

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

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local	)	WT Docket No. 99-217
Telecommunications Markets	)	

**REPORT AND ORDER**

**Adopted: March 19, 2008**

**Released: March 21, 2008**

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

**I. INTRODUCTION**

1. In this Order, we further our efforts under the Telecommunications Act of 1996 to foster competition in local communications markets by implementing additional measures to ensure that competing telecommunications providers are able to provide telecommunications services to customers in multiple tenant environments (MTEs).<sup>1</sup> In 2001, the Commission prohibited common carriers from entering into contracts with commercial MTE owners that granted to the carriers exclusive access for the provision of telecommunications services to tenants in the MTE.<sup>2</sup> Today, we extend the Commission's prior action and prohibit carriers from entering into contracts with residential MTE owners that grant carriers exclusive access for the provision of telecommunications services to residents in those MTEs. Specifically, we conclude today that in residential settings, carriers may not enter into contracts for the provision of telecommunications services with premises owners that restrict consumers' access to other telecommunications providers, and that such carriers may not enforce telecommunications service exclusivity contracts in predominantly residential MTEs.<sup>3</sup> These important safeguards create parity for the provision of telecommunications services to customers regardless of whether they are located in commercial or residential MTEs. We implement measures today to ensure that, in furtherance of the Telecommunications Act of 1996, certain exclusive contracts no longer serve as an obstacle to competitive access in the telecommunications market.<sup>4</sup>

2. These market-opening measures advance the policies and are consistent with the reasoning we recently adopted in the *Video Nonexclusivity Order*, in which we found that contractual agreements granting exclusive access for the provision of video services harm competition and broadband

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.) (1996 Act).

<sup>2</sup> *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983, 23052-53, paras. 160-64 (2000) (*Competitive Networks Order and Further Notice*).

<sup>3</sup> We do not address in this order exclusive marketing agreements or other arrangements that give a preference to a particular carrier but do not effectively restrict the premises owner from permitting other providers access. *Competitive Networks Order and Further Notice*, 15 FCC Rcd at 22997, para. 27 n.72. See also *id.* at 23000-01, para. 37 (discussing the types of arrangements that do fall under this prohibition).

<sup>4</sup> *Id.* at 23052-53, paras. 160-64.

deployment.<sup>5</sup> In that order, we further found that any benefits to consumers are outweighed by the harms of such exclusivity.<sup>6</sup> Therefore, in the video context, we prohibited the enforcement of existing exclusivity clauses and the execution of new ones by cable operators and others subject to the relevant statutory provisions.<sup>7</sup> Today, we take similar action in the telecommunications services context to prohibit carriers from entering into or enforcing such exclusivity contracts with premises owners in predominantly residential MTEs. We find that such exclusivity contracts are unjust and unreasonable practices pursuant to Section 201 because they perpetuate the barriers to facilities based competition that the 1996 Act was designed to eliminate. Moreover, the prohibition we adopt herein will not only materially advance the 1996 Act's goals of enhancing competition, but also the goal of broadband deployment.<sup>8</sup>

## II. BACKGROUND

3. In 2000, the Commission issued the *Competitive Networks Order and Further Notice* to foster local competition pursuant to the 1996 Act, and adopted several measures to ensure that competing telecommunications providers are able to provide services in MTEs. Most notably for the purposes of this proceeding, that order prohibited carriers from entering into contracts that restrict or effectively restrict owners and managers of commercial MTEs from permitting access by competing carriers.<sup>9</sup> The Commission also sought comment in several areas, including whether the prohibition on exclusive access contracts in commercial MTEs should be extended to residential settings, and whether carriers should be prohibited from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs.<sup>10</sup>

4. Last year, the Wireline Competition Bureau released a public notice inviting interested parties to update the record pertaining to issues raised in the Commission's *Competitive Networks* proceeding in light of marketplace and industry developments.<sup>11</sup> Specifically, the notice sought updates on the progress of the real estate industry's voluntary commitments aimed at improving tenants' access to alternative telecommunications carriers, and on intervening industry developments such as service bundling and integration.

## III. DISCUSSION

5. We conclude that exclusive agreements to provide telecommunications services to residential customers in MTEs harm competition and consumers without evidence of countervailing benefits, and we thus prohibit carriers from entering into or enforcing such provisions. This conclusion is bolstered by our decision in the *Video Nonexclusivity Order* to prohibit cable operators and others subject to the relevant statutory provisions from executing or enforcing existing video exclusivity provisions in

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<sup>5</sup> *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-189 (rel. Nov. 13, 2007) (*Video Nonexclusivity Order*).

<sup>6</sup> *Id.* at paras. 26-29.

<sup>7</sup> *Id.* at paras. 30-39.

<sup>8</sup> Section 706 of the Telecommunications Act of 1996 directs the Commission to encourage the deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis. 47 U.S.C. § 157 nt.

<sup>9</sup> *Competitive Networks Order and Further Notice*, 15 FCC Rcd at 22985, para. 1; see 47 C.F.R. § 64.2500.

<sup>10</sup> *Competitive Networks Order and Further Notice*, 15 FCC Rcd at 22989, para. 9.

<sup>11</sup> *Parties Asked to Refresh Record Regarding Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket No. 96-98, Public Notice, 22 FCC Rcd 5632 (2007) (*Notice*).

contracts to serve residential multiunit premises.<sup>12</sup> In an environment of increasingly competitive bundled service offerings, the importance of regulatory parity is particularly compelling in our determination to remove this impediment to fair competition. Moreover, nothing in the record indicates that the competitive benefits that commercial customers enjoy by virtue of the Commission's prior prohibition of such contracts in the commercial context should not also be extended to residential users.

6. *Scope of Residential MTEs.* In the *Competitive Networks Order and Further Notice*, the Commission prohibited exclusivity provisions with respect to the provision of telecommunications services in commercial MTEs. As it observed in that order, however, "some premises are used for both commercial and residential purposes."<sup>13</sup> In situations "where a single access agreement covers the entire premises, we find it most consistent with the purposes of our rule to determine its status as residential or commercial by predominant use."<sup>14</sup> The Commission has continued that approach in subsequent decisions, for example granting certain section 251(c) unbundling relief for fiber deployed to "predominantly residential" multiunit premises relying on the distinctions drawn in the *Competitive Networks Order and Further Notice*.<sup>15</sup> Consistent with that precedent, our protections against telecommunications exclusivity provisions here extend to the tenants in residential MTEs as determined by the MTE's predominant use.<sup>16</sup>

7. As the Commission held in the *Competitive Networks Order and Further Notice*, the guests of hotels or similar establishments are not "tenants" covered by the exclusivity ban within the meaning of our rules.<sup>17</sup> Similar to our decision in the video context in the *Video Nonexclusivity Order*, and consistent with prior decisions in the telecommunications context, we likewise do not find the prohibition we adopt here necessary to protect guests in "hotels, or similar establishments," since such guests tend to be transient users, for whom such a prohibition likely would not bring the same competitive benefits.<sup>18</sup> We therefore conclude that, for purposes of protecting consumers in residential MTEs, our prohibition on exclusive arrangements for the provision of telecommunications services does not extend to guests in hotels or similar establishments.

