, e.g.*, *USF/ICC Transformation Order,* 26 FCC Rcd at 18008, para. 944 ("adopt[ing] transitional rules specifying, prospectively, the default compensation for [VoIP] traffic"); *id*. at 18009, para. 945 n.1905 (discussing the application of the equivalent of the historical enhanced service provider (ESP) exemption in the transitional VoIP framework (where it does not apply) as compared to the transitional framework for other traffic (where it does apply)); *id*. at 18009, para. 947 (in contrast to other traffic that clearly had been subject to historical intercarrier compensation rules, the application of such requirements for VoIP traffic "would require the Commission to enunciate a policy rationale for expressly imposing that regime on VoIP traffic in the face of the known flaws of existing intercarrier compensation rules and notwithstanding the recognized need to move in a different direction"); *id*. (finding that "to the extent that particular carriers historically have relied on access revenues to subsidize local services, the record is clear that many providers did not pay the same intercarrier compensation rates for VoIP traffic that would have applied to traditional telephone service traffic"). *See also, e.g.*, Verizon Opposition (filed Feb. 9, 2012) at 8. In addition, structurally, the Commission addressed intercarrier compensation for VoIP traffic in a distinct section separate from its transitional intercarrier compensation framework for other traffic more generally, reinforcing its distinct treatment from other traffic as an element of the overall transitional intercarrier compensation rules adopted in the *Order*. *See, e.g.*, *USF/ICC Transformation Order*, 26 FCC Rcd at 17904-56, 18003-30, Section XII (Comprehensive Intercarrier Compensation Reform), Section XIV (Intercarrier Compensation For VoIP Traffic).

[85] *See, e.g.*, Frontier-Windstream Petition at 21-25. *See also, e.g.*, Cbeyond et al. Comments (filed Feb. 9, 2012) at 3; Rural Associations Opposition (filed Feb. 9, 2012) at 20-21; Frontier-Windstream Reply (filed Feb. 21, 2012) at 2-7.

In addition, although the *USF/ICC Transformation Order* cites illustrative examples of the operation of the VoIP intercarrier compensation framework for termination charges,[86] the text and the implementing rules demonstrate that the intercarrier compensation framework for toll VoIP traffic limits both default origination and termination charges to the level of interstate access rates.[87] Further, although the Commission built upon the ABC Plan in adopting a VoIP intercarrier compensation framework, the Commission did not adopt the ABC Plan, and as a result, individual commenters' interpretations of the ABC Plan do not dictate a different interpretation of the *USF/ICC Transformation Order*.[88]

32. More fundamentally, these arguments reflect a mistaken understanding of key elements of the *USF/ICC Transformation Order*.[89] Arguments that setting default rates equal to intrastate originating access are necessary to avoid "flash cuts" or "reductions" in intercarrier compensation assume that LECs were receiving intrastate originating access for intrastate toll VoIP traffic under the *status quo*

[86] *See, e.g.*, *USF/ICC Transformation Order*, 26 FCC Rcd at 18007-08, 18020-22, paras. 942, 963. The need to provide clarity regarding the framework's application to originating toll VoIP traffic explains the Commission's explicit reference to both "originating and terminating" interstate access rates in paragraph 961 of the *Order*, contrary to the Frontier-Windstream Petition's claim. *See* Frontier-Windstream Petition at 25 n.57. *See also, e.g.*, Frontier-Windstream Reply (filed Feb. 21, 2012) at 8-9. Further, contrary to commenters' claims, *see* Frontier-Windstream Reply (filed Feb. 21, 2012) at 8, footnote 1976's reference to originating access rates being phased-down pursuant to a transition considered in the FNPRM remains valid under this interpretation, because the FNPRM clearly contemplates future reforms to interstate originating access rates. *USF/ICC Transformation FNPRM*, 26 FCC Rcd at 18109-18112, paras. 1298-1305.

[87] As the *Order* emphasized "toll [VoIP] traffic will be subject to charges not more than originating and terminating interstate access rates." *USF/ICC Transformation Order*, 26 FCC Rcd at 18019-20, para. 961. *See also, e.g.*, *id.* at 18002, para. 933 ("Under this transitional framework . . . Default intercarrier compensation rates for toll [VoIP] traffic are equal to interstate access rates"); *id.* at 18008, 944 ("Default charges for 'toll' [VoIP] traffic will be equal to interstate access rates applicable to non-VoIP traffic, both in terms of the rate level and rate structure"); *id.* at 18018, para. 959 ("In addition, under the framework adopted here, most default rates actually paid for toll [VoIP] traffic—equal to interstate access rates—will be the same regardless of whether the [VoIP] toll traffic were considered to be solely interstate or both interstate and intrastate"). The Commission's implementing rules likewise reflect this interpretation. 47 C.F.R. § 51.913(a) ("Access Reciprocal Compensation subject to this subpart exchanged between a local exchange carrier and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format shall be subject to a rate equal to the relevant interstate access charges specified by this subpart."). *See also* 47 C.F.R. § 51.913(a) (explaining that the compensation subject to this subpart is for "telecommunications traffic exchanged between telecommunications providers that is interstate or intrastate exchange access, information access, or exchange services for such access, other than special access"); 51.903(h) (defining "Access Reciprocal Compensation" for purposes of this subpart consistent with that scope).

[88] The ABC Plan as filed proposed that the Commission classify all VoIP traffic as interstate. *See, e.g.*, ABC Plan, Attach. 5 at 18 (proposing that the Commission find that "all VoIP traffic . . . is inseverable and, therefore, interstate for jurisdictional purposes"). Although the Commission ultimately did not rely on that particular proposal in the *USF/ICC Transformation Order*, under the terms of the ABC Plan there is no explanation of how the Commission would (or could) both classify all VoIP traffic as interstate and nonetheless adopt intrastate originating access rates as the default for originating certain toll VoIP traffic. Thus, even if the interpretation of the ABC Plan is relevant, that plan, as filed, does not clearly support the interpretation of it adopted by some commenters. *See, e.g.*, Frontier-Windstream Petition at 23-24, 25-26; Frontier-Windstream Reply (filed Feb. 21, 2012) at 9.

[89] Commenters also cite the Commission's desire to "guard against new forms of arbitrage." *See, e.g.*, Frontier-Windstream Reply (filed Feb. 21, 2012) at 13 (quoting *USF/ICC Transformation Order*, 26 FCC Rcd at 18006, para. 941). *See also* Rural Associations Petition at 34 (claiming difficulty in identifying traffic that terminates in IP). However, they do not demonstrate that the *Order* should be interpreted categorically to preclude any individual rules that could preserve incentives for any form of arbitrage, nor that the procedural protections adopted in the *Order* are inadequate to address any such incentives. *See, e.g.*, *USF/ICC Transformation Order*, 26 FCC Rcd at 18011-12, para. 950 (discussing procedural protections adopted in the VoIP intercarrier compensation rules to guard against arbitrage). *See also, e.g.*, Verizon Opposition (filed Feb. 9, 2012) at 10.

prior to that *Order*.[90] Although the marketplace evidence in the record on reconsideration demonstrates the accuracy of that position in many cases, that assumption is not reflected in the *USF/ICC Transformation Order* itself. Rather, based on the available record evidence, the Commission found as a practical matter that compensation for VoIP traffic was widely subject to dispute and varied outcomes, and that "the record is clear that many providers did not pay the same intercarrier compensation rates for VoIP traffic that would have applied to traditional telephone service traffic."[91] The Commission did not reach a different conclusion in the case of originating access. Consequently, the *USF/ICC Transformation Order* itself does not provide a basis for interpreting the requirements of that *Order* against a baseline assumption that intrastate originating access historically had been received for intrastate toll VoIP traffic.

33. The record on reconsideration, however, indicates that prior to the *USF/ICC Transformation Order*, there were fewer disputes and instances of non-payment or under-payment of origination charges billed at intrastate originating access rates for intrastate toll VoIP traffic than was the case for terminating charges for such traffic, particularly for calls that originated in TDM format.[92] Consequently, several commenters present evidence that they will experience annual reductions in originating access revenues under the VoIP intercarrier compensation framework adopted in the *USF/ICC Transformation Order*.[93]

34. This new evidence regarding the *status quo* prior to the *USF/ICC Transformation Order* persuades us to reconsider the balancing of policy interests underlying the *Order*'s approach to VoIP traffic, consistent with Petitioners' request in the alternative to reconsider those rules. In light of this new evidence, we conclude that an appropriate, measured transition for these revenues is somewhat different from the transition that the Commission anticipated based on its findings in the *USF/ICC Transformation*

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[90] *See generally*, Frontier-Windstream Petition at 21-29; Cbeyond et al. Comments (filed Feb. 9, 2012) at 4-5; Rural Associations Opposition (filed Feb. 9, 2012) at 20-21; Frontier-Windstream Reply (filed Feb. 21, 2012) at 3-7, 10-11.

