

EPA—APPROVED MINNESOTA NONREGULATORY PROVISIONS—Continued

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/ effective date	EPA approved date	Comments
Duluth Carbon Monoxide Redesignation and Maintenance Plan.	St. Louis County (part)	10/30/92	04/14/94, 59 FR 17708.	
Duluth Carbon Monoxide Transportation Control Plan.	St. Louis County	07/3/79 and 07/27/79	06/16/80, 45 FR 40579.	
		10/30/92	04/14/94, 59 FR 17706 ..	Removal of transportation control measure.
Lead Maintenance Plan	Dakota County	06/22/93	10/18/94, 59 FR 52431 ..	Corrected codification information on 05/31/95 at 60 FR 28339.
Lead Monitoring Plan	Statewide	04/26/83, 02/15/84, and 02/21/84.	07/05/84, 49 FR 27502 ..	Entire Lead Plan except for the New Source Review portion.
Oxygenated Fuels Program—Carbon Monoxide Contingency Measure.	Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, Washington, and Wright Counties.	04/29/92	02/21/96, 61 FR 6547	Laws of Minnesota for 1992 Chapter 575, section 29(b).
Rochester Carbon Monoxide Transportation Control Plan.	Olmstead County	07/3/79 and 07/27/79	06/16/80, 45 FR 40579.	
Rochester PM-10 Redesignation and Maintenance Plan.	Olmstead County	09/07/94	05/31/95, 60 FR 28339.	
Rochester Sulfur Dioxide Redesignation and Maintenance Plan.	Olmstead County	11/04/98	03/09/01, 66 FR 14087.	
Small Business Stationary Source Technical and Environmental Compliance Assistance Plan.	Statewide	04/29/92	03/16/94, 59 FR 12165 ..	MN Laws Ch 546 sections 5 through 9.
St. Cloud Carbon Monoxide Redesignation.	Benton, Sherbourne, and Stearns Counties.	08/31/89	06/28/93, 58 FR 34532.	
St. Cloud Carbon Monoxide Transportation Control Plan.	Benton, Sherbourne, and Stearns Counties.	05/17/79	12/13/79, 44 FR 72116.	
		08/31/89	06/28/93, 58 FR 34529.	
St. Paul PM-10 Redesignation and Maintenance Plan.	Ramsey County	06/20/02	07/26/02, 67 FR 48787.	
Twin Cities Carbon Monoxide Redesignation and Maintenance Plan.	Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, Washington, and Wright Counties.	03/23/98	10/29/99, 64 FR 58347.	
Twin Cities Carbon Monoxide Transportation Control Plan.	Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington Counties.	07/3/79 and 07/27/79	06/16/80, 45 FR 40579 ..	
		07/21/81	12/08/81, 46 FR 59972 ..	
		05/20/85 and 04/17/86 ..	12/31/86, 51 FR 47237.	
Twin Cities / Pine Bend Sulfur Dioxide Redesignation and Maintenance Plan.	Anoka, Carver, Dakota, Hennepin, Ramsey, and Washington Counties.	09/07/94	05/31/95, 60 FR 28339 ..	Except for St. Paul Park area.
		10/03/95	05/13/97, 62 FR 26230 ..	St. Paul Park area.

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FEDERAL COMMUNICATIONS COMMISSION**47 CFR Part 51****[WC Docket No. 04-313, CC Docket No. 01-338; FCC 04-290]****Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers****AGENCY:** Federal Communications Commission.**ACTION:** Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) adopts rules concerning the unbundling obligations of incumbent local exchange carriers (LECs), with respect to the dedicated transport, high-capacity loop, and mass market circuit switching elements of their networks. This document also adopts appropriate transition periods to allow competitive LECs sufficient time to migrate their services to alternative facilities, or to negotiate alternative commercial arrangements, where unbundled network elements (UNEs)

must no longer be made available pursuant to our rules. The rules set forth in this Order on Remand encourage the innovation and investment that come from facilities-based competition. By implementing the Commission's unbundling authority pursuant to section 251 of the Communications Act, in a targeted manner, this Order imposes unbundling obligations only in those situations where the Commission finds that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition. This approach satisfies the guidance of courts to weigh the costs of unbundling, and ensures that the Commission's rules provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition.

DATES: Effective March 11, 2005.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. See *Supplementary Information for further filing instructions*.

FOR FURTHER INFORMATION CONTACT: Erin Boone, Attorney-Advisor, Wireline Competition Bureau, at (202) 418-0064 or via the Internet at erin.boone@fcc.gov. The complete text of this Order on Remand is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. Further information may also be obtained by calling the Wireline Competition Bureau's TTY number: (202) 418-0484.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order on Remand in WC Docket No. 04-313 and CC Docket No. 01-338, adopted December 15, 2004, and released February 4, 2005. The full text of this document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160. It is also available on the Commission's Web site at <http://www.fcc.gov>.

Synopsis of the Order on Remand

1. *Background.* The Commission took several steps to avoid excessive disruption of the local telecommunications market while it wrote new rules following the D.C. Circuit's decision in *United States Telecom Association v. FCC*, 359 F.3d

554 (D.C. Cir. 2004), *cert. denied*, 160 L. Ed 2d 223 (2004), which vacated and remanded significant portions of the unbundling rules set forth in the Commission's *Triennial Review Order*, 68 FR 52276 (Sept. 2, 2003), CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003). One of these steps included the release, on August 20, 2004, of *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 69 FR 55111, 69 FR 55128 (Sept. 13, 2004), CC Docket No. 01-338, WC Docket No. 04-313, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783, 16785-87, paras. 3-7 (2004) (*Interim Order and Triennial Remand NPRM*). The *Interim Order* required carriers to adhere to the commitments they made in their interconnection agreements, applicable statements of generally available terms (SGATs), and relevant state tariffs that were in effect on June 15, 2004 for an "interim period" beginning on the effective date of the *Interim Order* and *NPRM* and ending on the earlier of (1) six months after that effective date or (2) the effective date of final rules issued in this proceeding. The Commission also set forth and sought comment on a transition plan to govern the period following the interim period. The associated *Triennial Remand NPRM* sought comment on how to respond to the *USTA II* decision in its revised final rules. In this Order on Remand, the Commission promulgates those final rules based on guidance from the courts and comment received in response to the *Triennial Remand NPRM*.

2. *Unbundling Framework.* In the *USTA II* decision, the D.C. Circuit upheld the general impairment framework the Commission established in the *Triennial Review Order*, but sought several clarifications and, in several cases, criticized the manner in which the Commission applied that framework to particular elements. In response to those criticisms, the Commission clarifies the impairment standard adopted in the *Triennial Review Order* in one respect and modifies its unbundling framework in three other respects. First, the Commission clarifies that it evaluates impairment with regard to the capabilities of a reasonably efficient competitor. Second, it sets aside the *Triennial Review Order's* "qualifying service" interpretation of section 251(d)(2), but prohibits the use of UNEs for the exclusive provision of telecommunications services in the

mobile wireless and long-distance markets, which the Commission previously has found to be competitive. Third, the Commission notes that in applying its impairment test, it draws reasonable inferences regarding the prospects for competition in one geographic market based on the state of competition in other, similar markets. Fourth, it considers the appropriate role of tariffed incumbent LEC services in its unbundling framework, and determines that in the context of the local exchange market, a general rule prohibiting access to UNEs whenever a requesting carrier is able to compete using an incumbent LEC's tariffed offering would be inappropriate.