8. *Prohibition on Entering Into and Enforcing Exclusivity.* The record before us leaves no doubt of the existence of exclusive arrangements for the provision of telecommunications services.<sup>19</sup>

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<sup>12</sup> *Video Nonexclusivity Order* at paras. 30-31.

<sup>13</sup> *Competitive Networks Order and Further Notice*, 15 FCC Rcd at 23001, para. 38.

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

<sup>15</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 15856, 15858-59, para. 6 (2004).

<sup>16</sup> In sum, telecommunications exclusivity provisions in agreements to serve customers in exclusively or predominantly commercial MTEs were prohibited by the *Competitive Networks Order and Further Notice*, and telecommunications exclusivity provisions in agreements to serve customers in exclusively or predominantly residential MTEs are prohibited by our actions here. Thus, all MTEs are now addressed, as specified in our rules.

<sup>17</sup> *Competitive Networks Order and Further Notice*, 15 FCC Rcd at 23001, para. 38 n.92; 47 C.F.R. § 64.2500. The Commission further explained that to the extent a hotel itself is a tenant in a commercial building, the prohibition against exclusive contracts applies. *Competitive Networks Order and Further Notice*, 15 FCC Rcd at 23001, para. 38 n.92.

<sup>18</sup> *Id.*; see *Video Nonexclusivity Order* at para. 7.

<sup>19</sup> See, e.g., Embarq Comments, WT Docket No. 99-217, CC Docket No. 96-98 at 2-3 (filed July 30, 2007); Qwest Comments, WT Docket No. 99-217, CC Docket No. 96-98 at 1-2 (filed July 30, 2007); Letter from Cindy B. Miller, Senior Attorney, Florida Public Service Commission, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-98, (continued...)

These arrangements have the same harmful effects on the provision of triple play services and broadband deployment as discussed in the *Video Nonexclusivity Order*,<sup>20</sup> and pose just as much of a barrier to competition where they are attached to the provision of telecommunications services as they are to the provision of video services.<sup>21</sup> Such provisions can “prohibit or economically discourage consumers from seeking alternative service providers” for telecommunications services, thereby limiting consumer choice and competition.<sup>22</sup> This not only could adversely affect consumers’ rates, but also quality, innovation, and network redundancy.<sup>23</sup>

9. Developments in the markets for telecommunications, video, and broadband services over the last several years support our conclusion to extend the ban on exclusivity to residential MTEs. At the time the Commission issued the *Competitive Networks Order and Further Notice*, the Commission distinguished between residential and commercial tenants because of an inconclusive record about the likely competitive effects in residential MTEs, and cited commenter concerns that “in the residential context, potential revenue streams from any one building are typically not enough to attract competitive entry without exclusive contracts.”<sup>24</sup> As the Commission has discussed at length in the *Video Nonexclusivity Order* and in other recent orders,<sup>25</sup> the dramatic growth of service combinations and the “triple play” reduces the concern that a sole telecommunications service revenue stream is insufficient to generate additional competitive entry, even in the residential context.<sup>26</sup> The shift from competition

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WT Docket No. 99-217, MB Docket No. 07-51, Attach. (filed Oct. 23, 2007) (Florida PSC Oct. 23, 2007 *Ex Parte* Letter); see also *Competitive Networks Order and Further Notice*, 15 FCC Rcd at 22999, para. 33 (recognizing the presence of exclusive access contracts for the provision of telecommunications services to residential MTEs).

<sup>20</sup> *Video Nonexclusivity Order* at paras. 19-21, 26-28. We note that while the *Video Nonexclusivity Order* addresses the provision of video services to what it refers to as “multiple dwelling units” (MDUs), this order uses the term “MTEs” rather than MDUs, consistent with the notice set forth in the *Competitive Networks Order and Further Notice* and the record compiled in response. The scope of MTEs addressed in this order is defined above. See *supra*. paras. 6-7.

<sup>21</sup> See, e.g., Embarq Comments, WT Docket No. 99-217, CC Docket No. 96-98 at 3-5 (filed July 30, 2007). Indeed, even Comcast, while counseling for caution in the prohibition of exclusivity contracts, does concede that “the record in [the *Competitive Networks*] proceeding provides a stronger legal and factual basis for regulatory intervention than does the record in the [MVPD exclusivity] Proceeding.” Comcast Reply, WT Docket No. 99-217, CC Docket No. 96-98, CC Docket No. 88-57 at 2 (filed Aug. 28, 2007).

<sup>22</sup> See, e.g., Florida PSC Oct. 23, 2007 *Ex Parte* Letter, Attach at 6; Embarq Comments, WT Docket No. 99-217, CC Docket No. 96-98 at 2-3 (filed July 30, 2007); Qwest Comments, WT Docket No. 99-217, CC Docket No. 96-98 at 2-3 (filed July 30, 2007); Smart Buildings Policy Project Comments, at 37, WT Docket No. 99-217 (filed Mar. 8, 2002) cited in COMPTEL Comments, WT Docket No. 99-217, CC Docket No. 96-98 at 3 n.10 (filed July 30, 2007).

<sup>23</sup> See, e.g., Qwest Comments, WT Docket No. 99-217, CC Docket No. 96-98 at 3 (filed July 30, 2007); Smart Buildings Policy Project Comments, at 49-50, WT Docket No. 99-217 (filed Mar. 8, 2002).

<sup>24</sup> *Competitive Networks Order and Further Notice*, 15 FCC Rcd at 22996-97, 22999, paras. 27, 33.

<sup>25</sup> See, e.g., *Video Nonexclusivity Order* at paras. 19-21, 26-28; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 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, 17142-44, para. 274 (2003) (discussing the significant potential rewards for fiber deployment for carriers offering voice, data, video, and other services), corrected by Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), vacated and remanded in part, affirmed in part, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*).

<sup>26</sup> See, e.g., Embarq Comments, WT Docket No. 99-217, CC Docket No. 96-98 at 3-4 (filed July 30, 2007). Cf. Smart Buildings Policy Project Comments, at 47-48, WT Docket No. 99-217 (filed Mar. 8, 2002) (“if different (continued...)”).

between stand-alone services to that between service bundles, as well as the integration of service providers, supports the removal of obstacles to facilities-based entry.<sup>27</sup> Given that the same facilities used to provide video and data services often can readily be used to provide telephone service, as well, denying such providers the right to do so only serves to reduce the entry incentives of competing providers, and thus competition, for each of those services.<sup>28</sup>

10. In addition, section 706 and our goal of regulatory parity support our decision today. When the Commission last addressed this issue in 2000, the Commission indicated its hope that the growth of facilities-based competition would increase the availability of advanced services.<sup>29</sup> While providers have deployed broadband facilities to a tremendous degree since then, we believe that our actions here will further promote that goal. Because allowing the imposition of restrictions on competitive offerings to residents in a multiunit premise would deter competitors from offering broadband service in combination with video, voice, or other telecommunications services, we also find that prohibiting carriers from entering into exclusivity contracts for the provision of telecommunications services furthers section 706's mandate to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans"<sup>30</sup> as a basis for expanding the prohibition on contractual exclusivity.