[91] *USF/ICC Transformation Order*, 26 FCC Rcd at 18010, para. 948. In addition, the *USF/ICC Transformation Order* reflected the first occasion where the Commission expressly addressed the intercarrier compensation rules applicable to VoIP traffic generally, and it did so by exercising its authority to adopt purely prospective rates, remaining silent as to appropriate outcomes prior to the framework adopted in the *Order*. *Id.* at 18003, 18005, 18008-09, paras. 935, 939, 945. *See also USF/ICC Transformation NPRM*, 26 FCC Rcd at 4744-45, para. 608 ("The Commission has never addressed whether interconnected VoIP is subject to intercarrier compensation rules and, if so, the applicable rate for such traffic.").

[92] *See, e.g.*, Letter from Samuel L. Feder, counsel for Cablevision and Charter, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. at 2 (filed Mar. 12, 2012) (Cablevision-Charter Mar. 12, 2012 *Ex Parte* Letter); Letter from Malena F. Barzilai Regulatory Counsel / Director, Federal Government Affairs, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. at 2 (filed Mar. 5, 2012) (Windstream Mar. 5, 2012 *Ex Parte* Letter). We rely on this evidence only insofar as it provides a factual description of the operation of the marketplace during relevant time periods. As in the *USF/ICC Transformation Order*, we do not address preexisting law prior to the prospective framework adopted in the *USF/ICC Transformation Order*. *USF/ICC Transformation Order*, 26 FCC Rcd at 18003, 18008-09, paras. 935, 945.

[93] *See, e.g.*, NCTA Mar. 12, 2012 *Ex Parte* Letter at 1; Cablevision-Charter Mar. 12, 2012 *Ex Parte* Letter at 2; Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. at 2 (filed Mar. 12, 2012) (NTCA Mar. 12, 2012 *Ex Parte* Letter); Comcast Mar. 8, 2012 *Ex Parte* Letter at 2; Windstream Mar. 5, 2012 *Ex Parte* Letter at 2; Letter from Thomas Jones, counsel for Cbeyond et al. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. at 1-3 (filed Mar. 1, 2012) (Cbeyond et al. Mar. 1, 2012 *Ex Parte* Letter); Time Warner Cable Mar. 1, 2012 *Ex Parte* Letter at 2; Frontier Feb. 23, 2012 Data *Ex Parte* Letter at 1-2.

Order.[94] Consequently, on reconsideration we find it appropriate to permit LECs, prospectively, to tariff a rate equal to their intrastate originating access rates when they originate intrastate toll VoIP traffic, albeit for a finite period of time.

35. In particular, consistent with Frontier's proposal,[95] we amend Part 51 of our rules, as reflected in the attached Appendix A, to permit LECs to tariff default rates equal to their intrastate originating access rates when they originate intrastate toll VoIP traffic from the effective date of our the revised rules[96] until June 30, 2014—effective July 1, 2014, LECs will be permitted to tariff default rates for such traffic equal to their interstate originating access rates.[97] This is to be considered a transitional

[94] *USF/ICC Transformation Order*, 26 FCC Rcd at 18012-13, para. 952. By the same token, the record does not reveal that origination charges for VoIP traffic were never subject to dispute, nor that such disputes could not arise in the future. *See, e.g.*, Letter from Maggie McCready, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, Attach. at 7 (filed Mar. 23, 2012). This reinforces our conclusion that, although some action on reconsideration is warranted based on the new evidence, limiting that action to a finite period of time adequately provides carriers with a measured transition while balancing the Commission's other goals, as discussed below.

[95] Letter from Michael D. Saperstein, Jr., Director of Federal Regulatory Affairs, Frontier, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. at 2 (filed Mar. 20, 2012) (suggesting two years as a reasonable period).

[96] To enable providers time to implement changes to their intrastate tariffs and business plans, see Letter from Erin Boone, Senior Corporate Counsel, Federal Regulatory Affairs, Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 et al. at 2 (filed Mar. 20, 2012), we are persuaded that permitting a limited amount of additional time prior to the revised rules becoming effective is appropriate. Accordingly, our revised rules will become effective 45 days after publication in the Federal Register. This timing balances the potential burden on carriers of revising a number of intrastate tariffs and other business arrangements with the need for clarity and our timely implementation of revised rules to accommodate a measured transition. For the same reasons, if carriers are relying on factors to identify the traffic subject to rate revisions, carriers should use the most reliable and accurate data they have available for the relevant time period to develop their factors for the first quarter that the revised rules are effective. Thereafter, carriers will have the data necessary to develop more accurate factors for subsequent time periods *See* Letter from Erin Boone, Senior Corporate Counsel, Federal Regulatory Affairs, Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 et al. at 2 (filed Apr. 16, 2012).

[97] The applicable intrastate originating access rate is the LEC's otherwise-existing intrastate originating access rate at the time. Currently, for price cap carriers (and competitive LECs benchmarking to such carriers), the default rate will be the originating access rates as capped by the *USF/ICC Transformation Order*. *See USF/ICC Transformation Order*, 26 FCC Rcd at 17934-36, para. 801 & fig. 9 (capping price cap carriers' intrastate originating access rates as of the effective date of the rules). For rate-of-return carriers (and competitive LECs benchmarking to such carriers), the default rate will be the intrastate originating access rates as of the date the tariff (or other instrument) is filed addressing origination charges for intrastate toll VoIP traffic, because rate-of-return carriers' intrastate originating access rates were not capped by the *USF ICC Transformation Order*. *See id*. *See also* Letter from Kathleen Q. Abernathy, Chief Legal Officer and Executive Vice President, Regulatory and Government Affairs, Frontier, et al., to Hon. Julius Genachowski, Chairman, FCC, et al. at 1 (filed Mar. 8, 2012) (Frontier et al. Mar. 8, 2012 *Ex Parte* Letter (proposing certain intrastate originating access rate levels that would establish the default origination rates for intrastate toll VoIP traffic). These rates are subject to modification in the context of Commission action regarding originating access more generally as part of the FNPRM. *See generally USF/ICC Transformation FNPRM*. To the extent that the Commission acts to reduce originating access rates more quickly in that context, those new rates will form the basis of the default origination charges for toll VoIP traffic. Our reconsideration here does not adopt the Frontier-Windstream Petition's proposal that, "the Commission, at the very least, would need to permit LECs to use the recovery mechanism to recover lost originating access revenues." Frontier-Windstream Petition at 28-29. Related issues, such as advocacy regarding the elimination of equal access obligations due to reduced originating access revenues are more appropriate for consideration in the context of a rulemaking proceeding or a forbearance petition. *See* Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 et al., at 2 (filed Apr. 13, 2012); Letter from Jennie B. Chandra, Senior Counsel, Federal Policy, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 1 (filed Apr. 19, 2012).

rate. We do not find it appropriate to permit default origination charges equal to intrastate access rates indefinitely, consistent with the Commission's recognized need to "reduce disputes and provide greater certainty to the industry regarding intercarrier compensation revenue streams while also reflecting the Commission's move away from the pre-existing, flawed intercarrier compensation regimes that have applied to traditional telephone service"[98] under the framework adopted in the *USF/ICC Transformation Order*.[99] We are mindful that some providers were receiving compensation for originating VoIP traffic,[100] however, we consider the transition of origination charges for intrastate toll VoIP traffic in the context of the Commission's overall VoIP intercarrier compensation framework. Under this framework, most providers will receive, either via negotiated agreements or via tariffed charges, additional revenues for previously disputed terminating VoIP calls and will also realize savings associated with reduced litigation and disputes. In light of these benefits, indefinitely permitting origination charges at the level of intrastate access for prospective intrastate toll VoIP traffic is not necessary to ensure a measured transition and is indeed in tension with our overall policy goal of encouraging a migration to all IP networks and moving away from reliance on ICC revenues.