3. *Dedicated Interoffice Transport.* In this Order, the Commission tailors its unbundling requirements regarding dedicated interoffice transport narrowly to ensure that unbundling obligations apply only where competitive deployment of these facilities is not economic. The Commission finds that competing carriers are impaired without access to DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain either at least four fiber-based collocators or at least 38,000 business access lines. The Commission also finds that competing carriers are impaired without access to DS3 or dark fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines. Finally, the Commission finds that competing carriers are not impaired without access to entrance facilities connecting an incumbent LEC's network with a competitive LEC's network in any instance. In addition to these findings, the Commission adopts a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity dedicated transport where they are not impaired, and an 18-month plan to govern transitions away from dark fiber transport. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs in the absence of impairment. The Commission also requires that during the transition periods, competitive carriers retain access to unbundled dedicated transport at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.

4. *High-Capacity Loops.* The Commission finds that competitive

LECs are impaired without access to DS3-capacity loops except in any building within the service area of a wire center containing 38,000 or more business lines and four or more fiber-based collocators. In addition, the Commission finds that competitive LECs are impaired without access to DS1-capacity loops except in any building within the service area of a wire center containing 60,000 or more business lines and four or more fiber-based collocators. Finally, the Commission finds that competitive LECs are not impaired without access to dark fiber loops in any instance. In addition to these findings, the Commission adopts a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity loops where they are not impaired, and an 18-month plan to govern transitions away from dark fiber loops. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new high-capacity loop UNEs in the absence of impairment. The Commission requires that during the transition periods, competitive carriers retain access to unbundled facilities at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the high-capacity loop element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.

5. Mass Market Local Circuit Switching. In this Order, the Commission finds that incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching. The Commission concludes that competitive LECs have deployed a significant, growing number of their own switches, often using new, more-efficient technologies such as packet switches, and could do so in areas they do not yet serve as well. Thus, the Commission concludes that requesting carriers in most cases are not impaired without access to local circuit switching. Moreover, the Commission finds that regardless of any limited potential impairment requesting carriers may still face, the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives. It therefore determines, pursuant to section 251(d)(2)'s "at a minimum" authority, not to require unbundled access to mass market switching even in those areas where competitive LECs might face

impairment. In addition, the Commission adopts a 12-month plan for competing carriers to transition away from use of unbundled mass market local circuit switching. This transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new mass market switching UNEs. During the transition period, the Commission states that competitive carriers will retain access to the unbundled network element platform (*i.e.*, the combination of an unbundled loop, unbundled local circuit switching, and shared transport) at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004, plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for this combination of elements, plus one dollar.

Final Regulatory Flexibility Analysis

6. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Interim Order* and *NPRM* in this proceeding. The Commission sought written comment on the proposals in the *Interim Order* and *NPRM*, including comment on the IRFA. The present Final Regulatory Flexibility Analysis (FRFA) addresses comments received on the IRFA and conforms to the RFA.

Need for, and Objectives of, the Order on Remand

7. This Order responds to the United States Court of Appeals for the District of Columbia's *USTA II* decision, which vacated and remanded significant portions of the *Triennial Review Order's* unbundling rules. Based on the record compiled in response to the *Interim Order* and *NPRM*, the Commission adopted, in the *Triennial Review Order*, new unbundling rules implementing section 251 of the 1996 Act. The *Triennial Review Order* reinterpreted the statute's "impair" standard and reevaluated incumbent LECs' unbundling obligations with regard to particular elements. Various parties appealed the *Triennial Review Order*, and on March 2, 2004, the D.C. Circuit decided *USTA II*, vacating and remanding several of the *Triennial Review Order's* unbundling rules. In this Order, we address the remanded issues and take additional steps to encourage the innovation and investment that results from facilities-based competition.

8. Specifically, this Order clarifies the *Triennial Review Order's* impairment

standard in one respect and modifies its application in three respects. *First*, we clarify that we evaluate impairment with regard to the capabilities of a *reasonably efficient* competitor. *Second*, we set aside the *Triennial Review Order's* "qualifying service" interpretation of section 251(d)(2), but prohibit the use of UNEs for the provision of telecommunications services in the mobile wireless and long-distance markets, which we previously have found to be competitive. *Third*, in applying our impairment test, we draw reasonable inferences regarding the prospects for competition in one geographic market based on the state of competition in other, similar markets. *Fourth*, we consider the appropriate role of tariffed incumbent LEC services in our unbundling framework, and determine that in the context of the local exchange markets, a general rule prohibiting access to UNEs whenever a requesting carrier is able to compete using an incumbent LEC's tariffed offering would be inappropriate. We then apply this revised unbundling framework to the dedicated transport network element, the high-capacity loop network element, and the mass market local circuit switching network element. In each case, we adopt a result that will promote the deployment of competitive facilities wherever possible, spreading the benefits of facilities-based competition to market entrants and end-user customers alike, including small businesses falling into each category.

Summary and Discussion of Significant Issues Raised by Public Comments in Response to IRFA

9. In this section, we respond to comments filed in response to the IRFA. To the extent we received comments raising general small business concerns during this proceeding, those comments are discussed throughout the Order and are summarized in part E, below.

10. First, we reject TeleTruth's contention that the Commission fails to assess the impact of its unbundling rules on small Internet Service Providers (ISPs), and that this failure violates the RFA. Although we understand that our rules will have an economic impact in many sectors of the economy, including the ISP market, the RFA only requires the Commission to consider the impact on entities *directly* subject to our rules. The RFA is not applicable to ISPs because, as we previously noted, ISPs are only *indirectly* affected by our unbundling actions and were not formally included in the IRFA or formally included in this FRFA. In the interest of ensuring notice

to all interested parties and out of an abundance of caution, we have previously included ISPs among the entities potentially indirectly affected by our unbundling rules, although we have been explicit in emphasizing that ISPs are only indirectly affected by these rules. On this subject, we note that the D.C. Circuit “has consistently held that the RFA imposes no obligation to conduct a small entity impact analysis of effects on entities which [the agency conducting the analysis] does not regulate.” Thus, we emphasize that the RFA imposes no independent obligation to examine the effects an agency’s action will have on the customers, clients, or end users of the companies it regulates—including ISPs—unless such entities are, themselves, subject to regulation by the agency. In any event, we have considered the needs of small business customers of competitive (and incumbent) LECs throughout this Order and previous Orders, in each case choosing the outcome that will foster facilities-based competition and the benefits such competition will bring to small businesses and other consumers of telecommunications.

11. We also reject TeleTruth’s argument that the Commission violates the RFA by relying on outdated 1997 Census Bureau data to identify the number of ISPs potentially affected by our final rules in the IRFA. The 1997 Census Bureau data were and still are the most current data available. According to TeleTruth, data compiled by both the SBA and Boardwatch/ISP-Planet, an ISP-focused periodical, indicate that the number of ISPs is close to 7,000, rather than the 2,751 ISPs identified by the IRFA. Although TeleTruth cites to higher numbers, the Census Bureau has not released the more recent (2002) results for telecommunications providers or for ISPs. Thus, the IRFA in this proceeding and this FRFA appropriately rely on the most up-to-date 1997 Census Bureau data and therefore comply with the RFA.