11. We are not persuaded by those commenters who argue that the Commission should refrain from taking any action with regard to residential MTEs. In response to the issues raised in the *Competitive Networks* proceeding, the real estate industry made a commitment to the Commission to develop model contracts and "best practices" to facilitate negotiations for building access, which include a firm policy not to enter into exclusive contracts.<sup>31</sup> While this approach is commendable and pro-competitive, we do not find on this record that the effects of this voluntary commitment are widespread,<sup>32</sup> nor do we find such an unenforceable commitment sufficient to ensure the necessary competitive access.

12. With regard to the benefits of exclusivity, the Commission previously concluded that there was no evidence of benefits to competition or consumer welfare from the use of exclusive contracts in commercial settings,<sup>33</sup> and the record in residential settings similarly lacks such evidence. Although the data cited in the comments recently refreshing the *Competitive Networks* proceeding are not detailed, that

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technologies render it economical for there to be multiple service providers in a residential environment, a *de jure* exclusive [contract] would prevent those advances from benefiting consumers").

<sup>27</sup> See, e.g., *SBC Communications Inc. and AT&T Corp. Application for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290 (2005); *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005); *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007).

<sup>28</sup> See, e.g., Embarq Comments, WT Docket No. 99-217, CC Docket No. 96-98 at 3 (filed July 30, 2007).

<sup>29</sup> *Competitive Networks Order and Further Notice*, 15 FCC Rcd at 22987, para. 5.

<sup>30</sup> 47 U.S.C. § 157 nt.

<sup>31</sup> *Competitive Networks Order and Further Notice*, 15 FCC Rcd at 22992, para. 16.

<sup>32</sup> See, e.g., AT&T Comments, WT Docket No. 99-217, at 13 (filed Jan. 22, 2001) (noting "there is little evidence that [this] initiative has been implemented in an expeditious manner, has been embraced by the real-estate industry as a whole, or is designed to promote a truly competitive MTE environment"); Winstar Comments, WT Docket No. 99-217, at 3 (filed Jan. 22, 2001) (reporting that the RAA and its members represent only a very small percentage of the real estate industry).

<sup>33</sup> *Competitive Networks Order and Further Notice*, 15 FCC Rcd at 22998, para. 32.

does not render the anticompetitive impact of exclusivity provisions inconsequential. Qwest reports that it is increasingly encountering residential buildings where it is prohibited to sell its voice services.<sup>34</sup> Indeed, no party disputes that carriers and MTE representatives continue to enter into these contracts, and even in arguing against a prohibition, RAA introduces a survey of property owners and managers showing that two percent of the respondents admit to having at least one exclusive agreement for building access.<sup>35</sup> We are mindful of the concerns of some that “community-based arrangements” allow competitive providers some assurance of a steady revenue stream to justify their initial development,<sup>36</sup> but, for the reasons described above, we are not persuaded by such concerns in the present marketplace environment.<sup>37</sup> Thus, we conclude that the perpetuation of exclusivity contracts is not in the public interest. Just as we concluded in the context of video programming services, we find that the benefits do not outweigh the harms, and we act accordingly for telecommunications services.<sup>38</sup> The exclusive provision of telecommunications services in residential MTEs bars competitive and new entry in the telecommunications services market and triple play market, and discourages the deployment of broadband facilities to the American public. This in turn results in higher prices and fewer competitive choices for consumers. Such limitations are inconsistent with the pro-competitive goals of the 1996 Act, and therefore such contracts are unjust and unreasonable practices.<sup>39</sup>

13. We find that immediately prohibiting the enforcement of such provisions is more appropriate than phasing them out or waiting until contracts expire and are replaced by contracts without exclusivity provisions.<sup>40</sup> We agree with commenters that such approaches would only serve to further delay the entry of competition to customers in the buildings at issue.<sup>41</sup> To leave existing exclusivity

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<sup>34</sup> Qwest Comments, WT Docket No. 99-217, CC Docket No. 96-98 at 1 (filed July 30, 2007).

<sup>35</sup> RAA Comments, WT Docket No. 98-217, CC Docket No. 96-98 at 6 (filed July 30, 2007). Sixteen percent of owners and managers report that having two or fewer providers is “typical” in their buildings. Because these figures are based on voluntary responses to a survey, the percentage of property owners and managers who have contracted to at least one exclusive agreement may in fact be higher.

<sup>36</sup> OpenBand of Virginia, LLC Comments, WT Docket No. 99-217, CC Docket No. 96-98 at 4-5 (filed July 30, 2007) (“[I]ssues such as access and exclusivity need to be addressed with an eye toward catalyzing and preserving this ready and able competitive market. A planned community, as the ‘customer,’ generally makes a careful choice in selecting a communications provider. . . . Where a developer or other property owner has carefully provided for the significant investment to provide meaningful broadband services to a community, has chosen a company to provide those services, and fully discloses to homeowners the nature of the arrangement in the community, such arrangements need to be thoughtfully considered as options to facilitate wired community models.”).

<sup>37</sup> See *supra* para. 9.

<sup>38</sup> See *Video Nonexclusivity Order* at para. 16.

<sup>39</sup> In its comments, XO Communications addresses a situation where it is seeking to access microwave entrance facilities in buildings owned by a particular carrier, but acknowledges that “this is not the traditional building access problem discussed in the *Competitive Networks Proceeding*.” XO Communications Comments, WT Docket No. 99-217, CC Docket No. 96-98 at i, 5 (filed July 30, 2007). We find that XO seeks relief that is beyond the scope of this particular Order, and that its allegations are more appropriately considered separately.

<sup>40</sup> See *Competitive Networks Order and Further Notice*, 15 FCC Rcd at 23053, para. 164 (seeking comment on “whether, in lieu of an immediate prohibition on the enforcement of exclusive access provisions in existing contracts, we should phase out such provisions by establishing a future termination date for these provisions”); see also, e.g., Real Access Alliance Comments, WT Docket No. 99-217, CC Docket Nos. 96-98, 88-57, at 66 (filed Jan. 22, 2001) (arguing that it is unnecessary to abrogate existing contracts where, as the contracts expire, they will be replaced by contracts without exclusivity provisions).