36. Indeed, the *USF/ICC Transformation Order* makes clear the Commission's goal of promoting migration to IP services.[101] As VoIP providers observe, actions that may benefit some providers through a more measured transition away from reliance on intercarrier compensation also burden other providers that are required to bear those costs.[102] Other providers likewise explain that these costs flow through to their services and, in turn, the services their customers provide.[103] In light of these considerations, we believe that a measured transition with a time limit on the use of intrastate access charges as a default for that time period is necessary to ensure that migration to IP services is adequately promoted. The time limit we adopt falls well within our uniform, national framework for comprehensive intercarrier compensation reform which set forth the overall transition for intercarrier compensation rates established in the *USF/ICC Transformation Order*. Within this time period, we predict that carriers will have had the opportunity to make significant progress transitioning their business plans away from extensive reliance on intercarrier compensation.[104]

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[98] *USF/ICC Transformation Order*, 26 FCC Rcd at 18009, para. 946. *See also, e.g.*, *id*. at 18000, para. 930 (observing that "[t]he decisions we adopt today will provide LECs, including incumbent LECs, with more certain revenue throughout the transition, and will also allow them to avoid the litigation expense associated with attempts to collect access charges for VoIP traffic").

[99] *See also, e.g.*, Verizon Opposition (filed Feb. 9, 2012) at 9 (discussing the balancing of "the Commission's objective to phase out all access charges—both terminating and originating charges—over time" and the recognized flaws in the preexisting intercarrier compensation rules); Verizon Mar. 6, 2012 *Ex Parte* Letter at 1-2 (discussing the balancing of "the Commission's objectives to avoid applying the legacy access charge regime to IP traffic").

[100] At the same time, consistent with the *USF/ICC Transformation Order*, we continue to address intercarrier compensation for VoIP only on a prospective basis. *See, e.g.*, *USF/ICC Transformation Order*, 26 FCC Rcd at 18002-03, 18009-10, paras. 933, 935, 946-48.

[101] *See, e.g.,USF/ICC Transformation Order*, 26 FCC Rcd at 18025, para. 968. *See also, e.g.*, Letter from Erin Boone, Senior Corporate Counsel, Federal Regulatory Affairs, Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 et al. at 3 (filed Mar. 14, 2012) (Level 3 Mar. 14, 2012 *Ex Parte* Letter).

[102] *See, e.g.*, Letter from Glenn S. Richards, Executive Director, VON Coalition, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 et al. at 1-2 (filed Mar. 14, 2012) ("VoIP providers in particular are specifically subject for the first time to interstate access charges for IP-PSTN traffic. Unlike rate of return carriers that may have regulatory alternatives to lost revenues, the VoIP market is subject to vigorous competition and VoIP providers will have to either raise rates, and risk losing customers, or find other ways to reduce costs to account for the increased carrier charges.").

[103] *See, e.g.*, Level 3 Mar. 14, 2012 *Ex Parte* Letter at 2-3.

[104] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17932-36, paras. 798-803 & fig. 9. This timeframe of slightly more than two years also permits carriers to charge rates for originating intrastate toll VoIP traffic in excess

(continued....)

37. As with the national VoIP intercarrier compensation framework adopted in the *USF/ICC Transformation Order*, the Commission here is specifying rates applicable to LECs' origination of intrastate toll VoIP traffic as an exercise of the same legal authority that enables the Commission to specify transitional rates for comprehensive intercarrier compensation reform under the basic framework of section 251(b)(5).[105] In the *USF/ICC Transformation Order*, the Commission asserted authority to allow transitional origination charges for toll VoIP traffic, and our action here relies on that authority.[106] In the *USF/ICC Transformation Order* the Commission noted that "[t]he legal authority that enables us to specify transitional rates for comprehensive intercarrier compensation reform also enables us to adopt our transitional VoIP-PSTN intercarrier compensation framework pending the transition to bill-and-keep."[107] The Commission also noted that it "has authority to adopt …[a] transitional framework for toll VoIP-PSTN traffic based on our rulemaking authority to implement section 251(b)(5)," and that "interpreting our rulemaking authority in this manner is consistent with court decisions recognizing that 'avoiding market disruptions pending broader reforms is, of course, a standard and accepted justification for a temporary rule.'"[108] Our actions here likewise do not alter states' roles or preexisting Commission decisions regarding the treatment of VoIP more generally.[109] In particular, nothing in this Order impacts the holding of the *Vonage Order*.[110] Other than specifying a new transitional default rate that LECs are permitted to tariff in the context of originating intrastate toll VoIP traffic, we leave the *USF/ICC Transformation Order*'s transitional national VoIP intercarrier compensation framework completely unaltered.[111]

38. We disagree with commenters who argue that the Commission has not sufficiently justified its legal authority to permit transitional origination charges for toll VoIP traffic consistent with sections 251(b)(5) and 251(g) of the Act.[112] As the Commission explained in the *USF/ICC*

(...continued from previous page)
of interstate access rates for longer than the approximately eighteen months from the effective date of the *USF/ICC Transformation Order*'s rules that the Commission permitted for terminating access. *See id*.

[105] *USF/ICC Transformation Order*, 26 FCC Rcd at 18014-15, para. 955.

[106] *See USF/ICC Transformation Order*, 26 FCC Rcd at 18019-20, para. 961, n. 1976.

[107] *See id*. at 18014-15, para. 955.

[108] *See id*.

[109] *USF/ICC Transformation Order*, 26 FCC Rcd at 18018, para. 959 n.1969. *See also id*. at 17928-32, paras. 788-97 (discussing the Commission's conclusion that a uniform national framework is appropriate for intercarrier compensation reform, with certain state roles in implementation).

[110] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) (*Vonage Order*).

[111] We note that Verizon raised concerns about the implications of our action on this petition for "the Commission's careful efforts in the *USF-ICC Transformation Order* to avoid extending the legacy intrastate access regulatory regime to VoIP . . ." *See* Letter from Maggie M. McCready, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket 10-90, et al., at 1 (filed Apr. 11, 2012). As discussed below, this order modifies a rate level but does not otherwise modify the prospective framework adopted in the *USF/ICC Transformation Order.*

[112] *See, e.g.*, USTelecom Petition for Reconsideration at 39; Letter from Christi Shewman, General Attorney, AT&T Services Inc, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed Apr. 16, 2012) (AT&T Apr. 16, 2012 *Ex Parte* Letter). We note, moreover, that the Commission did not rely solely on sections 251(b)(5) and 251(g) as authority for its transitional intercarrier compensation rules, but also sections 201 and 332, as well as its discretion to craft transitional rules designed to limit marketplace disruption. *USF/ICC Transformation Order*, 26 FCC Rcd at 17914-24, 17938, paras. 760-79, 809-10; *supra* para. 37. *See also* Letter from Samuel L. Feder, Counsel for Cablevision and Charter, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. at 3 n.6 (filed Apr. 23, 2012) (Cablevision-Charter Apr. 23, 2012 *Ex Parte* Letter).

Transformation Order, traffic previously was not subject to compensation under section 251(b)(5) if "such traffic [was] subject to pre-1996 Act obligations regarding 'exchange access,'" and thus grandfathered under section 251(g).[113] The Commission concluded that "[r]egardless of whether particular VoIP services are telecommunications services or information services, there [were] pre-1996 Act obligations regarding LECs' compensation for the provision of exchange access to an IXC or an information service provider"—namely, either intercarrier access charges or, if subject to the ESP exemption, special access or subscriber line charges.[114] Contrary to some claims, it was not necessary for the Commission to resolve which of those exchange access charge frameworks applied in particular circumstances previously[115]—so long as they were exchange access regulations involving the exchange of traffic between a LEC and an interexchange carrier or information service provider, they were subject to grandfathering under section 251(g) until superseded by the Commission. Moreover, we agree with parties arguing that "the grandfathering provision of section 251(g) does not require pre-Act compensation regulations to be frozen in time" but allows the Commission "to 'modify LECs' pre-Act 'restrictions' or 'obligations' pending full implementation of relevant sections of the Act."[116] Thus, in exercising its authority to adopt a transitional framework for VoIP intercarrier compensation, the Commission was not restricted to adopting precisely the same charges that might have applied previously. As commenters observe, "[t]o find otherwise would remove any ability of the Commission to adopt a reasonable transition away from pre-Act compensation obligations."[117] Thus, regardless of whether the ESP exemption framework historically applied to VoIP traffic, the Commission had authority to eliminate the potential application of that framework to VoIP traffic[118] and adopt transitional intercarrier compensation rules, including origination charges for toll VoIP traffic, that seek to limit marketplace

[113] *USF/ICC Transformation Order*, 26 FCC Rcd at 18015-17, para. 957. *See also id*. at 17915-16, 17923, 18017, paras. 763, 778, 958; Cablevision-Charter Apr. 23, 2012 *Ex Parte* Letter at 2.