12. We disagree with TeleTruth’s claim that by relying on 1997 Census Bureau data in the IRFA, the Commission violates the Data Quality Act (DQA). We conclude that the IRFA’s description of the ISP marketplace based on 1997 Census Bureau data was consistent with the Commission’s DQA guidelines. As an initial matter, the DQA requires federal agencies to issue information quality guidelines ensuring the quality, utility, objectivity and integrity of information that they disseminate, and to provide mechanisms by which affected persons can take action to correct any errors

reflected in such information. In 2002, the Commission adopted guidelines implementing the DQA stating that it is dedicated to ensuring that all data that it disseminates reflect a level of quality commensurate with the nature of the information. Specifically, these guidelines require the Commission to review and substantiate the quality of information before it is disseminated to the public and describe the administrative mechanisms allowing affected persons to seek and obtain correction of information that does not comply with the guidelines. By relying on the most recent Census Bureau data, the Commission complied with DQA guidelines as the Census Bureau is the leading source of high-quality data of the sort set forth in the IRFA—and a source on which we have consistently relied. In this regard, we note that the Census Bureau data and SBA generic small business size standards track each other precisely, as intended by both the Census Bureau and SBA. Moreover, as indicated above, we have updated this FRFA based on the recent preliminary 2002 Census Bureau Industry Series data, mitigating the concern that the data set out in the IRFA was too old to be of use in assessing the impact our conclusions might have on small entities.

13. We also reject TeleTruth’s argument that the Commission violates the RFA by failing to conduct proper outreach to small businesses for purposes of compiling a comprehensive record in this proceeding. The Commission has satisfied its RFA obligation to assure that small companies were able to participate in this proceeding. Specifically, the RFA requires the Commission to “assure that small entities have been given an opportunity to participate in the rulemaking,” and proposes as example five “reasonable techniques” that an agency might employ to do so. In this proceeding, the Commission has complied with the RFA by employing several of these techniques: it (1) has published a “notice of proposed rulemaking in publications likely to be obtained by small entities”; (2) has “includ[ed] * * * a statement that the proposed rule may have a significant economic effect on a substantial number of small entities” in the *Interim Order and NPRM*; (3) has solicited comments over its computer network; and (4) has acted “to reduce the cost or complexity of participation in the rulemaking by small entities” by, among other things, facilitating electronic submission of comments.

14. We also disagree with commenters that claim that the Commission did not

specifically consider the impact of eliminating UNEs on small businesses or describe alternatives to minimize any impact in the IRFA. Although the Small Business Administration Office of Advocacy (SBA Advocacy) recommends that we issue a revised IRFA to account for the impact our rules might have on small competitive LECs, we believe it is not necessary since the *Interim Order and NPRM* explained in detail the ruling of the D.C. Circuit in *USTA II*, which gave rise to this proceeding; posed specific questions to commenters regarding the proper implementation of that decision; and solicited comment from all parties. While the NPRM did not specify particular results the Commission would consider—and the IRFA therefore did not catalogue the effects that such particular results might have on small businesses—the Commission provided notice to parties regarding the range of policy outcomes that might result from this order. As indicated above, a summary of the *Interim Order and NPRM* was published in the **Federal Register**, and we believe that such publication constitutes appropriate notice to small businesses subject to this Commission’s regulation. Indeed, far from discouraging small entities from participating, the *Interim Order and NPRM* and the associated IRFA elicited extensive comment on issues affecting small businesses. These comments have enabled us to consider the concerns of competitive LECs throughout this order. Moreover, in Part C, below, we attempt to estimate the number of competitive LECs that will be affected by the rules we adopt herein. We therefore reject arguments that small entities were prejudiced by any lack of specificity regarding specific results potentially resulting from this proceeding.

Description and Estimate of the Number of Small Entities to Which the Rules Would Apply

15. 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 rules adopted herein. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. 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).

16. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by our action. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report. The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers, Paging, and Cellular and Other Wireless Telecommunications. Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

17. 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." SBA 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. 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.

18. *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. According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year. Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more. Thus, under this size standard, the great majority of firms can be considered small.

19. *Incumbent Local Exchange Carriers*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services (LECs). 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. According to Commission data, 1,310 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,310 carriers, an estimated 1,025 have 1,500 or fewer employees and 285 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

20. *Competitive Local Exchange Carriers, 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. According to Commission data, 563 carriers have reported that they are engaged in the provision of either CAP services or competitive LEC services. Of these 563 carriers, an estimated 472 have 1,500 or fewer employees and 91 have more than 1,500 employees. In addition, 14 carriers have reported that they are "Shared-Tenant Service Providers," and all 14 are estimated to have 1,500 or fewer employees. In addition, 37 carriers have reported that they are "Other Local Service Providers." Of the 37, an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our proposed action.

21. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 281 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 254 have 1,500 or fewer employees and 27 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

22. *Operator Service Providers (OSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for OSPs. 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. According to Commission data, 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 22 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed action.

23. *Prepaid Calling Card Providers*. The SBA has developed a size standard for a small business within the category of Telecommunications Resellers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 32 companies reported that they were engaged in the provision of prepaid calling cards. Of these 32 companies, an estimated 31 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the great majority of prepaid calling card providers are small entities that may be affected by the rules and policies adopted herein.

24. *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, OSPs, 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. According to Commission's data, 65 companies reported that their primary telecommunications service activity was the provision of other toll services. Of these 65 companies, an estimated 62 have 1,500 or fewer employees and three have more than 1,500 employees. Consequently, the Commission estimates that most "Other Toll Carriers" are small entities that may be affected by the rules and policies adopted herein.

25. *Wireless Service Providers*. The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging" and "Cellular and Other Wireless Telecommunications."

Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year. Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year. Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

26. *Broadband PCS*. The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of \$40 million or less in the three previous calendar years. 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." These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA. No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 305, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In addition, we note that, as

a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. In addition, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

27. *Narrowband Personal Communications Services (PCS)*. The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of \$40 million or less. Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses. 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*. 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. 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. The SBA has approved these small business size standards. A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

28. *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 definition of 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 "Cellular and Other Wireless Telecommunications" companies. This category provides that a small business

is a wireless company employing no more than 1,500 persons. According to the Census Bureau data for 1997, only twelve firms out of a total of 1,238 such firms that operated for the entire year in 1997, had 1,000 or more employees. If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business standard.

29. *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 a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for defining "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. This small business 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. A "very small business" is defined as 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. The SBA has approved these small size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. 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 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses. A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.

30. *Specialized Mobile Radio*. The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than \$15 million in each of the three previous calendar years. The Commission awards "very small entity" bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years. The SBA has approved

these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. 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. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 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. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

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

32. In the *Paging Second Report and Order*, the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. 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. The SBA has approved this definition. An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold. One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third

auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses. Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service*, 379 private and common carriers reported that they were engaged in the provision of either paging or "other mobile" services. Of these, we estimate that 373 are small, under the SBA-approved small business size standard. We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

33. *700 MHz Guard Band Licenses*. In the *700 MHz Guard Band Order*, we adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years. 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. SBA approval of these definitions is not required. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000. 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.

34. *Rural Radiotelephone Service*. The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service. A significant subset of the Rural Radiotelephone Service is the BETRS. The Commission uses the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons. 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 adopted herein.

35. *Air-Ground Radiotelephone Service*. The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service. We will use SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons. 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.

36. *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 "Cellular and Other Telecommunications," which is 1,500 or fewer 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. In addition, a "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$3 million dollars. 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.