<sup>41</sup> See, e.g., AT&T Comments, WT Docket No. 99-217, at 42 (filed Jan. 22, 2001); RCN *et al.* Comments, WT Docket No. 99-217, CC Docket Nos. 96-98, 88-57, at 17-18 (filed Jan. 22, 2001); AT&T Reply, WT Docket No. 99-217, at 29 (filed Feb. 21, 2001).

contracts in effect would allow the competitive harms we have identified to continue for some time, even years, and we believe it is in the public interest to prohibit such contracts from being enforced. Further, to the extent that exclusivity provisions prevent incumbent local exchange carriers (LECs) from serving a building, they could be at odds with applicable carrier of last resort obligations.<sup>42</sup> In addition, nothing in the record suggests that small carriers are particularly disadvantaged by exclusivity prohibitions, or that the cost/benefit analysis for consumers differs when small carriers are involved. Finally, we note that the validity of exclusivity provisions in contracts for the provision telecommunications services to residential MTEs has been subject to question for some time. In the *Competitive Networks Order and Further Notice*, the Commission found such provisions unreasonable in the context of commercial MTEs, and sought comment on the propriety of a similar prohibition for residential MTEs, including the prohibition on enforcement of existing exclusivity provisions.<sup>43</sup> Thus, carriers have been on notice for more than seven years that the Commission might prohibit both their entering, and enforcement of, such provisions.<sup>44</sup>

#### IV. LEGAL AUTHORITY

14. As the Commission found in the *Competitive Networks Order and Further Notice*,<sup>45</sup> we have ample authority to prohibit exclusivity provisions in agreements for the provision of telecommunications service to residential MTEs. There, the Commission specifically found that “exclusive contracts for telecommunications service in commercial settings impede the pro-competitive purposes of the 1996 Act and appear to confer no substantial countervailing public benefits,” and thus “a carrier’s agreement to such a contract is an unreasonable practice” under section 201(b) of the Communications Act of 1934, as amended (Act).<sup>46</sup>

15. The same conclusion is applicable here because just as in the commercial MTE context, the prohibition of exclusive contracts in the provision of telecommunications services to residential MTEs effects the same policy goals – facilitating competitive entry, lower prices, and more broadband deployment. Thus, we find that a carrier’s execution or enforcement of such an exclusive access provision is an unreasonable practice and implicates our authority under section 201(b) of the Act to prohibit unreasonable practices.<sup>47</sup> As the United States Court of Appeals for the District of Columbia Circuit has held, the Commission has authority to regulate the contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation.<sup>48</sup> Consequently, we prohibit carriers from executing or enforcing such exclusive access contracts with residential building owners or their agents.

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<sup>42</sup> See, e.g., SBC Comments, WT Docket No. 99-217, at 2 (filed Jan. 22, 2001); Verizon Reply, WT Docket No. 99-217, CC Docket Nos. 96-98, 88-57, at 4 (filed Feb. 21, 2001).

<sup>43</sup> *Competitive Networks Order and Further Notice*, 15 FCC Rcd at 22998-99, paras. 32-33.

<sup>44</sup> We limit our prohibition on enforcement of existing exclusive contracts to the provision of telecommunications service to residential MTEs. The Commission’s prohibition on entering into exclusive contracts in the business context went into effect several years ago, and the record does not indicate the prevalence of pre-existing commercial contracts that would warrant a similar rule.

<sup>45</sup> *Id.* at 23000, para. 35.

<sup>46</sup> *Competitive Networks Order and Further Notice*, 15 FCC Rcd at 23000, para. 35.

<sup>47</sup> Section 201(b) expressly authorizes the Commission to regulate “[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service,” to ensure that such practices are “just and reasonable.” 47 U.S.C. § 201(b).

<sup>48</sup> See *Cable & Wireless v. FCC*, 166 F.3d 1224, 1230-32 (D.C. Cir. 1999).

16. As with video contracts, we do not limit our prohibition to future exclusivity contracts for the provision of telecommunications services, but also prohibit the enforcement of such existing contracts.<sup>49</sup> In the *Competitive Networks Order and Further Notice*, the Commission sought comment on whether to prohibit carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential multiunit premises, including the extent of the Commission's authority to do so.<sup>50</sup> We conclude that we have such authority, and that it is in the public interest to prohibit the enforcement of exclusive contracts for the provision of telecommunications services to residential MTEs.

17. The Commission has clear authority to "modify . . . provisions of private contracts when necessary to serve the public interest."<sup>51</sup> The Commission has exercised this authority previously when private contracts violate sections 201 through 205 of the Act.<sup>52</sup> As the Commission found in the *Competitive Networks Order and Further Notice*, the exclusive access provisions at issue here "perpetuate the very 'barriers to facilities-based competition' that the 1996 Act was designed to eliminate," and appear to confer no substantial countervailing public benefits.<sup>53</sup> Having for the same reasons found such exclusive contracts violate section 201 of the Act, and given the adverse competitive effects of such contracts, we find it necessary in the public interest to prohibit enforcement of such existing contracts.<sup>54</sup>

18. In addition, we conclude that our prohibition on the enforcement of telecommunications exclusivity contracts here does not violate the Fifth Amendment for the same reasons discussed in the *Video Nonexclusivity Order* in the context of video exclusivity provisions.<sup>55</sup> In particular, such action is not a *per se* taking,<sup>56</sup> nor does it represent a regulatory taking under the Supreme Court's framework.<sup>57</sup>

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<sup>49</sup> See *Video Nonexclusivity Order* at paras. 30-37 (discussing the Commission's authority to prohibit the enforcement of existing exclusivity clauses in contracts for the provision of video services to MDUs).

<sup>50</sup> *Competitive Networks Order and Further Notice*, 15 FCC Rcd at 23041-50, 23053, paras. 132-50, 163-64.

<sup>51</sup> *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).

<sup>52</sup> See, e.g., *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5207-10, paras. 197-208 (1994), *remanded on other grounds*, *Pacific Bell v. FCC*, 81 F.3d 1147 (D.C. Cir. 1996) (limiting termination liabilities in current contracts on the grounds that "certain long-term special access arrangements may prevent customers from obtaining the benefits of the new, more competitive access environment"); *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677, 2681-82, paras. 23-28 (1992) (eliminating termination liabilities for certain current AT&T customers under the authority of Section 205 of the Act, on the grounds that "AT&T's termination liability clauses will be unreasonable in light of the risk of leveraging in 800 services").

<sup>53</sup> *Competitive Networks Order and Further Notice*, 15 FCC Rcd at 23000, para. 35.

<sup>54</sup> While the *Competitive Networks Order and Further Notice* also sought comment on prohibiting carriers from enforcing existing exclusivity contracts for commercial MTEs, the most recent record evidence does not demonstrate significant problems in this regard, perhaps because the entry of telecommunications service exclusivity contracts has been prohibited with respect to commercial MTEs for some time now. Nor do commercial MTEs present the same regulatory parity interests as residential MTEs, given the focus of the recent restrictions on video exclusivity in the residential environment.

<sup>55</sup> *Video Nonexclusivity Order* at para. 55. As with the *Video Nonexclusivity Order*, this action does not involve the permanent condemnation of physical property. Cf. *Loretto v. Teleprompter Manhattan City Corp.*, 458 U.S. 419, 427 (1982) ("When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking."); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.").

<sup>56</sup> See *Video Nonexclusivity Order* at para. 56.