[114] *USF/ICC Transformation Order*, 26 FCC Rcd at 18015-17, para. 957. *See also* Cablevision-Charter Apr. 23, 2012 *Ex Parte* Letter at 2. AT&T claims, without detailed analysis, that the D.C. Circuit's *WorldCom* decision precludes such an interpretation. AT&T Apr. 16, 2012 *Ex Parte* Letter at 2. As the Commission explained in the *USF/ICC Transformation Order*, however, the *WorldCom* decision dealt with the exchange of traffic between two LECs for which it was "uncontested—and the Commission declared in the Initial Order"—that there was no "pre-Act obligation relating to intercarrier compensation." *USF/ICC Transformation Order*, 26 FCC Rcd at 18017, para. 958 (quoting *WorldCom v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002)). *See also* Cablevision-Charter Apr. 23, 2012 *Ex Parte* Letter at 3. As the Commission observed, "[h]ere, by contrast, there is no evidence that the exchange of toll [VoIP] traffic inherently involves the exchange of traffic between two LECs. Moreover, we note that to the extent [VoIP] traffic is not 'toll' traffic, it is subject to the preexisting reciprocal compensation regime under section 251(b)(5) rather than the transitional framework for toll [VoIP] traffic that we adopt in this Order." *USF/ICC Transformation Order*, 26 FCC Rcd at 18017, para. 958.

[115] *See, e.g.*, AT&T Apr. 16, 2012 *Ex Parte* Letter at 2.

[116] Cablevision-Charter Apr. 23, 2012 *Ex Parte* Letter at 2 (quoting *WorldCom v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002) (citing *TOPUC v. FCC*, 265 F.3d 313, 324-25 (5th Cir. 2001)).

[117] Cablevision-Charter Apr. 23, 2012 *Ex Parte* Letter at 2. Indeed, the Commission has modified its access charge rules on a variety of occasions subsequent to the 1996 Act. *See, e.g.*, *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4706, para. 51 (2011) (*USF/ICC Transformation NPRM*) (summarizing prior reforms).

[118] *USF/ICC Transformation Order*, 26 FCC Rcd at 18008-09, para. 945 ("we make clear that, whatever its possible relevance historically, the ESP exemption is not relevant or applicable prospectively in determining the intercarrier compensation obligations for [VoIP] traffic").

disruptions pending the ultimate transition to bill-and-keep under section 251(b)(5).[119]

39. We also make clear that the new default rate for originating intrastate toll VoIP traffic applies regardless of whether the VoIP traffic originates in TDM or IP format.[120] The VoIP intercarrier compensation rules adopted in the *USF/ICC Transformation Order* included a "symmetry" principle that all VoIP traffic will be subject to the same intercarrier compensation requirements, regardless of whether TDM or IP technology was used to originate or terminate the call. The Commission thus "decline[d] to adopt an asymmetric approach that would apply VoIP-specific rates for only IP-originated or only IP-terminated traffic."[121] Rather, the Commission "adopt[ed] rules making clear that origination and termination charges may be imposed under our transitional [VoIP] intercarrier compensation framework, including when an entity 'uses Internet Protocol facilities to transmit such traffic to [or from] the called party's premises.'"[122]

40. This "VoIP symmetry rule"[123] was incorporated in the codified intercarrier compensation rules for toll VoIP traffic. Section 51.913(a) of the Commission's rules specifies the rate applicable to all "Access Reciprocal Compensation subject to this subpart exchanged between a local exchange carrier and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format," without distinguishing among classes of VoIP traffic depending upon whether they originate in TDM or IP.[124] In addition, section 51.913(b) of the rules makes clear that a LEC "shall be entitled to assess and collect the full Access Reciprocal Compensation charges prescribed by this subpart that are set forth in a local exchange carrier's interstate or intrastate tariff for the access services defined in § 51.903" even if the relevant origination or termination functions are performed by the LEC's retail VoIP provider partner—which, of necessity, would be performing these functions in IP, rather than TDM.[125] Likewise, the rules make clear that "functions provided by a LEC as part of transmitting telecommunications between designated points using, in whole or in part, technology other than TDM

[119] *See supra* para. 37. *See also supra* paras. 33-36 (balancing policy goals, including the goal of a measured transition, in revising the transitional VoIP intercarrier compensation rules); Cablevision-Charter Apr. 23, 2012 *Ex Parte* Letter at 3-4 (discussing the "strong" policy arguments supporting transitional origination charges for the exchange of toll VoIP traffic).

[120] *See, e.g.*, Comcast Comments (filed Feb. 9, 2012) at 8-9; NCTA Comments (filed Feb. 9, 2012) at 14-15; Verizon Opposition (filed Feb. 9, 2012) at 8-9; Cox Reply (filed Feb. 21, 2012) at 7-8; Cablevision-Charter Mar. 12, 2012 *Ex Parte* Letter at 1-2; Frontier et al. Mar. 8, 2012 *Ex Parte* Letter at 1-2; Time Warner Cable Mar. 1, 2012 *Ex Parte* Letter at 2-3.

[121] *USF/ICC Transformation Order,* 26 FCC Rcd at 18007, para. 942. Although Cbeyond et al. cite language where the Commission discusses the application of the symmetry rule in the context of termination, *see* Cbeyond et al. Mar. 1, 2012 *Ex Parte* Letter at 3-4, as discussed above, that is an illustrative example and does not suggest that the symmetry rule applies only to termination. *See supra* note 86 and accompanying text. *See also infra* paras. 39-40 (discussing the VoIP symmetry rule).

[122] *USF/ICC Transformation Order,* 26 FCC Rcd at 18025, para. 969. *See also id*. at 18026-27, para. 970 ("we adopt rules that permit a LEC to charge the relevant intercarrier compensation for functions performed by it and/or by its retail VoIP partner, regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional TDM architecture").

[123] *Connect America Fund* et al., WC Docket No. 10-90 et al., Order, DA 12-298, paras. 3-5 (Wir. Comp. Bur. rel. Feb. 27, 2012) (*Second Bureau Clarification Order*) (referring to the "VoIP symmetry rule" and clarifying its application).

[124] 47 C.F.R. § 51.913(a).

[125] 47 C.F.R. § 51.913(b); *USF/ICC Transformation Order*, 26 FCC Rcd at 18026-27, para. 970; *Second Bureau Clarification Order* at paras. 3-4. In addition, the VoIP provider partner must "not itself seek to collect Access Reciprocal Compensation charges prescribed by this subpart for that traffic." 47 C.F.R. § 51.913(b).

transmission" count equally as access services for purposes of section 51.903 of the Commission's rules as those performed in TDM.[126]

41. The Petitions focus on the factual scenario of TDM-originated VoIP traffic,[127] and do not request reconsideration of the VoIP symmetry rule nor state that interstate rates should continue to apply to IP-originated VoIP traffic.[128] Precisely because the Petitions did not ask the Commission to reconsider the VoIP symmetry rule, however, they necessarily implicate the rate regulations for all originating intrastate VoIP traffic, because all such traffic would have to be considered for the Petitions to be accommodated within the framework of the VoIP symmetry rule. As commenters observe, the Petitions would be inconsistent with the symmetrical rules adopted in the *USF/ICC Transformation Order* if interpreted as implicating only TDM-originated VoIP traffic.[129] Indeed, Frontier and Windstream subsequently joined with a number of other stakeholders in advocating that the Commission act on their Petition "by stating that all originating access charges are subject to the same treatment pending further reform."[130] Consequently, we interpret the Petitions as implicating the rate regulations for all originating intrastate VoIP traffic, consistent with the rules we adopt on reconsideration.[131]

42. Notably, we would not grant the requests for reconsideration of our VoIP intercarrier compensation rules if the symmetry rule were not applicable here. The Commission adopted the symmetry requirement in the *USF/ICC Transformation Order* to avoid "marketplace distortions that give one category of providers an artificial regulatory advantage in costs and revenues relative to other market participants."[132] As commenters recognized, reconsidering the rules only for intrastate toll VoIP traffic originated in TDM could lead to the outcome the Commission's symmetry rule sought to avoid, for instance by creating artificial incentives for parties to send traffic using TDM technology simply to increase their revenues, which likewise would provide competitive advantages to such providers relative to providers relying on IP networks.[133] The symmetry rule avoids these outcomes, enabling us to grant

[126] 47 C.F.R. § 51.913(b). The functions must be provided "in a manner that is comparable to a service offered by a local exchange carrier." *Id*.

[127] Although the Petitions refer to "PSTN-originated" VoIP calls, from the context we interpret them to mean "TDM-originated." *See, e.g.*, Frontier-Windstream Petition at 27; Rural Associations Petition at 34. Under the *USF/ICC Transformation Order*, "reference to 'PSTN' refers to the exchange of traffic between carriers in (Time Division Multiplexing) TDM format." *USF/ICC Transformation Order,* 26 FCC Rcd at 18005-06, para. 940 n.1891. Since "PSTN" refers to how traffic is exchanged, regardless of how it is originated or terminated, the phrase "PSTN-originated" has no meaning in this context.