37. *Fixed Microwave Services*. Fixed microwave services include common

carrier, private operational-fixed, and broadcast auxiliary radio services. At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 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 proposed herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

38. *Offshore Radiotelephone Service.* This service operates on several ultra high frequencies (UHF) television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico. There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for "Cellular and Other Wireless Telecommunications" services. Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.

39. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these definitions. The Commission auctioned geographic area licenses in the WCS service. In the auction, which

commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670–1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

40. *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. 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. The SBA has approved these small business size standards. 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 the rules and policies proposed herein.

41. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service.* Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In connection with the 1996 MDS auction, the Commission defined "small business" as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years. The SBA has approved of this standard. The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities.

42. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such

companies generating \$12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under \$10 million, and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies.

43. Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities. There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

44. *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. The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years. 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. The SBA has approved these small business size standards in the context of LMDS auctions. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winners that won 119 licenses.

45. *218–219 MHz Service.* The first auction of 218–219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs). Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in

annual profits each year for the previous two years. In the *218–219 MHz Report and Order and Memorandum Opinion and Order*, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding \$15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding \$3 million for the preceding three years. The SBA has approved of these definitions. At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218–219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this analysis that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

46. *Incumbent 24 GHz Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of “Cellular and Other Wireless Telecommunications” companies. This category provides that such a company is small if it employs no more than 1,500 persons. According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year. Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. Thus, under this size standard, the great majority of firms can be considered small. These broader Census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent 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.

47. *Future 24 GHz Licensees.* With respect to new applicants in the 24 GHz band, we have defined “small business” as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the

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

48. *Internet Service Providers.* While ISPs are only indirectly affected by our present actions, and ISPs are therefore not formally included within this present FRFA, we have addressed them informally to create a fuller record and to recognize their participation in this proceeding. The SBA has developed a small business size standard for ISPs. This category comprises establishments “primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others.” Under the SBA size standard, such a business is small if it has average annual receipts of \$21 million or less. According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year. Of these, 2,659 firms had annual receipts of under \$10 million, and an additional 67 firms had receipts of between \$10 million and \$24,999,999. Thus, under this size standard, the great majority of firms can be considered small entities.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

49. Pursuant to sections 251(c) and (d) of the Act, incumbent LECs, including those that qualify as small entities, are required to provide nondiscriminatory access to UNEs to requesting telecommunications carriers in certain circumstances. In this Order, we modify our unbundling rules, as described above. Specifically, we conclude, except as set forth in other Commission orders, that requesting carriers: (1) Shall be afforded unbundled access to DS1-capacity dedicated transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines; (2) shall be afforded unbundled access to DS3-capacity dedicated transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines; (3) shall be afforded unbundled access to dark fiber dedicated transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-

based collocators or at least 24,000 business lines; (4) shall not be afforded unbundled access to entrance facilities in any instance; (5) shall be afforded unbundled access to DS1-capacity loops except in any building within the service area of wire centers with 60,000 or more business lines and 4 or more fiber-based collocators; (6) shall be afforded unbundled access to DS3-capacity loops except in any building within the service area of wire centers with 38,000 or more business lines and 4 or more fiber-based collocators; (7) shall not be afforded unbundled access to dark fiber loops in any instance; and (8) shall not be afforded unbundled access to mass market local circuit switching in any instance. We also set forth specific transition plans to govern competitive carriers’ migration from UNEs to alternative arrangements, where necessary. The various compliance requirements contained in this Order will require the use of engineering, technical, operational, accounting, billing, and legal skills. The carriers that are affected by these requirements already possess these skills.

Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

50. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed 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, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

51. In this Order, we adopt rules implementing section 251(c)(3) of the Communications Act, which requires that incumbent LECs make elements of their networks available on an unbundled basis to new entrants at cost-based rates, pursuant to standards set out in section 251(d)(2). As noted above, these rules respond to the D.C. Circuit’s decision in *USTA II*. Particularly, we focus on those items that the court remanded for our consideration. Our actions will affect both telecommunications carriers that request access to UNEs and the incumbent LECs that must provide access to UNEs under section 251(c)(3).

52. In arriving at the conclusions described above, the Commission considered various alternatives, which it rejected or accepted for the reasons set forth in the body of this Order, and made certain changes to the rules to reduce undue regulatory burdens, consistent with the Communications Act and with guidance received from the courts. These efforts to reduce regulatory burden will affect both large and small carriers. The significant alternatives that commenters discussed and that we considered are as follows.

53. *Reasonably Efficient Competitor.* In this Order, we clarify that, in assessing impairment pursuant to the standard set forth in the *Triennial Review Order*, we presume a reasonably efficient competitor. Specifically, we presume that a requesting carrier will use reasonably efficient technology and we consider *all* the revenue opportunities that such a competitor can reasonably expect to gain over the facilities, taking into account limitations on entrants' ability to provide multiple services. This clarification, we conclude, will encourage facilities-based competitors, including small businesses, to deploy efficient technologies so as to maximize quality of service and minimize costs. Thus, while we recognize that our approach might prevent inefficient small entities from using UNEs to compete (*i.e.*, in those cases where a reasonably efficient small entity would not require access to UNEs), we believe that the alternative approach, which would reward inefficiency and produce overbroad unbundling rules, would be inconsistent with the Communications Act.

54. *Service Considerations.* In response to the *USTA II* court's guidance, we revise our approach to unbundling for the exclusive provision of long distance and mobile wireless services. Specifically, we abandon the "qualifying services" approach set forth in the *Triennial Review Order*, which limited the section 251(d)(2) inquiry to a subset of telecommunications services and which was rejected by the D.C. Circuit. Based on the record, the court's guidance, and the Commission's previous findings, we find that the mobile wireless services market and long distance services market are markets where competition has evolved without access to UNEs. We have therefore determined, pursuant to our "at a minimum" authority to consider factors other than impairment when assessing unbundling obligations, to prohibit access to UNEs for exclusive provision of service to those markets. We also considered, but declined to adopt, an approach also barring use of

UNEs for provision of other services specified in the Act—namely, telephone exchange service and exchange access service, the two services LECs provide. We recognize that the use restrictions adopted in this Order may prevent small providers of mobile wireless and long distance service from using UNEs to compete. We conclude, however, that given the court's guidance, and the generally competitive state of the mobile wireless and long distance markets, the benefits associated with unbundling would not be commensurate with the costs imposed on incumbent LECs, and would potentially depress deployment of new facilities that would ultimately redound to the benefit of all carriers and end-user customers of every size.

55. *Reasonable Inferences.* In this Order, we adopt an approach that relies, to a far greater degree than our previous analyses, on the inferences that can be drawn from one market regarding the prospects for competitive entry in another. As described in detail in the Order, we rely, where possible, on correlations between business line counts and/or fiber collocations in a particular wire center, on the one hand, and the deployment of competitive dedicated transport or high-capacity loops, on the other. We have considered and rejected the alternative of relying only actual deployment in assessing unbundling obligations. As described more fully in the Order, we have concluded that the "actual deployment" approach would be impracticable to administer, would be inconsistent with the *USTA II* decision, and would overstate requesting carriers' UNE needs.