As is true in the video context, our prohibition on exclusivity arrangements does not prevent telecommunications carriers from utilizing the facilities they own to provide services to MTEs, nor does it prohibit other types of arrangements such as exclusive marketing arrangements.<sup>58</sup> Moreover, exclusive telecommunications contracts have been under scrutiny for years, and have been prohibited by the Commission and states in certain contexts.<sup>59</sup> Indeed, to the extent that carriers have used exclusivity to obstruct competition, any underlying investment-backed expectations are not sufficiently longstanding or pro-competitive in nature to warrant immunity from regulation.<sup>60</sup> In addition, our prohibition on enforcement of the exclusivity provisions at issue substantially advances the government interest in preventing unreasonable practices reflected in section 201(b) of the Act, and is based on our weighing of the relative costs and benefits of such provisions.<sup>61</sup> Moreover, we note that the action we take today applies only to carriers seeking to enter or enforce telecommunications exclusivity contracts – we are not hereby mandating access to residential or other MTEs. Thus, we find that we have ample authority to regulate telecommunications carriers’ contractual conduct even though it may have a tangential effect on MTE owners.

19. In sum, we conclude that we have both a sufficient policy basis and legal authority to prohibit carriers from entering or enforcing exclusivity provisions on contracts to provide telecommunications services to residential MTEs. By adopting such a prohibition here, we further the competitive goals of the 1996 Act, and continue our efforts to ensure that consumers in MTEs enjoy the benefits of increased competition in both telephone and video service offerings.

## V. PROCEDURAL MATTERS

20. *Final Regulatory Flexibility Act.* As required by the Regulatory Flexibility Act (RFA),<sup>62</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Further Notice*.<sup>63</sup> The Commission sought written public comment on the possible significant economic impact on small entities regarding the proposals addressed in the *Further Notice*, including comments on the IRFA. Pursuant to the RFA, a Final Regulatory Flexibility Analysis is contained in Appendix A.

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(...continued from previous page)

<sup>57</sup> See *Video Nonexclusivity Order* at para. 56 (quoting *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211 (1986)).

<sup>58</sup> See *Video Nonexclusivity Order* at para. 57.

<sup>59</sup> See *Video Nonexclusivity Order* at para. 58.

<sup>60</sup> Cf. *Connolly*, 475 U.S. at 226-27 (declining to find interference with investment-backed expectations where subjects of regulation long had been “objects of legislative concern”; where “it was clear” that agency discretion to regulate, if exercised, would result in liability; and where affected entities had “more than sufficient notice” of possibility of regulation); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958) (“Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.”). Furthermore, we do not believe that any carrier has a legitimate investment-backed expectation in profits obtained through anticompetitive behavior such as that found to exist in this Order. Cf. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (antitrust law proscribing monopolies “assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency,” and a monopolist may not “substitute for competition anticompetitive uses of its dominant power”); *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 178 (2d Cir. 1990) (“A monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits.”).

<sup>61</sup> See *supra* paras. 5-13.

<sup>62</sup> See 5 U.S.C. § 603.

<sup>63</sup> *Competitive Networks Order and Further Notice*, App. C, 15 FCC Rcd at 23108-22.

21. *Paperwork Reduction Act Analysis.* This document does not contain new or modified information collection requirements 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 burdens 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).

22. *Congressional Review Act.* 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).

## VI. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED, pursuant to sections 1, 2(a), 4(j), 4(i), 201, 202, 205, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 154(j), 201, 202, 205, and 405, and pursuant to section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt., that the Report and Order in WT Docket No. 99-217 IS ADOPTED, and that Part 64 of the Commission’s Rules, 47 C.F.R. Part 64, is amended as set forth in Appendix B. It is our intention in adopting these rule changes that, if any provision of the rules is held invalid by any court of competent jurisdiction, the remaining provisions shall remain in effect to the fullest extent permitted by law.

24. IT IS FURTHER ORDERED that the rules and the requirements of this Report and Order SHALL BECOME EFFECTIVE 60 days after publication of this Report and Order in the Federal Register.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Further Notice of Proposed Rulemaking* (the *Further Notice*) to this proceeding.<sup>2</sup> The Commission sought written public comment on the proposals in the *Further Notice*, including comment on the IRFA. The Commission received one comment on the IRFA, from the Real Access Alliance. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>3</sup>

**A. Need for, and Objectives of, the Report and Order**

2. This Report and Order adopts rules and provides guidance to implement sections 1, 2(a), 4(i), 4(j), 201, 202, 205, and 405 of the Communications Act of 1934, as amended (the Act) and section 706 of the Telecommunications Act of 1996.<sup>4</sup> Those Sections of the Act authorize the Commission to prohibit any telecommunications carrier from enforcing or executing contracts with premises owners for provision of telecommunications service alone or in combination with other services in predominantly residential multiple tenant environments (MTEs). The Commission has found that existing and future exclusive contracts constitute an unreasonable barrier to entry for competitive entrants that would impede competition and accelerated broadband deployment, and that they constitute an unfair method of competition. The measures adopted in this Report and Order ensure that, in furtherance of the Telecommunications Act of 1996, certain contractual exclusivity provisions no longer serve as an obstacle to competitive access in the telecommunications market.<sup>5</sup>

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

3. Only one commenter, RAA, submitted a comment that specifically responded to the IRFA. RAA asserts that the IRFA was defective because it did not address the effects of possible outcomes on apartment building owners.<sup>6</sup>

4. We disagree with RAA's assertion. In fact, the IRFA discussed apartment building owners specifically in paragraph 15.<sup>7</sup> Moreover, an IRFA need only address the concerns of entities directly regulated by the Commission.<sup>8</sup> The Commission does not directly regulate apartment building operators.

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996.

<sup>2</sup> *Competitive Networks Order and Further Notice*, App. C, 15 FCC Rcd at 23108-22.

<sup>3</sup> See 5 U.S.C. § 604.

<sup>4</sup> 47 U.S.C. §§ 151, 152(a), 154(i), 154(j), 157 nt., 201, 202, 205, 405.

<sup>5</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.) (1996 Act).

<sup>6</sup> RAA Joint Regulatory Flexibility Act Comments at 2; *but see* Reply Comments of AT&T Corp. Regarding the Regulatory Flexibility Act, WT at 3-5 (IRFA meets standards laid out in cases cited by RAA).

<sup>7</sup> *Competitive Networks Order and Further Notice*, App. C, 15 FCC Rcd at 23114-15 ("The SBA has developed definitions of small entities for operators of . . . apartment buildings").

<sup>8</sup> *Mid-Tex Elec. Co-Op., Inc. v. FERC*, 773 F.2d 327, 343 (D.C. Cir. 1985) (inferring that "Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy").

Accordingly, even if the IRFA had not addressed the concerns of apartment building owners, it would not be defective. When an agency finds that there is no direct impact on a substantial number of small entities that are subject to the requirements of the rule, then no discussion of alternatives, less costly than the proposed rule, is required.<sup>9</sup>

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

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

6. The rules and guidance adopted by this Report and Order will ease the entry of providers of telecommunications services, including those providing the “triple play” of voice, video, and broadband Internet access service. The Commission has determined that the group of small entities directly affected by the rules adopted herein consists of wireline and wireless telecommunications carriers. Therefore, in the Report and Order, we consider the impact of the rules on carriers. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

7. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses according to SBA data.<sup>14</sup>

8. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.<sup>15</sup>

9. *Small Governmental Jurisdictions.* The term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>16</sup> Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.<sup>17</sup> We estimate that, of this total, 84,377 entities

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<sup>9</sup> *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996) (“no analysis is necessary when an agency determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule.”) (internal quotation marks and italics omitted).