[128] *See generally* Frontier-Windstream Petition at 27-28; Rural Associations Petition at 34-35. *See also* Frontier-Windstream Reply (filed Feb. 21, 2012) at 12 n.40 (rejecting NCTA's "assert[ion] that the Frontier and Windstream Petition urges a different form of asymmetry, whereby a 'carrier could assess originating access charges only at interstate rates' if a [VoIP] call originates in IP" stating instead that "the Petition does not adopt a position on originating access charges for IP-originated traffic").

[129] *See, e.g.*, Comcast Comments (filed Feb. 9, 2012) at 8-9; NCTA Comments (filed Feb. 9, 2012) at 14-15; letter from Jennifer K. MeKee, Vice President and Associate General Counsel, National Cable and Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, WC Docket 10-90 et al. at 2-5 (filed March 30, 2012).

[130] Letter from Kathleen Q. Abernathy, Chief Legal Officer and Executive Vice President, Regulatory and Government Affairs, Frontier, et al., to Hon. Julius Genachowski, Chairman, FCC, et al. at 1 (filed Mar. 8, 2012).

[131] We therefore reject Verizon's argument that such an outcome would be inconsistent with section 405 of the Act and section 1.429 of the Commission's rules. *See, e.g.*, Letter from Maggie McCready, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 at 2 (filed Mar. 23, 2012).

[132] *USF/ICC Transformation Order*, 26 FCC Rcd at 18007-08, para. 942.

[133] *See, e.g.*, Comcast Comments (filed Feb. 9, 2012) at 8-9; NCTA Comments (filed Feb. 9, 2012) at 14-15; Cox Reply (filed Feb. 21, 2012) at 8; Letter from Matthew A. Brill, counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. at 2-3 (filed Mar. 1, 2012).

reconsideration on this issue.

III. PROCEDURAL MATTERS

A. Paperwork Reduction Act

43. This Second Order on Reconsideration contains revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law No. 104-13. It has been submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding.

B. Final Regulatory Flexibility Act Certification

44. The Regulatory Flexibility Act (RFA)[134] requires that agencies prepare a regulatory flexibility analysis for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not have a significant economic impact on a substantial number of small entities."[135] The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[136] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[137] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[138]

45. This Second Order on Reconsideration adopts revisions to 47 C.F.R. Parts 51 and 54. A Final Regulatory Flexibility Analysis for the revision to Part 51 is included below as Appendix B. We hereby certify that the revision to Part 54 will not have a significant economic impact on a substantial number of small entities. Previously, our rules governing Phase I of the Connect America Fund required, among other things, that carriers accepting incremental support deploy only to locations shown as unserved on the National Broadband Map. In this Order, we revise our rules to expand the areas to which such carriers may deploy, by permitting them to also deploy to unserved locations that are shown as served by the carrier itself, a change we make in recognition of the fact that the Map generally shows wireline coverage on a census-block-by-census-block basis, and thus shows an entire census block as served by the incumbent carrier even when there may be many locations in the block that are, in fact, not served. We conclude that this change to our rules will not have a significant impact on a substantial number of small entities. The Commission will send a copy of this Order, including this certification, to

[134] *See* 5 U.S.C. § 601 *et seq*. The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857.

[135] 5 U.S.C. § 605(b).

[136] 5 U.S.C. § 601(6).

[137] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[138] Small Business Act, 15 U.S.C. § 632.

the Chief Counsel for Advocacy of the Small Business Administration.[139] In addition, the Order (or a summary thereof) and certification will be published in the Federal Register.[140]

C. Congressional Review Act

46. The Commission will send a copy of this Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[141]

IV. ORDERING CLAUSES

47. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 2, 4(i), 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 152, 154(i), 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403, 1302, and sections 1.1 and 1.429 of the Commission's rules, 47 C.F.R. §§ 1.1, 1.429, that this Second Order on Reconsideration IS ADOPTED.

48. IT IS FURTHER ORDERED that the Petition for Reconsideration of the United States Telecom Association is DENIED to the extent provided herein.

49. IT IS FURTHER ORDERED that the Petition for Reconsideration and/or Clarification of Frontier Communications Corp. and Windstream Communications, Inc., is GRANTED to the extent provided herein and DENIED to the extent provided herein.

50. IT IS FURTHER ORDERED that the Petition for Reconsideration and Clarification of the National Exchange Carrier Association, Inc., Organization for the Promotion and Advancement of Small Telecommunications Companies and Western Telecommunications Alliance, is GRANTED to the extent provided herein.

51. IT IS FURTHER ORDERED that the Petition for Reconsideration of the Independent Telephone & Telecommunications Alliance is GRANTED to the extent provided herein and DENIED to the extent provided herein.

52. IT IS FURTHER ORDERED that Part 51 of the Commission's rules, 47 C.F.R. Part 51, is AMENDED as set forth in Appendix A, and such rule amendments shall be effective 45 days after the date of publication of the rule amendments in the Federal Register.

53. IT IS FURTHER ORDERED that Part 54 of the Commission's rules, 47 C.F.R. Part 54, is AMENDED as set forth in Appendix A, and such rule amendments shall be effective 30 days after the date of publication of the rule amendments in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

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[139] *Id.*

[140] *Id.*

[141] *See* 5 U.S.C. 801(a)(1)(A).

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

For the reasons discussed in the Second Order on Reconsideration, the Federal Communications Commission amends 47 CFR parts 51 and 54 to read as follows:

PART 51-INTERCONNECTION

1. The authority citation for part 51 continues to read as follows:

Authority: Sections 1–5, 7, 201–05, 207–09, 218, 220, 225–27, 251–54, 256, 271, 303(r), and 332, of the Communications Act of 1934, as amended, and section 706 of the Telecommunication Act of 1996, as amended; 47 U.S.C. 151–55, 157, 201–05, 207–09, 218, 220, 225–227, 251–254, 256, 271, 303(r), 332, 1302, 47 U.S.C. 157 note, unless otherwise noted.

2. Revise § 51.913(a) to read as follows:

(a)(1) Terminating Access Reciprocal Compensation subject to this subpart exchanged between a local exchange carrier and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format shall be subject to a rate equal to the relevant interstate terminating access charges specified by this subpart. Interstate originating Access Reciprocal Compensation subject to this subpart exchanged between a local exchange carrier and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format shall be subject to a rate equal to the relevant interstate originating access charges specified by this subpart.

(2) Until June 30, 2014, intrastate originating Access Reciprocal Compensation subject to this subpart exchanged between a local exchange carrier and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format shall be subject to a rate equal to the relevant intrastate originating access charges specified by this subpart. Effective July 1, 2014, originating Access Reciprocal Compensation subject to this subpart exchanged between a local exchange carrier and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format shall be subject to a rate equal to the relevant interstate originating access charges specified by this subpart.

(3) Telecommunications traffic originates and/or terminates in IP format if it originates from and/or terminates to an end-user customer of a service that requires Internet protocol-compatible customer premises equipment.

* * * * *

PART 54—UNIVERSAL SERVICE

1. The authority citation for part 54 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 201, 205, 214, 219, 220, 254, 303(r), 403, and 1302 unless otherwise noted.

2. Amend section 54.312(b)(3) by revising it to read as follows:

* * * * *

(b)

(1) * * *

(2) * * *

(3) A carrier may elect to accept or decline incremental support. A holding company may do so on a holding-company basis on behalf of its operating companies that are eligible telecommunications carriers, whose eligibility for incremental support, for these purposes, shall be considered on an aggregated basis. A carrier must provide notice to the Commission, relevant state commissions, and any affected Tribal government, stating the amount of incremental support it wishes to accept and identifying the areas by wire center and census block in which the designated eligible telecommunications carrier will deploy broadband to meet its deployment obligation, or stating that it declines incremental support. Such notification must be made within 90 days of being notified of any incremental support for which it would be eligible. Along with its notification, a carrier accepting incremental support must also submit a certification that the locations to be served to satisfy the deployment obligation are not shown as served by fixed broadband provided by any entity other than the certifying entity or its affiliate on the then-current version of the National Broadband Map; that, to the best of the carrier's knowledge, the locations are, in fact, unserved by fixed broadband; that the carrier's current capital improvement plan did not already include plans to complete broadband deployment within the next three years to the locations to be counted to satisfy the deployment obligation; and that incremental support will not be used to satisfy any merger commitment or similar regulatory obligation.