56. *Relevance of Tariffed Alternatives.* In this Order, we address the relevance of special access tariffed offerings to the unbundling inquiry in the local exchange markets where we find UNE access to be appropriate. We find that statutory concerns, administrability concerns, and concerns about anticompetitive price squeeze preclude a rule foreclosing UNE access when carriers are able to compete using special access or other tariffed alternatives. We also find that a competitor's current use of special access does not, on its own, demonstrate that that carrier is not impaired without access to UNEs. We note that to reach a different result would be inconsistent with the Act's text and its interpretation by various courts, would be impracticable, and would create a significant risk of abuse by incumbent LECs. This decision is consistent with the interests of many small businesses, who claim, for example, that they cannot compete against incumbent LECs

in the local exchange markets using tariffed alternatives to UNEs.

57. *Dedicated Transport.* In this Order, we limit unbundled access to dedicated transport to those routes on which competitive deployment at a particular capacity level is not economic. Specifically, we find that competing carriers are impaired without access to DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines, and that competing carriers are impaired without access to DS3 or dark fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines. Finally, we find that competing carriers are not impaired without access to entrance facilities connecting an incumbent LEC's network with a competitive LEC's network in any instance.

58. In reaching our decisions concerning dedicated transport, we considered the comments by small competitive LECs, which generally sought broader unbundled access to dedicated transport links. We rejected these arguments, finding that they failed to account adequately for the prospects of competitive deployment and for the advantages held out by such deployment, where feasible, for consumers and carriers alike. Similarly, we also rejected a "matched pair" approach that would require the existence of actual competitive transport links (whether direct or indirect) before relieving an incumbent's unbundling obligations, because that approach failed to draw reasonable inferences regarding potential deployment. Alternatively, we also considered and rejected arguments that we should employ higher business line and fiber-based collocator thresholds in assessing impairment. While these higher thresholds might have minimized unbundling obligations and thus benefited small (and large) incumbent LECs, we believed that higher thresholds would *understate* the need for unbundling, and would prohibit UNE access on routes where competitive deployment was not economic. Finally, we considered but rejected alternative proposals to adopt conclusions regarding transport that would apply to entire MSAs. A single MSA can encompass urban, suburban, and rural areas, each of which presents different challenges to competitive LECs seeking to self-deploy facilities. Thus, while we recognize that MSA-wide determinations might confer administrability-related efficiencies on

small entities, we believe that our more specific route-based approach is also easily administered, and permits a greater degree of nuance in assessing unbundling obligations.

59. *High-Capacity Loops.* We find that competitive LECs are impaired without access to DS3-capacity loops except in any building within the service area of a wire center containing 38,000 or more business lines and 4 or more fiber-based collocators. Furthermore, competitive LECs are impaired without access to DS1-capacity loops except in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators. Finally, we determine that competitive LECs are not impaired without access to dark fiber loops in any instance.

60. As with dedicated transport, we have considered and rejected proposals to adopt either more restrictive or less restrictive unbundling rules, which we recognize might benefit small incumbent LECs or small competitive LECs, respectively. For reasons explained in the Order, we believe our choice of thresholds properly assesses the prospects for competitive duplication of loops at the DS1 and DS3 capacity, incorporating reasonable inferences regarding potential deployment of such facilities from the areas in which competitors actually have deployed high-capacity loops. We have also considered, and rejected as unadministrable, a building-specific approach to loop impairment. While the building-specific approach might allow more nuance than the approach we have chosen, we believe that it would be impracticable to administer, and would invite protracted conflict between carriers as to whether or not unbundling was permitted in each particular building. Such disputes would benefit no party, and might in fact impose disproportionate costs on small incumbent LECs and competitive LECs. Finally, we have considered, and rejected, proposals that we evaluate impairment for high-capacity loops not by wire center, but by broader geographic areas, such as MSAs. As noted above, a single MSA can encompass wide areas presenting a range of topographies and customer densities, and thus a variety of distinct circumstances with regard to the prospects for competitive deployment. As explained in the Order, we believe that our wire-center approach to evaluating impairment with regard to high-capacity loops strikes the proper balance between administrability and case-specificity.

61. *Mass Market Local Circuit Switching.* We find that incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching. Many commenters suggested a variety of alternatives to this rule, several of which were intended to mitigate the rule's effect on small competitive LECs. Specifically, we considered and rejected arguments that small competitive LECs are impaired in specific circumstances due to unique characteristics of the particular customer markets or geographic markets they seek to serve or because of the competitive carrier's size. For instance, some commenters argued that competitive LECs are uniquely impaired when seeking to serve rural areas. We concluded that these commenters' claims were at odds with our impairment standard, which evaluates impairment based on a "reasonably efficient competitor," not based on the individualized circumstances of a particular requesting carrier, and "consider[s] all the revenue opportunities that such a competitor can reasonably expect to gain over the facilities, from providing all possible services that an entrant could reasonably expect to sell." Moreover, to the extent that small competitive LECs are harmed by our decision not to permit unbundled access to mass market local circuit switching, we believe that the attendant increase in incentives to deploy facilities justify a bar on unbundling even where the competitive carrier might be "impaired," and thus believe it is appropriate to invoke our "at a minimum" authority to prohibit unbundling in these cases. Although we recognize that some small carriers might find it more difficult to compete without unbundled access to switching, we believe that the corresponding increase in deployment incentives—for incumbent LECs and competitive LECs alike—justifies our approach here.

62. We have also considered comments that ask the Commission to minimize the impact of our decision on small businesses by imposing particular requirements regarding the incumbent LEC hot cut process. However, as explained above, the record demonstrates that the incumbent LECs from whom competitive carriers are receiving unbundled switching in almost all cases—i.e., the BOCs—have a record of providing hot cuts on a timely basis and have made significant improvements in their hot cut processes that should enable them to perform larger volumes of hot cuts to the extent

necessary. We believe that the improvements in the hot cut process will ultimately benefit small businesses and should ensure a smooth transition away from mass market switching UNEs.

63. *Transition Plans.* The Order also sets out transition plans to govern the migration away from UNEs where a particular element is no longer available on an unbundled basis. We have considered various comments indicating that many small businesses have built their business plans on the basis of continued access to UNEs and have worked to ensure that the transition plans will give competing carriers a sufficient opportunity to transition to alternative facilities or arrangements. This alternative represents a reasonable accommodation for small entities and others, which we believe will ultimately result in an orderly and efficient transition. Therefore, as set forth in the Order, we have adopted plans to retain unbundled access to dark fiber loops and dark fiber dedicated transport for 18 months, at rates somewhat higher than those at which a carrier had access to those UNEs on June 15, 2004, and to retain unbundled access to DS1 loops, DS3 loops, DS1 dedicated transport, DS3 dedicated transport, and mass market local circuit switching for 12 months, again at rates somewhat higher than those at which a carrier had access to those UNEs on June 15, 2004. We believe that these plans offer sufficient time in which a competitive LEC can determine which specific arrangements must be transitioned and establish alternative means of serving customers currently served using those arrangements. We therefore reject proposals that we adopt longer transitions, which we believe would be unnecessary and therefore inappropriate in the face of a Commission declining to unbundle the element at issue.

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 Comptroller General pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the Report and Order including the FRFA (or summaries thereof) will be published in the **Federal Register**.

Paperwork Reduction Act

65. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In

addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

Ordering Clauses

66. Accordingly, *it is ordered* that pursuant to sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 153, 154, 201-205, 251, 252, 256, 303(r) and section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, the *Order on Remand* in CC Docket No. 01-338 and WC Docket No. 04-313 *is adopted*, and that part 51 of the Commission's Rules, 47 CFR part 51, is amended as set forth in the rule changes. The requirements of this Order shall become effective on March 11, 2005, pursuant to 5 U.S.C. 553(d)(3).