<sup>10</sup> 5 U.S.C. §§ 603(b)(3), 604(a)(3).

<sup>11</sup> 5 U.S.C. § 601(6).

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

<sup>13</sup> 15 U.S.C. § 632.

<sup>14</sup> See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

<sup>15</sup> Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

<sup>16</sup> 5 U.S.C. § 601(5).

<sup>17</sup> U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, Section 8, page 272, Table 415.

were “small governmental jurisdictions.”<sup>18</sup> Thus, we estimate that most governmental jurisdictions are small.

### 1. Wireline Carriers and Service Providers

10. We have included small incumbent local exchange carriers (LECs) in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees) and “is not dominant in its field of operation.”<sup>19</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>20</sup> 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.

11. *Incumbent LECs.* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent 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.<sup>21</sup> According to Commission data,<sup>22</sup> 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action.

12. *Competitive LECs, Competitive Access Providers (CAPs), “Shared-Tenant Service Providers,” and “Other Local Service Providers.”* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>23</sup> According to Commission data,<sup>24</sup> 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive LEC services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are “Shared-Tenant Service Providers,” and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are “Other Local Service Providers.” Of the 44, an estimated 43 have 1,500 or

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<sup>18</sup> We assume that the villages, school districts, and special districts are small, and total 48,558. See U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

<sup>19</sup> 15 U.S.C. § 632.

<sup>20</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

<sup>21</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>22</sup> FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service* at Table 5.3, page 5-5 (Feb. 2007) (*Trends in Telephone Service*). This source uses data that are current as of October 20, 2005.

<sup>23</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>24</sup> *Trends in Telephone Service* at Table 5.3.

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.

13. *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.<sup>25</sup> According to Commission data,<sup>26</sup> 330 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 309 have 1,500 or fewer employees and 21 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our action.

## 2. Wireless Telecommunications Service Providers

14. Below, for those services subject to auctions, 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. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

15. *Wireless Service Providers*. The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of “Paging”<sup>27</sup> and “Cellular and Other Wireless Telecommunications.”<sup>28</sup> 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 2002 show that there were 807 firms in this category that operated for the entire year.<sup>29</sup> Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.<sup>30</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.<sup>31</sup> Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.<sup>32</sup> Thus, under this second category and size standard, the majority of firms can, again, be considered small.

16. *Cellular Licensees*. The SBA has developed a small business size standard for wireless firms within the broad economic census category “Cellular and Other Wireless Telecommunications.”<sup>33</sup>

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<sup>25</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>26</sup> *Trends in Telephone Service* at Table 5.3.

<sup>27</sup> 13 C.F.R. § 121.201, NAICS code 517211 (changed from 513321 in Oct. 2002).

<sup>28</sup> 13 C.F.R. § 121.201, NAICS code 517212 (changed from 513322 in Oct. 2002).

<sup>29</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517211 (issued Nov. 2005).

<sup>30</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is firms with “1000 employees or more.”

<sup>31</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517212 (issued Nov. 2005).

<sup>32</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is firms with “1000 employees or more.”

<sup>33</sup> 13 C.F.R. § 121.201, NAICS code 517212.

Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.<sup>34</sup> Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.<sup>35</sup> Thus, under this category and size standard, the majority of firms can be considered small. Also, according to Commission data, 437 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio (SMR) Telephony services, which are placed together in the data.<sup>36</sup> We have estimated that 260 of these are small under the SBA small business size standard.<sup>37</sup>

17. *Paging.* The SBA has developed a small business size standard for the broad economic census category of “Paging.”<sup>38</sup> Under this category, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.<sup>39</sup> Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.<sup>40</sup> In addition, according to Commission data,<sup>41</sup> 365 carriers have reported that they are engaged in the provision of “Paging and Messaging Service.” Of this total, we estimate that 360 have 1,500 or fewer employees, and five have more than 1,500 employees. Thus, in this category the majority of firms can be considered small.

18. We also note that, 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.<sup>42</sup> In this context, 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.<sup>43</sup> The SBA has approved this definition.<sup>44</sup> An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499

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<sup>34</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517212 (issued Nov. 2005).

<sup>35</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is firms with “1000 employees or more.”

<sup>36</sup> *Trends in Telephone Service* at Table 5.3.

<sup>37</sup> *Id.*

<sup>38</sup> 13 C.F.R. § 121.201, NAICS code 517211.

<sup>39</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517211 (issued Nov. 2005).

<sup>40</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

<sup>41</sup> *Trends in Telephone Service*, Table 5.3.

<sup>42</sup> *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, PP Docket No. 93-235, Second Report and Order, 12 FCC Rcd 2732, 2811-2812, paras. 178-181 (*Paging Second Report and Order*); see also *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, PP Docket No. 93-235, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 10030, 10085-10088, paras. 98-107 (1999).

<sup>43</sup> *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

<sup>44</sup> See Letter from Aida Alvarez, Administrator, Small Business Administration, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau (dated Dec. 2, 1998) (SBA Dec. 2, 1998 Letter).

licenses auctioned, 985 were sold.<sup>45</sup> Fifty-seven companies claiming small business status won 440 licenses.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> We also note that, currently, there are approximately 74,000 Common Carrier Paging licenses.

19. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction. A “small business” is an entity with average gross revenues of \$40 million or less for each of the three preceding years, and a “very small business” is an entity with average gross revenues of \$15 million or less for each of the three preceding years. The SBA has approved these small business size standards.<sup>49</sup> The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as “very small business” entities, and one that qualified as a “small business” entity.

20. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services (PCS), and specialized mobile radio (SMR) telephony carriers. As noted earlier, the SBA has developed a small business size standard for “Cellular and Other Wireless Telecommunications” services.<sup>50</sup> Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.<sup>51</sup> According to Commission data, 432 carriers reported that they were engaged in the provision of wireless telephony.<sup>52</sup> We have estimated that 221 of these are small under the SBA small business size standard.

21. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined “small entity” for Blocks C and F as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.<sup>53</sup> 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.<sup>54</sup> These standards defining “small entity” in the context of broadband PCS auctions have

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<sup>45</sup> See *929 and 931 MHz Paging Auction Closes*, Public Notice, 15 FCC Rcd 4858 (WTB 2000).

<sup>46</sup> *Id.*

<sup>47</sup> See *Lower and Upper Paging Band Auction Closes*, Public Notice, 16 FCC Rcd 21821 (WTB 2002).

<sup>48</sup> See *Lower and Upper Paging Bands Auction Closes*, Public Notice, 18 FCC Rcd 11154 (WTB 2003).

<sup>49</sup> SBA Dec. 2, 1998 Letter.

<sup>50</sup> 13 C.F.R. § 121.201, NAICS code 517212.

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

<sup>52</sup> *Trends in Telephone Service* at Table 5.3.

<sup>53</sup> See *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824, 61 FR 33859 (July 1, 1996) (*PCS Order*); see also 47 C.F.R. § 24.720(b).