* * * * *

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980 (RFA),[1] as amended, Initial Regulatory Flexibility Analyses (IRFAs) were incorporated in the *Notice of Proposed Rule Making and Further Notice of Proposed Rulemaking* (*USF/ICC Transformation NPRM*), in the *Notice of Inquiry and Notice of Proposed Rulemaking* (*USF Reform NOI/NPRM*), and in the *Notice of Proposed Rulemaking* (*Mobility Fund NPRM*) for this proceeding.[2] The Commission sought written public comment on the proposals in the *USF/ICC Transformation NPRM*, including comment on the IRFA. The Commission only received comments on the *USF/ICC Transformation NPRM* IRFA.[3] The comments received were discussed in the *USF/ICC Transformation Order,*[4] and are not discussed further here. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[5]

A. Need for, and Objectives of the Order

2. In the *USF/ICC Transformation Order*, the Commission adopted policies to transition outdated universal service and intercarrier compensation (ICC) systems to the Connect America Fund (CAF). In the present order, in addition to revising some rules related to universal service, which revisions we certify will not have a significant economic impact on a substantial number of small entities, we revise the rules adopted in the *USF/ICC Transformation Order* governing intercarrier compensation for Voice over Internet Protocol (VoIP).[6] In that Order*, the Commission* permited LECs, starting December 29, 2011, to tariff default intercarrier compensation rates for both originating and terminating

[1] 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612 has been amended by the Contract With America Advancement Act of 1996, Public Law No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554 (2011) (*USF/ICC Transformation NPRM*); *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, Notice of Proposed Rulemaking, 25 FCC Rcd 14,716 (2010) ("*Mobility Fund NPRM*").

[3] *See* Furchtgott-Roth Economic Enterprises *USF/ICC Transformation NPRM Ex Parte* Comments at 14; Bluegrass Telephone Company *USF/ICC Transformation NPRM* Comments at 35-36; Letter from Brenda Crosby, President, Cascade Utilities, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, et al., at 3 (filed April 6, 2011); Molalla Tele§phone Company *USF/ICC Transformation NPRM* at 3; Letter from John Hemphill, Vice President, Pine Telephone System, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, et al., at 3 (filed March 30, 2011); Letter from Dave Osborn, Valley Telephone Cooperative, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, et al., at 3 (filed August 29, 2011).

[4] *See In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*) ; *pets. for review pending sub nom. In re: FCC*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

[5] *See* 5 U.S.C. § 604.

[6] 47 C.F.R § 51.913.

toll VoIP traffic at rates equal to interstate access rates, with default intercarrier compensation for other VoIP traffic at the otherwise-applicable reciprocal compensation rates.[7]

3. In this Second Order on Reconsideration, the Commission reconsidered the transitional intercarrier compensation framework adopted in the *USF/ICC Transformation Order* for originating VoIP traffic.[8] Specifically, the Commission modified the VoIP ICC rules to permit LECs to tariff default charges equal to intrastate originating access for originating intrastate toll VoIP traffic at intrastate rates until June 30, 2014.[9]

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

4. No comments relating to any of the IRFAs have been filed since the Commission released the *USF/ICC Transformation* Order. In making the determinations reflected in the Order, we have considered the impact of our actions on small entities.

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

5. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[10] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[11] In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act.[12] A small-business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[13]

6. **Small Businesses**. Nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.[14]

7. **Wired Telecommunications Carriers**. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[15] According to Census Bureau data for 2007, there were 3,188 firms in this category,

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[7] *USF/ICC Transformation Order, 26 FCC Rcd* at 18002, 18008, 18011, 18017-18025, paras. 933, 944, 949 n.1919, 959, 961-67; 47 C.F.R. §§ 51.701(b)(3), 51.703(c), 51.913.

[8] *Order* at para. 45.

[9] *Order* at para. 47.

[10] *See* 5 U.S.C. § 603(b)(3).

[11] *See* 5 U.S.C. § 601(6).

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

[13] *See* 15 U.S.C. § 632.

[14] *See* SBA, Office of Advocacy, "Frequently Asked Questions," http://www.sba.gov/advo/stats/sbfaq.pdf (accessed Dec. 2010).

[15] 13 C.F.R. § 121.201, NAICS code 517110.

total, that operated for the entire year.[16] Of this total, 3144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.[17] Thus, under this size standard, the majority of firms can be considered small.

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

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

10. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[24] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[25] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

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[16] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110" (issued Nov. 2010).

[17] *See id*.

[18] 13 C.F.R. § 121.201, NAICS code 517110.

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

[20] *See id*.

[21] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[22] *See Trends in Telephone Service* at Table 5.3.

[23] *See id*.

[24] 5 U.S.C. § 601(3).

[25] *See* Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a); *see also* 5 U.S.C. § 601(3). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

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

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

13. **Prepaid Calling Card Providers**. Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[35] According to Commission data, 193 carriers have reported that they are engaged in the provision of prepaid calling cards.[36] Of these, an estimated all 193 have 1,500 or fewer employees and none have more than 1,500 employees.[37] Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by rules adopted pursuant to the Order.

14. **Local Resellers**. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or

[26] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[27] *See Trends in Telephone Service* at Table 5.3.

[28] *See id.*

[29] *See id*.

[30] *See id*.

[31] *See id*.

[32] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[33] *See Trends in Telephone Service* at Table 5.3.

[34] *See id.*

[35] *See* 13 C.F.R. § 121.201, NAICS code 517911.

[36] *See Trends in Telephone Service* at Table 5.3.

[37] *See id*.

fewer employees.[38] According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.[39] Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.[40] Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by rules adopted pursuant to the Order.

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

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

17. **800 and 800-Like Service Subscribers**.[47] Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service (toll free) subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[48] The most reliable source of information regarding the number of these service subscribers appears to be data the Commission collects on the 800, 888, 877, and 866 numbers in use.[49] According to our data, as of September 2009, the number of 800 numbers assigned was 7,860,000; the number of 888 numbers assigned was 5,588,687; the number of 877 numbers assigned was 4,721,866; and the number of 866 numbers assigned was 7,867,736.[50] We do not have data specifying the number of these subscribers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA

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[38] *See* 13 C.F.R. § 121.201, NAICS code 517911.

[39] *See Trends in Telephone Service* at Table 5.3.

[40] *See id*.

[41] *See* 13 C.F.R. § 121.201, NAICS code 517911.

[42] *See Trends in Telephone Service* at Table 5.3.

[43] *See id*.

[44] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[45] *See Trends in Telephone Service* at Table 5.3.

[46] *See id*.

[47] We include all toll-free number subscribers in this category, including those for 888 numbers.

[48] *See* 13 C.F.R. § 121.201, NAICS code 517911.

[49] *See Trends in Telephone Service* at Tables 18.7-18.10.

[50] *See id*.

size standard. Consequently, we estimate that there are 7,860,000 or fewer small entity 800 subscribers; 5,588,687 or fewer small entity 888 subscribers; 4,721,866 or fewer small entity 877 subscribers; and 7,867,736 or fewer small entity 866 subscribers.

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

19. **Broadband Personal Communications Service**. The broadband personal communications service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years.[58] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[59] These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[60] No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very

[51] *See* 13 C.F.R. § 121.201, NAICS code 517210.

[52] U.S. Census Bureau, 2002 NAICS Definitions, "517211 Paging"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM; U.S. Census Bureau, 2002 NAICS Definitions, "517212 Cellular and Other Wireless Telecommunications"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM.

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

[54] U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210" (issued Nov. 2010).

[55] *Id*. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "100 employees or more."

[56] *See Trends in Telephone Service* at Table 5.3.

[57] *See id*.

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

[59] *See generally Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824 (1996); *see also* 47 C.F.R. § 24.720(b)(2).

[60] *See, e.g.*, *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532 (1994).

small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[61] In 1999, the Commission re-auctioned 347 C, E, and F Block licenses.[62] There were 48 small business winning bidders. In 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction 35.[63] Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction 58. There were 24 winning bidders for 217 licenses.[64] Of the 24 winning bidders, 16 claimed small business status and won 156 licenses. In 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction 71.[65] Of the 14 winning bidders, six were designated entities.[66] In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F block licenses in Auction 78.[67]

20. **Advanced Wireless Services**. In 2008, the Commission conducted the auction of Advanced Wireless Services ("AWS") licenses.[68] This auction, which as designated as Auction 78, offered 35 licenses in the AWS 1710-1755 MHz and 2110-2155 MHz bands ("AWS-1"). The AWS-1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A bidder with attributed average annual gross revenues that exceeded $15 million and did not exceed $40 million for the preceding three years ("small business") received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed $15 million for the preceding three years ("very small business") received a 25 percent discount on its winning bid. A bidder that had combined total assets of less than $500 million and combined gross revenues of less than $125 million in each of the last two years qualified for entrepreneur status.[69] Four winning bidders that identified themselves as very small businesses won 17 licenses.[70] Three of the winning bidders that identified themselves as a small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

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

[62] *See* "C, D, E, and F Block Broadband PCS Auction Closes" *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

[63] *See* "C and F Block Broadband PCS Auction Closes; Winning Bidders Announced," *Public Notice*, 16 FCC Rcd 2339 (2001).