67. *It is further ordered*, pursuant to sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 153, 154, 201-205, 251, 252, 256, 303(r) and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 157 nt, that the Emergency Joint Petition for Stay filed in CC Docket Nos. 01-338, 96-98 and 98-147 by the Coalition for High-Speed Online Internet Competition and Enterprise on August 27, 2003; the Joint Petition for Stay filed in CC Docket Nos. 01-338, 96-98 and 98-147 by BellSouth Corporation, Qwest Communications International, Inc., SBC Communications Inc., the United States Telecom Association, and the Verizon telephone companies on September 4, 2003; the Emergency Petition for Stay filed in CC Docket Nos. 01-338, 96-98 and 98-147 by Sage Telecom, Inc. on September 22, 2003; the Emergency Stay Petition filed in CC Docket Nos. 01-338, 96-98 and 98-147 by DCSI Corporation *et al.* on September 22, 2003; the Emergency Petition for Stay filed in CC Docket Nos. 01-338, 96-98 and 98-147 by NuVox Communications, Inc. on September 25, 2003; and the Petition for Emergency Stay filed in CC Docket Nos. 01-338, 96-98 and 98-147 by Allegiance Telecom, Inc., Cbeyond Communications, LLC, El Paso Global Networks, Focal Communications Corporation, McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp. and TDS Metrocom, LLC on September 26, 2003 *are dismissed as moot*.

68. *It is further ordered*, pursuant to sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of

1934, as amended, 47 U.S.C. 151, 153, 154, 201-205, 251, 252, 256, 303(r) and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 157 nt, that the Petition for Clarification or Reconsideration filed in CC Docket Nos. 01-338, 96-98 and 98-147 by AT&T Wireless on October 2, 2003; the Petition for Reconsideration or Clarification filed in CC Docket Nos. 01-338, 96-98 and 98-147 by the Cellular Telecommunications & Internet Association on October 2, 2003; the Petition for Reconsideration or Clarification filed in CC Docket Nos. 01-338, 96-98 and 98-147 by Nextel Communications, Inc. on October 2, 2003; and the Petition for Reconsideration filed in CC Docket Nos. 01-338, 96-98 and 98-147 by T-Mobile USA, Inc. on October 2, 2003 *are dismissed as moot*.

69. *It is further ordered*, pursuant to sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 153, 154, 201-205, 251, 252, 256, 303(r) and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 157 nt, that the Petition for Reconsideration filed in CC Docket Nos. 01-338, 96-98 and 98-147 by the National Association of State Utility Consumer Advocates (NASUCA) on October 2, 2003 *is dismissed as moot*.

70. *It is further ordered*, pursuant to sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 153, 154, 201-205, 251, 252, 256, 303(r) and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 157 nt, that the Petition for Clarification and/or Partial Reconsideration filed in CC Docket Nos. 01-338, 96-98 and 98-147 by BellSouth Corporation on October 2, 2003 *is dismissed as moot* to the extent indicated herein.

71. *It is further ordered*, pursuant to sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 153, 154, 201-205, 251, 252, 256, 303(r) and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 157 nt, that the Petition for Reconsideration filed in CC Docket No. 01-338 by TSI Telecommunication Services, Inc. on October 3, 2003 *is dismissed as moot*.

72. *It is further ordered*, pursuant to sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 153, 154, 201-205, 251, 252, 256, 303(r) and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 157 nt, that the Petition for Waiver filed in CC Docket Nos. 01-338, 96-98 and 98-147 by the Telecommunications Regulatory Board

of Puerto Rico on December 30, 2003 *is dismissed*.

73. *It is further ordered*, pursuant to sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 153, 154, 201-205, 251, 252, 256, 303(r) and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 157 nt, that the Petition for Waiver filed in CC Docket Nos. 01-338, 96-98 and 98-147 by BellSouth Corporation on February 11, 2004 *is dismissed as moot*.

74. *It is further ordered*, pursuant to sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 153, 154, 201-205, 251, 252, 256, 303(r) and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 157 nt, that the Petition for Rulemaking filed by Qwest Communications International, Inc. on March 29, 2004 *is dismissed as moot*.

75. *It is further ordered*, pursuant to sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 153, 154, 201-205, 251, 252, 256, 303(r) and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 157 nt, that the Petition for Emergency Clarification and/or Errata filed in WC Docket No. 04-313 and CC Docket No. 01-338 by the Association for Local Telecommunications Services, Alpheus Communications, LP, Cbeyond Communications, LLC, Conversant Communications, LLC, GlobalCom, Inc., Mpower Communications Corp., New Edge Networks, Inc., OneEighty Communications, Inc., TDS Metrocom, LLC on August 27, 2004 *is dismissed as moot*.

76. *It is further ordered*, pursuant to sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 153, 154, 201-205, 251, 252, 256, 303(r) and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 157 nt, that the Emergency Petition for Expedited Determination that Competitive Local Exchange Carriers are Impaired Without DS1 UNE Loops filed in WC Docket No. 04-313 and CC Docket No. 01-338 by XO Communications, Inc. on September 29, 2004 *is denied*.

77. *It is further ordered*, pursuant to sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 153, 154, 201-205, 251, 252, 256, 303(r) and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 157 nt, that as of the effective date of this Order, the interim period described in the *Interim Order and NPRM*, WC Docket No. 01-338 and CC Docket No. 01-338, and all requirements associated with that

period, shall terminate and be superseded by the transition periods described in this Order.

78. *It is further ordered*, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Order on Remand*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 51

Communications common carriers, and Telecommunications.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ Part 51 of title 47 of the Code of Federal Regulations is amended 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, 225–27, 251–54, 256, 271, 303(r), 332, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151–55, 157, 201–05, 207–09, 218, 225–27, 251–54, 256, 271, 303(r), 332, 47 U.S.C. 157 note, unless otherwise noted.

■ 2. Section 51.5 is amended by removing the definitions for “Non-qualifying service” and “Qualifying service” and by adding five new definitions in alphabetical order to read as follows:

§ 51.5 Terms and Definitions.

* * * * *

Business line. A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies:

(1) Shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,

(2) Shall not include non-switched special access lines,

(3) Shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 “business lines.”

* * * * *

Fiber-based collocator. A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that

(1) Terminates at a collocation arrangement within the wire center;

(2) Leaves the incumbent LEC wire center premises; and

(3) Is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. 153(1) and any relevant interpretation in this Title.

* * * * *

Mobile wireless service. A mobile wireless service is any mobile wireless telecommunications service, including any commercial mobile radio service.

* * * * *

Triennial Review Remand Order. The Triennial Review Remand Order is the Commission's Order on Remand in CC Docket Nos. 01–338 and 04–313 (released February 4, 2005).

* * * * *

Wire center. A wire center is the location of an incumbent LEC local switching facility containing one or more central offices, as defined in the Appendix to part 36 of this chapter. The wire center boundaries define the area in which all customers served by a given wire center are located.

■ 3. Section 51.309 is amended by revising paragraphs (b), (d), and (g)(2) to read as follows:

§ 51.309 Use of unbundled network elements.

* * * * *

(b) A requesting telecommunications carrier may not access an unbundled network element for the exclusive provision of mobile wireless services or interexchange services.