<sup>54</sup> See *PCS Order*, 11 FCC Rcd 7824.



been approved by the SBA.<sup>55</sup> 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.<sup>56</sup> 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 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

22. *Narrowband Personal Communications Services.* The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less.<sup>57</sup> Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup> The SBA has approved these small business size standards.<sup>62</sup> 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.<sup>63</sup> Three of these claimed status as a small or very small entity and won 311 licenses.

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<sup>55</sup> See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5332, 59 FR 37566 (July 22, 1994).

<sup>56</sup> FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. Jan. 14, 1997); see also *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, Second Report and Order, 12 FCC Rcd 16436, 62 FR 55348 (Oct. 24, 1997).

<sup>57</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

<sup>58</sup> See *Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674*, Public Notice, PNWL 94-004 (rel. Aug. 2, 1994); *Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787*, Public Notice, PNWL 94-27 (rel. Nov. 9, 1994).

<sup>59</sup> *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS*, ET Docket No. 92-100, PP Docket No. 93-253, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000).

<sup>60</sup> *Id.*

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

<sup>62</sup> See Letter from Aida Alvarez, Administrator, Small Business Administration, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (dated Dec. 2, 1998).

<sup>63</sup> See *Narrowband PCS Auction Closes*, Public Notice, 16 FCC Rcd 18663 (WTB 2001).

23. *220 MHz Radio Service – Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to “Cellular and Other Wireless Telecommunications” companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> Thus, under this second category and size standard, the majority of firms can, again, be considered small. Assuming 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 size standard. In addition, limited preliminary census data for 2002 indicate that the total number of cellular and other wireless telecommunications carriers increased approximately 321 percent from 1997 to 2002.<sup>67</sup>

24. *220 MHz Radio Service – Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is 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 “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>68</sup> This small business size standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.<sup>69</sup> A “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years. The SBA has approved these small business size standards.<sup>70</sup> Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.<sup>71</sup> 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

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<sup>64</sup> 13 C.F.R. § 121.201, NAICS code 517212.

<sup>65</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued Oct. 2000).

<sup>66</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1000 employees or more.”

<sup>67</sup> See U.S. Census Bureau, 2002 Economic Census, Industry Series: “Information,” Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513322 (issued Nov. 2004). The preliminary data indicate that the total number of “establishments” increased from 2,959 to 9,511. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of “firms,” because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

<sup>68</sup> *220 MHz Third Report and Order*, 12 FCC Rcd 10943, 11068-70, paras. 291-95 (1997).

<sup>69</sup> *Id.* at 11068, para. 291.

<sup>70</sup> See Letter from A. Alvarez, Administrator, SBA, to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC (Jan. 6, 1998).

<sup>71</sup> See generally *220 MHz Service Auction Closes*, Public Notice, 14 FCC Rcd 605 (1998).

licenses auctioned, 693 were sold.<sup>72</sup> Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.<sup>73</sup>

25. *800 MHz and 900 MHz Specialized Mobile Radio Licenses.* The Commission awards “small entity” and “very 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, or that had revenues of no more than \$3 million in each of the previous calendar years, respectively.<sup>74</sup> These bidding credits apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. The Commission assumes, for purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz SMR bands. There were 60 winning bidders that qualified as small or very small entities in the 900 MHz SMR auctions. Of the 1,020 licenses won in the 900 MHz auction, bidders qualifying as small or very small entities won 263 licenses. In the 800 MHz auction, 38 of the 524 licenses won were won by small and very small entities.

26. *700 MHz Guard Band Licensees.* In the *700 MHz Guard Band Order*, we adopted a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>75</sup> A “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.<sup>76</sup> 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.<sup>77</sup>

27. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of \$40 million or less in the three previous calendar years.<sup>78</sup> 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

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<sup>72</sup> See, e.g., *FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made*, Public Notice, 14 FCC Rcd 1085 (1999).

<sup>73</sup> *Phase II 220 MHz Service Spectrum Auction Closes*, Public Notice, 14 FCC Rcd 11218 (1999).

<sup>74</sup> 47 C.F.R. § 90.814(b)(1).

<sup>75</sup> See *Service Rules for the 746-764 MHz Bands, and Revisions to part 27 of the Commission’s Rules*, WT Docket No. 99-168, Second Report and Order, 15 FCC Rcd 5299, 65 FR 17594 (2000).

<sup>76</sup> See generally *220 MHz Service Auction Closes*, Public Notice, Report No. WT 98-36 (rel. Oct. 23, 1998).

<sup>77</sup> *700 MHz Guard Band Auction Closes*, Public Notice, 16 FCC Rcd 4590 (rel. Feb. 22, 2001).

<sup>78</sup> See *Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, Report and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 18600, 63 FR 6079 (Feb. 6, 1998).

years.<sup>79</sup> The SBA has approved these small business size standards.<sup>80</sup> 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 adopted herein.

28. *Wireless Cable Systems.* Wireless cable systems use 2 GHz band frequencies of the Broadband Radio Service (“BRS”), formerly Multipoint Distribution Service (“MDS”),<sup>81</sup> and the Educational Broadband Service (“EBS”), formerly Instructional Television Fixed Service (“ITFS”),<sup>82</sup> to transmit video programming and provide broadband services to residential subscribers.<sup>83</sup> These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services.<sup>84</sup> We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. Local Multipoint Distribution Service (“LMDS”) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.<sup>85</sup> As described below, the SBA small business size standard for the broad census category of Cable and Other Program Distribution, which consists of such entities generating \$13.5 million or less in annual receipts, appears applicable to MDS, ITFS and LMDS.<sup>86</sup> Other standards also apply, as described.

29. The Commission has defined small MDS (now BRS) and LMDS entities in the context of Commission license auctions. In the 1996 MDS auction,<sup>87</sup> the Commission defined a small business as an

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<sup>79</sup> *Id.*

<sup>80</sup> See Letter from Aida Alvarez, Administrator, SBA, to Kathleen O’Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (Feb. 4, 1998).

<sup>81</sup> MDS, also known as Multichannel Multipoint Distribution Service (“MMDS”), is regulated by Part 21 of the Commission’s rules, *see* 47 C.F.R. Part 21, subpart K, and has been renamed the Broadband Radio Service (BRS). *See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission’s Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission’s Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket Nos. 03-66, 03-67, 02-68, and 00-230, MM Docket No. 97-217, RM-10586, RM-9718, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004) (*MDS/ITFS Order*).

<sup>82</sup> ITFS systems are regulated by Part 74 of the Commission’s rules; *see* 47 C.F.R. Part 74, subpart I. ITFS, an educational service, has been renamed the Educational Broadband Service (EBS). *See MDS/ITFS Order*, 19 FCC Rcd 14165. ITFS licensees, however, are permitted to lease spectrum for MDS operation.

<sup>83</sup> *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report*, 20 FCC Rcd 2507, 2565, para. 131 (2006) (*2006 Cable Competition Report*).

<sup>84</sup> *Id.*

<sup>85</sup> *See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fix Satellite Services*, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545 (1997) (*Local Multipoint Distribution Service Order*).