[64] *See* "Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58," *Public Notice,* 20 FCC Rcd 3703 (2005).

[65] *See* "Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71," *Public Notice*, 22 FCC Rcd 9247 (2007).

[66] *Id*.

[67] *See "*Auction of AWS-1 and Broadband PCS Licenses Rescheduled For August 13, 3008, Notice of Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures For Auction 78," *Public Notice*, 23 FCC Rcd 7496 (2008) (*AWS-1 and Broadband PCS Procedures Public Notice*).

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

[69] *Id*. at 7521-22.

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

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

22. **Paging (Private and Common Carrier)**. In the *Paging Third Report and Order*, we developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[78] A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small business size standards.[79] According to Commission data, 291 carriers have reported that they are engaged in Paging or Messaging Service.[80] Of these, an estimated 289 have 1,500 or fewer employees, and two have more than 1,500 employees.[81] Consequently, the Commission estimates that the majority of paging providers are small entities that may be affected by our action. An auction of Metropolitan

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

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

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

[74] *Narrowband PCS Second Report and Order*, 15 FCC Rcd at 10476, para. 40.

[75] *Id.*

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

[77] *See "*Narrowband PCS Auction Closes," *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

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

[79] *See Alvarez Letter 1998*.

[80] *See Trends in Telephone Service* at Table 5.3.

[81] *See id*.

Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses.[82] A subsequent auction of MEA and Economic Area ("EA") licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold.[83] One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.[84] A fourth auction, consisting of 9,603 lower and upper paging band licenses was held in the year 2010. Twenty-nine bidders claiming small or very small business status won 3,016 licenses.[85].

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

24. **220 MHz Radio Service – Phase II Licensees**. The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[87] This small business size standard indicates that a "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[88] A "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years.[89] The SBA has approved these small business size standards.[90] Auctions of Phase

[82] *See id.*

[83] *See* "*Lower and Upper Paging Band Auction Closes*," Public Notice, 16 FCC Rcd 21821 (WTB 2002).

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

[85] *See* "*Auction of Lower and Upper Paging Bands Licenses Closes*," Public Notice, 25 FCC Rcd 18,164 (WTB 2010).

[86] *See* 13 C.F.R. § 121.201, NAICS code 517210.

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

[88] *See id*. at 11068–69, para. 291.

[89] *See id*. at 11068–70, paras. 291–95.

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

II licenses commenced on September 15, 1998, and closed on October 22, 1998.[91] In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.[92]

25. **Specialized Mobile Radio**. The Commission awards small business bidding credits in auctions for Specialized Mobile Radio ("SMR") geographic area licenses in the 800 MHz and 900 MHz bands to entities that had revenues of no more than $15 million in each of the three previous calendar years.[93] The Commission awards very small business bidding credits to entities that had revenues of no more than $3 million in each of the three previous calendar years.[94] The SBA has approved these small business size standards for the 800 MHz and 900 MHz SMR Services.[95] The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction was completed in 1996.[96] Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band.[97] The 800 MHz SMR auction for the upper 200 channels was conducted in 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.[98] A second auction for the 800 MHz band was conducted in 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.[99]

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

27. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation

[91] *See* "Phase II 220 MHz Service Auction Closes," *Public Notice*, 14 FCC Rcd 605 (1998).

[92] *See* "Phase II 220 MHz Service Spectrum Auction Closes," *Public Notice*, 14 FCC Rcd 11218 (1999).

[93] 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

[94] 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

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

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

[97] *Id*.

[98] *See* "Correction to Public Notice DA 96-586 'FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,'" *Public Notice*, 11 FCC Rcd 18,637 (WTB 1996).

[99] *See Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

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

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

authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees.[102] We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

28. **Broadband Radio Service and Educational Broadband Service**. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service ("MDS") and Multichannel Multipoint Distribution Service ("MMDS") systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") (previously referred to as the Instructional Television Fixed Service ("ITFS")).[103] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[104] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas ("BTAs"). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[105] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. The Commission has adopted three levels of bidding credits for BRS: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) is eligible to receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) is eligible to receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) is eligible to receive a 35 percent discount on its winning bid.[106] In 2009, the Commission conducted Auction 86, which offered 78 BRS licenses.[107] Auction 86 concluded with ten bidders winning 61 licenses.[108] Of the ten, two bidders claimed small business status and won 4 licenses; one bidder claimed very small business status and won three licenses; and two bidders claimed entrepreneur status and won six licenses.

[102] *See generally* 13 C.F.R. § 121.201, NAICS code 517210.

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

[104] 47 C.F.R. § 21.961(b)(1).

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

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

[107] *Auction 86 Procedures Public Notice*, 24 FCC Rcd at 8280.

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

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

30. **Lower 700 MHz Band Licenses**. The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.[113] The Commission defined a "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[114] A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[115] Additionally, the Lower 700 MHz Band had a third category of small business status for Metropolitan/Rural Service Area ("MSA/RSA") licenses, identified as "entrepreneur" and defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[116] The SBA approved these small size standards.[117] The Commission conducted an auction in 2002 of 740 Lower 700 MHz Band licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)). Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders.[118] Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.[119] The Commission conducted a second Lower 700

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

[110] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition); http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

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

[112] *See id*.

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

[114] *See Channels 52-59 Report and Order*, 17 FCC Rcd at 1087-88 para. 172.

[115] *See id*.

[116] *See id*. at 1088 para. 173.

[117] *See Alvarez Letter 1999*.

[118] *See* "Lower 700 MHz Band Auction Closes," *Public Notice*, 17 FCC Rcd 17272 (WTB 2002).

[119] *Id*.

MHz Band auction in 2003 that included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses.[120] Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.[121] In 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz Band, designated Auction 60. There were three winning bidders for five licenses. All three winning bidders claimed small business status.[122]

31. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.[123] The *700 MHz Second Report and Order* revised the band plan for the commercial (including Guard Band) and public safety spectrum, adopted services rules, including stringent build-out requirements, an open platform requirement on the C Block, and a requirement on the D Block licensee to construct and operate a nationwide, interoperable wireless broadband network for public safety users.[124] An auction of A, B and E block licenses in the Lower 700 MHz band was held in 2008.[125] Twenty winning bidders claimed small business status (those with attributable average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years). Thirty three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years). In 2011, the Commission conducted Auction 92, which offered 16 Lower 700 MHz band licenses that had been made available in Auction 73 but either remained unsold or were licenses on which a winning bidder defaulted. Two of the seven winning bidders in Auction 92 claimed very small business status, winning a total of four licenses.[126]

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

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[120] *See* "Lower 700 MHz Band Auction Closes," *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

[121] *See id.*

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

[123] *See Service Rules for the 698-746, 747-762 and 777-792 MHz Band, WT Docket No. 06-150, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephone*, *Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, Former Nextel Communications, Inc. Upper700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules*, *Implementing a Nationwide, Broadband Interoperable Public Safety Network in the 700 MHz Band, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Communications Requirements Through the Year 2010*, WT Docket Nos. 96-86, 01-309, 03-264, 06-169, PS Docket No. 06-229, *Second Report and Order*, 22 FCC Rcd 15289 (2007) (*700 MHz Second Report and Order*).

[124] *Id*.

[125] *See* Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 FCC Rcd 4572 (WTB 2008).

[126] *See* "Auction of 700 MHz Band Licenses Closes, Winning Bidders Announced for Auction 92, Down Payments and FCC Forms 601 and 602 Due August 11, 2011, Final Payments Due August 25, 2011, Ten-Day Petition to Deny Period," *Public Notice*, 26 FCC Rcd 10,494 (WTB 2011).

[127] *700 MHz Second Report and Order*, 22 FCC Rcd 15,289.

[128] *See* Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 FCC Rcd 4572 (2008).