* * * * *

(d) A requesting telecommunications carrier that accesses and uses an unbundled network element consistent with paragraph (b) of this section may provide any telecommunications services over the same unbundled network element.

* * * * *

(g) * * *

(2) Shares part of the incumbent LEC's network with access services or inputs for mobile wireless services and/or interexchange services.

■ 4. Section 51.317 is revised to read as follows:

§ 51.317 Standards for requiring the unbundling of network elements.

(a) **Proprietary network elements.** A network element shall be considered to be proprietary if an incumbent LEC can demonstrate that it has invested resources to develop proprietary information or functionalities that are protected by patent, copyright or trade secret law. The Commission shall undertake the following analysis to determine whether a proprietary network element should be made available for purposes of section 251(c)(3) of the Act:

(1) Determine whether access to the proprietary network element is “necessary.” A network element is “necessary” if, taking into consideration the availability of alternative elements outside the incumbent LEC's network, including self-provisioning by a requesting telecommunications carrier or acquiring an alternative from a third-party supplier, lack of access to the network element precludes a requesting telecommunications carrier from providing the services that it seeks to offer. If access is “necessary,” the Commission may require the unbundling of such proprietary network element.

(2) In the event that such access is not “necessary,” the Commission may require unbundling if it is determined that:

(i) The incumbent LEC has implemented only a minor modification to the network element in order to qualify for proprietary treatment;

(ii) The information or functionality that is proprietary in nature does not differentiate the incumbent LEC's services from the requesting telecommunications carrier's services; or

(iii) Lack of access to such element would jeopardize the goals of the Act.

(b) **Non-proprietary network elements.** The Commission shall determine whether a non-proprietary network element should be made available for purposes of section 251(c)(3) of the Act by analyzing, at a minimum, whether lack of access to a non-proprietary network element “impairs” a requesting carrier's ability to provide the service it seeks to offer. A requesting carrier's ability to provide service is “impaired” if, taking into consideration the availability of alternative elements outside the incumbent LEC's network,

including elements self-provisioned by the requesting carrier or acquired as an alternative from a third-party supplier, lack of access to that element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market by a reasonably efficient competitor uneconomic.

■ 5. Section 51.319 is amended by removing paragraphs (a)(7) and (e)(4), redesignating paragraphs (a)(8) and (a)(9) as (a)(7) and (a)(8), redesignating paragraph (e)(5) as (e)(4), and by revising paragraphs (a)(4), (a)(5), (a)(6), (d)(2), (d)(4), (e) introductory text, (e)(1), (e)(2), and (e)(3) to read as follows:

§ 51.319 Specific unbundling requirements.

(a) * * *

(4) *DS1 loops.* (i) Subject to the cap described in paragraph (a)(4)(ii) of this section, an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS1 loop on an unbundled basis to any building not served by a wire center with at least 60,000 business lines and at least four fiber-based collocators. Once a wire center exceeds both of these thresholds, no future DS1 loop unbundling will be required in that wire center. A DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services.

(ii) *Cap on unbundled DS1 loop circuits.* A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 loops to any single building in which DS1 loops are available as unbundled loops.

(iii) *Transition period for DS1 loop circuits.* For a 12-month period beginning on the effective date of the *Triennial Review Remand Order*, any DS1 loop UNEs that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (a)(4)(i) or (a)(4)(ii) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115% of the rate the requesting carrier paid for the loop element on June 15, 2004, or, 115% of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that loop element. Where incumbent LECs are not required to provide unbundled DS1 loops pursuant to paragraphs (a)(4)(i) or (a)(4)(ii) of this section, requesting carriers may not

obtain new DS1 loops as unbundled network elements.

(5) *DS3 loops.* (i) Subject to the cap described in paragraph (a)(5)(ii) of this section, an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS3 loop on an unbundled basis to any building not served by a wire center with at least 38,000 business lines and at least four fiber-based collocators. Once a wire center exceeds both of these thresholds, no future DS3 loop unbundling will be required in that wire center. A DS3 loop is a digital local loop having a total digital signal speed of 44.736 megabytes per second.

(ii) *Cap on unbundled DS3 loop circuits.* A requesting telecommunications carrier may obtain a maximum of a single unbundled DS3 loop to any single building in which DS3 loops are available as unbundled loops.

(iii) *Transition period for DS3 loop circuits.* For a 12-month period beginning on the effective date of the *Triennial Review Remand Order*, any DS3 loop UNEs that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (a)(5)(i) or (a)(5)(ii) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115% of the rate the requesting carrier paid for the loop element on June 15, 2004, or, 115% of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that loop element. Where incumbent LECs are not required to provide unbundled DS3 loops pursuant to paragraphs (a)(5)(i) or (a)(5)(ii) of this section, requesting carriers may not obtain new DS3 loops as unbundled network elements.

(6) *Dark fiber loops.* (i) An incumbent LEC is not required to provide requesting telecommunications carriers with access to a dark fiber loop on an unbundled basis. Dark fiber is fiber within an existing fiber optic cable that has not yet been activated through optonics to render it capable of carrying communications services.

(ii) *Transition period for dark fiber loop circuits.* For an 18-month period beginning on the effective date of the *Triennial Review Remand Order*, any dark fiber loop UNEs that a competitive LEC leases from the incumbent LEC as of that date shall be available for lease from the incumbent LEC at a rate equal to the higher of 115% of the rate the requesting carrier paid for the loop element on June 15, 2004, or, 115% of

the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that loop element. Requesting carriers may not obtain new dark fiber loops as unbundled network elements.

* * * * *

(d) * * *

(2) *DS0 capacity (i.e., mass market) determinations.* (i) An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops.

(ii) Each requesting telecommunications carrier shall migrate its embedded base of end-user customers off of the unbundled local circuit switching element to an alternative arrangement within 12 months of the effective date of the *Triennial Review Remand Order*.

(iii) Notwithstanding paragraph (d)(2)(i) of this section, for a 12-month period from the effective date of the *Triennial Review Remand Order*, an incumbent LEC shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve its embedded base of end-user customers. The price for unbundled local circuit switching in combination with unbundled DS0 capacity loops and shared transport obtained pursuant to this paragraph shall be the higher of the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or, the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that combination of network elements, plus one dollar. Requesting carriers may not obtain new local switching as an unbundled network element.

* * * * *

(4) *Other elements to be unbundled.* Elements relating to the local circuit switching element shall be made available on an unbundled basis to a requesting carrier to the extent that the requesting carrier is entitled to unbundled local circuit switching as set forth in paragraph (d)(2) of this section.

(i) An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to signaling, call-related databases, and shared transport facilities on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part, to the extent that local circuit switching is required to be made available pursuant to paragraph

(d)(2)(iii) of this section. These elements are defined as follows:

(A) *Signaling networks.* Signaling networks include, but are not limited to, signaling links and signaling transfer points.

(B) *Call-related databases.* Call-related databases are defined as databases, other than operations support systems, that are used in signaling networks for billing and collection, or the transmission, routing, or other provision of a telecommunications service. Where a requesting telecommunications carrier purchases unbundled local circuit switching from an incumbent LEC, an incumbent LEC shall allow a requesting telecommunications carrier to use the incumbent LEC's service control point element in the same manner, and via the same signaling links, as the incumbent LEC itself.

(1) Call-related databases include, but are not limited to, the calling name database, 911 database, E911 database, line information database, toll free calling database, advanced intelligent network databases, and downstream number portability databases by means of physical access at the signaling transfer point linked to the unbundled databases.