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

34. **Cellular Radiotelephone Service**. Auction 77 was held to resolve one group of mutually exclusive applications for Cellular Radiotelephone Service licenses for unserved areas in New Mexico.[134] Bidding credits for designated entities were not available in Auction 77.[135] In 2008, the Commission completed the closed auction of one unserved service area in the Cellular Radiotelephone Service, designated as Auction 77. Auction 77 concluded with one provisionally winning bid for the unserved area totaling $25,002.[136]

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

36. As of March 2010, there were 424,162 PLMR licensees operating 921,909 transmitters in the PLMR bands below 512 MHz. We note that any entity engaged in a commercial activity is eligible to

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

[130] *See id*. at 5343–45 paras. 106–10.

[131] *See id*.

[132] *See* "700 MHz Guard Band Auction Closes," *Public Notice*, 15 FCC Rcd 18026 (2000).

[133] *See* "700 MHz Guard Band Auction Closes," *Public Notice*, 16 FCC Rcd 4590 (2001).

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

[135] *Id*. at 6685.

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

[137] *See* 13 C.F.R. § 121.201, NAICS code 517210.

[138] *See generally* 13 C.F.R. § 121.201.

hold a PLMR license, and that any revised rules in this context could therefore potentially impact small entities covering a great variety of industries.

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

38. **Air-Ground Radiotelephone Service**. The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.[142] We will use SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.[143] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard and may be affected by rules adopted pursuant to the Order.

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

139 The service is defined in 47 C.F.R. § 22.99.

140 BETRS is defined in 47 C.F.R. §§ 22.757 and 22.759.

141 13 C.F.R. § 121.201, NAICS code 517210.

142 *See* 47 C.F.R. § 22.99.

143 *See* 13 C.F.R. § 121.201, NAICS code 517210.

144 *See* 13 C.F.R. § 121.201, NAICS code 517210.

145 U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

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

revenues for the preceding three years not to exceed $3 million dollars.[147] There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards and may be affected by rules adopted pursuant to the Order.

40. **Fixed Microwave Services**. Fixed microwave services include common carrier,[148] private operational-fixed,[149] and broadcast auxiliary radio services.[150] At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.[151] The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

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

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[147] *See id*.

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

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

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

[151] *See* 13 C.F.R. § 121.201, NAICS code 517210.

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

[153] *Id*.

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

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

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

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

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

[156] *See id.*

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

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

[159] *See LMDS Second Report and Order*, 12 FCC Rcd at 12689-90, para. 348.

[160] *See id.*

[161] *See Alvarez to Phythyon Letter 1998*.

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

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

is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed $3 million for the preceding three years.[164] These size standards will be used in future auctions of 218-219 MHz spectrum.

45. **2.3 GHz Wireless Communications Services**. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services ("WCS") auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years.[165] The SBA has approved these definitions.[166] The Commission auctioned geographic area licenses in the WCS service. In the auction, which was conducted in 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

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

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

48. **24 GHz – Incumbent Licensees**. This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. For this service, the Commission uses the SBA small business size standard for the category "Wireless Telecommunications Carriers (except satellite)," which is 1,500 or fewer employees.[168] To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.[169] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census' use of the classifications "firms" does not track the number of "licenses". The Commission

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[164] *See id*.

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

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

[167] The service is defined in section 90.1301 *et seq*. of the Commission's Rules, 47 C.F.R. § 90.1301 *et seq*.

[168] 13 C.F.R. § 121.201, NAICS code 517210.

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

believes that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent[170] and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

49. **24 GHz – Future Licensees**. With respect to new applicants in the 24 GHz band, the size standard for "small business" is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of $15 million.[171] "Very small business" in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years.[172] The SBA has approved these small business size standards.[173] These size standards will apply to a future 24 GHz license auction, if held.

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

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

52. The second category of Other Telecommunications "primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar

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

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

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

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

[174] *See* 13 C.F.R. § 121.201, NAICS code 517410.

[175] *Id*.

[176] *See* 13 C.F.R. § 121.201, NAICS code 517919.

[177] U.S. Census Bureau, 2007 NAICS Definitions, "517410 Satellite Telecommunications".

[178] *See* 13 C.F.R. § 121.201, NAICS code 517410.

[179] *See id*. An additional 38 firms had annual receipts of $25 million or more.

station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry."[180] For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year.[181] Of this total, 2,346 firms had annual receipts of under $25 million.[182] Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

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

54. **Cable Companies and Systems**. The Commission has developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[187] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[188] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[189] Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers,

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[180] U.S. Census Bureau, 2007 NAICS Definitions, "517919 Other Telecommunications", http://www.census.gov/naics/2007/def/ND517919.HTM.

[181] *See* 13 C.F.R. § 121.201, NAICS code 517919.

[182] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517919" (issued Nov. 2010).

[183] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition), http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[184] 13 C.F.R. § 121.201, NAICS code 517110.

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

[186] *See id*.

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

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

[189] *See* 47 C.F.R. § 76.901(c).

and an additional 379 systems have 10,000-19,999 subscribers.[190] Thus, under this second size standard, most cable systems are small and may be affected by rules adopted pursuant to the Order.

55. **Cable System Operators**. The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate 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."[191] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[192] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[193] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[194] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

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

[190] WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

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

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

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

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

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

[196] *See* 47 U.S.C. § 573.

[197] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

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

[199] *See id*.

[200] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[201] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

57. **Internet Service Providers**. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[202] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[203] According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.[204] Of this total, 3144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.[205] Thus, under this size standard, the majority of firms can be considered small. In addition, according to Census Bureau data for 2007, there were a total of 396 firms in the category Internet Service Providers (broadband) that operated for the entire year.[206] Of this total, 394 firms had employment of 999 or fewer employees, and two firms had employment of 1000 employees or more.[207] Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the Order.

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

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

[202] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition), http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[203] 13 C.F.R. § 121.201, NAICS code 517110.

[204] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110" (issued Nov. 2010).

[205] *See id*.

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

[207] *See id*.

[208] U.S. Census Bureau, "2007 NAICS Definitions: 519130 Internet Publishing and Broadcasting and Web Search Portals," http://www.naics.com/censusfiles/ND519130.HTM.

[209] *See* 13 C.F.R. § 121.201, NAICS code 519130.

[210] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 519130" (issued Nov. 2010).

23 firms had employment of 500 employees or more.[211] Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the Order.

59. **Data Processing, Hosting, and Related Services**. Entities in this category "primarily … provid[e] infrastructure for hosting or data processing services."[212] The SBA has developed a small business size standard for this category; that size standard is $25 million or less in average annual receipts.[213] According to Census Bureau data for 2007, there were 8,060 firms in this category that operated for the entire year.[214] Of these, 7,744 had annual receipts of under $ $24,999,999.[215] Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the Order. .

60. **All Other Information Services**. The Census Bureau defines this industry as including "establishments primarily engaged in providing other information services (except news syndicates, libraries, archives, Internet publishing and broadcasting, and Web search portals)."[216] Our action pertains to interconnected VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The SBA has developed a small business size standard for this category; that size standard is $7.0 million or less in average annual receipts.[217] According to Census Bureau data for 2007, there were 367 firms in this category that operated for the entire year.[218] Of these, 334 had annual receipts of under $5.0 million, and an additional 11 firms had receipts of between $5 million and $9,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

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

61. Under the revised VoIP pricing rules we adopt, carriers may tariff default intercarrier compensation charges for intrastate originating toll VoIP-PSTN traffic in the absence of an agreement for different intercarrier compensation. Service providers may need to revise their interstate and intrastate tariffs to account for these changes.

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

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

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[211] *Id*.

[212] U.S. Census Bureau, "2007 NAICS Definitions: 518210 Data Processing, Hosting, and Related Services", http://www.census.gov/naics/2007/def/NDEF518.HTM.

[213] *See* 13 C.F.R. § 121.201, NAICS code 518210.

[214] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 4, "Establishment and Firm Size: Receipts Size of Firms for the United States: 2007 NAICS Code 518210" (issued Nov. 2010).

[215] *Id*.

[216] U.S. Census Bureau, "2007 NAICS Definitions: 519190 All Other Information Services", http://www.census.gov/naics/2007/def/ND519190.HTM.

[217] *See* 13 C.F.R. § 121.201, NAICS code 519190.

[218] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 4, "Establishment and Firm Size: Receipts Size of Firms for the United States: 2007 NAICS Code 519190" (issued Nov. 2010).

standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[219]

63. We did not identify any feasible alternatives that would have lessened the economic impact on small entities. In the absence of an agreement, there is no other way than through a tariff filing to effectuate the new default rates where increased rates may be allowed.

E. Report to Congress

64. The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[220] In addition, the Commission will send a copy of the Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.[221]

[219] 5 U.S.C. § 603.

[220] 5 U.S.C. § 801(a)(1)(A).

[221] *See id*. § 604(b).