(2) Service management systems are defined as computer databases or systems not part of the public switched network that interconnect to the service control point and send to the service control point information and call processing instructions needed for a network switch to process and complete a telephone call, and provide a telecommunications carrier with the capability of entering and storing data regarding the processing and completing of a telephone call. Where a requesting telecommunications carrier purchases unbundled local circuit switching from an incumbent LEC, the incumbent LEC shall allow a requesting telecommunications carrier to use the incumbent LEC's service management systems by providing a requesting telecommunications carrier with the information necessary to enter correctly, or format for entry, the information relevant for input into the incumbent LEC's service management system, including access to design, create, test, and deploy advanced intelligent network-based services at the service management system, through a service creation environment, that the incumbent LEC provides to itself.

(3) An incumbent LEC shall not be required to unbundle the services created in the advanced intelligent network platform and architecture that qualify for proprietary treatment.

(C) *Shared transport.* Shared transport is defined as the transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network.

(ii) An incumbent LEC shall provide a requesting telecommunications carrier nondiscriminatory access to operator services and directory assistance on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part, to the extent that local circuit switching is required to be unbundled by a state commission, if the incumbent LEC does not provide that requesting telecommunications carrier with customized routing, or a compatible signaling protocol, necessary to use either a competing provider's operator services and directory assistance platform or the requesting telecommunications carrier's own platform. Operator services are any automatic or live assistance to a customer to arrange for billing or completion, or both, of a telephone call. Directory assistance is a service that allows subscribers to retrieve telephone numbers of other subscribers.

(e) *Dedicated transport.* An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to dedicated transport on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part, as set forth in paragraphs (e) through (e)(4) of this section. A "route" is a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches. A route between two points (e.g., wire center or switch "A" and wire center or switch "Z") may pass through one or more intermediate wire centers or switches (e.g., wire center or switch "X"). Transmission paths between identical end points (e.g., wire center or switch "A" and wire center or switch "Z") are the same "route," irrespective of whether they pass through the same intermediate wire centers or switches, if any.

(1) *Definition.* For purposes of this section, dedicated transport includes incumbent LEC transmission facilities between wire centers or switches owned by incumbent LECs, or between wire centers or switches owned by incumbent LECs and switches owned by requesting telecommunications carriers, including, but not limited to, DS1-, DS3-, and OCn-capacity level services, as well as dark fiber, dedicated to a particular customer or carrier.

(2) *Availability.* (i) *Entrance facilities.* An incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers.

(ii) *Dedicated DS1 transport.* Dedicated DS1 transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dedicated DS1 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 1.544 megabytes per second and are dedicated to a particular customer or carrier.

(A) *General availability of DS1 transport.* Incumbent LECs shall unbundle DS1 transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are Tier 1 wire centers. As such, an incumbent LEC must unbundle DS1 transport if a wire center at either end of a requested route is not a Tier 1 wire center, or if neither is a Tier 1 wire center.

(B) *Cap on unbundled DS1 transport circuits.* A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

(C) *Transition period for DS1 transport circuits.* For a 12-month period beginning on the effective date of the *Triennial Review Remand Order*, any DS1 dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(ii)(A) or (e)(2)(ii)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or, 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled DS1 transport pursuant to paragraphs (e)(2)(ii)(A) or (e)(2)(ii)(B) of this section, requesting carriers may not obtain new DS1 transport as unbundled network elements.

(iii) *Dedicated DS3 transport.* Dedicated DS3 transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dedicated DS3 transport consists of

incumbent LEC interoffice transmission facilities that have a total digital signal speed of 44.736 megabytes per second and are dedicated to a particular customer or carrier.

(A) *General availability of DS3 transport.* Incumbent LECs shall unbundle DS3 transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are either Tier 1 or Tier 2 wire centers. As such, an incumbent LEC must unbundle DS3 transport if a wire center on either end of a requested route is a Tier 3 wire center.

(B) *Cap on unbundled DS3 transport circuits.* A requesting telecommunications carrier may obtain a maximum of 12 unbundled DS3 dedicated transport circuits on each route where DS3 dedicated transport is available on an unbundled basis.

(C) *Transition period for DS3 transport circuits.* For a 12-month period beginning on the effective date of the *Triennial Review Remand Order*, any DS3 dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(iii)(A) or (e)(2)(iii)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or, 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled DS3 transport pursuant to paragraphs (e)(2)(iii)(A) or (e)(2)(iii)(B) of this section, requesting carriers may not obtain new DS3 transport as unbundled network elements.

(iv) *Dark fiber transport.* Dedicated dark fiber transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dark fiber transport consists of unactivated optical interoffice transmission facilities.

(A) *General availability of dark fiber transport.* Incumbent LECs shall unbundle dark fiber transport between any pair of incumbent LEC wire centers except where, though application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are either Tier 1 or Tier 2 wire centers. As such, an

incumbent LEC must unbundle dark fiber transport if a wire center on either end of a requested route is a Tier 3 wire center.

(B) *Transition period for dark fiber transport circuits.* For an 18-month period beginning on the effective date of the *Triennial Review Remand Order*, any dark fiber dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(iv)(A) or (e)(2)(iv)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or, 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled dark fiber transport pursuant to paragraphs (e)(2)(iv)(A) or (e)(2)(iv)(B) of this section, requesting carriers may not obtain new dark fiber transport as unbundled network elements.

(3) *Wire center tier structure.* For purposes of this section, incumbent LEC wire centers shall be classified into three tiers, defined as follows:

(i) Tier 1 wire centers are those incumbent LEC wire centers that contain at least four fiber-based collocators, at least 38,000 business lines, or both. Tier 1 wire centers also are those incumbent LEC tandem switching locations that have no line-side switching facilities, but nevertheless serve as a point of traffic aggregation accessible by competitive LECs. Once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center.

(ii) Tier 2 wire centers are those incumbent LEC wire centers that are not Tier 1 wire centers, but contain at least 3 fiber-based collocators, at least 24,000 business lines, or both. Once a wire center is determined to be a Tier 2 wire center, that wire center is not subject to later reclassification as a Tier 3 wire center.

(iii) Tier 3 wire centers are those incumbent LEC wire centers that do not meet the criteria for Tier 1 or Tier 2 wire centers.

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[FR Doc. 05-3511 Filed 2-23-05; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05-299; MM Docket No. 02-63, RM-10398]

Radio Broadcasting Service; Burbank and Walla Walla, WA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division, at the request of New Northwest Broadcasters, LLC, reallocates Channel 256C1 from Walla Walla to Burbank, Washington, and modifies Station KUJ-FM's license accordingly. See 67 FR 17669, April 11, 2002. We also dismiss the one-step upgrade application (File No. BPH-20041008ACV) filed by New Northwest Broadcasters, LLC, requesting the substitution of Channel 256C1 for 256C2 at Walla Walla, Washington, as moot. Channel 256C1 can be reallocated to Burbank in compliance with the Commission's minimum distance separation requirements at petitioner's presently licensed site. The coordinates for Channel 256C1 at Burbank are 45-57-22 North Latitude and 118-41-11 West Longitude.

DATES: Effective March 21, 2005.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Media Bureau, (202) 418-2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MM Docket No. 02-63, adopted February 2, 2005, and released February 4, 2005. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY-A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160 or <http://www.BCPIWEB.com>. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.