<sup>86</sup> 13 C.F.R. § 121.201, NAICS code 517510.

<sup>87</sup> MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996. (67 bidders won 493 licenses.)

entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.<sup>88</sup> This definition of a small entity in the context of MDS auctions has been approved by the SBA.<sup>89</sup> In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates 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.<sup>90</sup> MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

30. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).<sup>91</sup> We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

31. In the 1998 and 1999 LMDS auctions,<sup>92</sup> the Commission defined a small business as an entity that has annual average gross revenues of less than \$40 million in the previous three calendar years.<sup>93</sup> Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than \$15 million in the previous three calendar years.<sup>94</sup> These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA.<sup>95</sup> In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

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<sup>88</sup> 47 C.F.R. § 21.961(b)(1).

<sup>89</sup> See *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service & in the Instructional Television Fixed Service*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

<sup>90</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of \$13.5 million or less). See 13 C.F.R. § 121.201, NAICS code 517910.

<sup>91</sup> In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

<sup>92</sup> The Commission has held two LMDS auctions: Auction 17 and Auction 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998. (104 bidders won 864 licenses.) Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999. (40 bidders won 161 licenses.)

<sup>93</sup> See *Local Multipoint Distribution Service Order*, 12 FCC Rcd at 12545.

<sup>94</sup> *Id.*

<sup>95</sup> See Letter from A. Alvarez, Administrator, SBA, to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC (January 6, 1998).

32. *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.<sup>96</sup> The auction of the 1,030 LMDS licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licensees as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>97</sup> 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.<sup>98</sup> The SBA has approved these small business size standards in the context of LMDS auctions.<sup>99</sup> 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 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses consists of the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers.

33. *218-219 MHz Service.* The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.<sup>100</sup> In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we established a small business size standard for a “small business” as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed \$15 million for the preceding three years.<sup>101</sup> 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 to exceed \$3 million for the preceding three years.<sup>102</sup> We cannot estimate, however, 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.

34. *24 GHz – Incumbent Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band and applicants who wish to provide services in the 24 GHz band. 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.<sup>103</sup> According to Census Bureau data for 1997, there were 977 firms in this

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<sup>96</sup> See *Local Multipoint Distribution Service Order*, 12 FCC Rcd 12545.

<sup>97</sup> *Id.*

<sup>98</sup> See *id.*

<sup>99</sup> See Letter from Aida Alvarez, Administrator, SBA, from Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC (Jan. 6, 1998).

<sup>100</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330, 59 FR 24947 (May 13, 1994).

<sup>101</sup> *Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497, 64 FR 59656 (Nov. 3, 1999).

<sup>102</sup> *Id.*

<sup>103</sup> 13 C.F.R. § 121.201, NAICS code 517212.

category, total, that operated for the entire year.<sup>104</sup> 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.<sup>105</sup> 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<sup>106</sup> 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.

35. *24 GHz – Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for “small business” is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of \$15 million.<sup>107</sup> “Very small business” in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.<sup>108</sup> The SBA has approved these small business size standards.<sup>109</sup> These size standards will apply to the future auction, if held.

#### **D. Description of Projected Reporting, Record Keeping and other Compliance Requirements**

36. The rule adopted in the *Report and Order* will require no additional reporting, record keeping, and other compliance requirements.

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

37. 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.<sup>110</sup>

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<sup>104</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Employment Size of Firms Subject to Federal Income Tax: 1997,” Table 5, NAICS code 513322 (issued Oct. 2000).

<sup>105</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”

<sup>106</sup> Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

<sup>107</sup> *Amendments to Parts 1,2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967, para. 77 (2000); *see also* 47 C.F.R. § 101.538(a)(2).

<sup>108</sup> *Amendments to Parts 1,2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967, para. 77 (2000); *see also* 47 C.F.R. § 101.538(a)(1).

<sup>109</sup> *See* Letter from Gary M. Jackson, Assistant Administrator, SBA, to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (July 28, 2000).

<sup>110</sup> 5 U.S.C. §§ 603(c)(1)-(c)(4).

38. Because the *Report and Order* imposes no compliance or reporting requirements on any entity, only the last of the foregoing alternatives is material. The *Report and Order* takes note in paragraph 13 above that nothing in the record suggests that small carriers are particularly disadvantaged by exclusivity prohibitions, or that the cost/benefit analysis for consumers differs when small carriers are involved.

39. **Report to Congress:** The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>111</sup> A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>112</sup>

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<sup>111</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>112</sup> See 5 U.S.C. § 604(b).



**APPENDIX B****Final Rules**

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 64.2500 is revised to read as follows:

**§ 64.2500 Prohibited Agreements.**

(a) No common carrier shall enter into any contract, written or oral, that would in any way restrict the right of any commercial multiunit premises owner, or any agent or representative thereof, to permit any other common carrier to access and serve commercial tenants on that premises.

(b) No common carrier shall enter into or enforce any contract, written or oral, that would in any way restrict the right of any residential multiunit premises owner, or any agent or representative thereof, to permit any other common carrier to access and serve residential tenants on that premises.

2. Section 64.2501 is revised to read as follows:

**§ 64.2501 Scope of Limitation.**

For the purposes of this subpart, a multiunit premises is any contiguous area under common ownership or control that contains two or more distinct units. A commercial multiunit premises is any multiunit premises that is predominantly used for non-residential purposes, including for-profit, non-profit, and governmental uses. A residential multiunit premises is any multiunit premises that is predominantly used for residential purposes.

**STATEMENT OF  
CHAIRMAN KEVIN J. MARTIN**

*Re: Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217*

All consumers, regardless of where they live, should enjoy the benefits of competition. Today's Order eliminates exclusive contracts between telecom providers and owners of apartment buildings. This decision will help provide Americans living in apartment buildings with the same choices as people that live in the suburbs. This action follows in the footsteps of our recent Order to prohibit similar exclusive arrangements for video services offered in apartment buildings.

There is no reason that consumers living in apartment buildings should be locked into one service provider. Competition is ultimately the best protector of the consumer's interest. It is the best method of delivering the benefits of choice, innovation, and affordability to American consumers.

Consistent with my commitment to fostering a competitive marketplace and consumer choice, I have and will continue to encourage new entrants trying to break into both the voice and video markets. Importantly, our policies seek to support all new entrants and do not favor one technology or industry over another. Moreover, this Order demonstrates the Commission and my commitment to ensure we achieve regulatory parity by applying a consistent regulatory framework across platforms.

This Order demonstrates the Commission's commitment to ensure that all consumers—including those living in apartment buildings—benefit from competition in the provision of voice and video services.

**SEPARATE STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

*Re: Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Report and Order (Mar. 19, 2008)

Late last year the Commission prohibited video service providers from entering into exclusive contracts covering consumers who happen to live in multiple dwelling units (MDUs). At the time, I asked that the Commission conclude its open proceeding examining the permissibility of exclusive contracts for telecommunications services in the telecom equivalent of an MDU – a residential multiple tenant environment (MTE). Putting the nomenclature aside, the basic point is to offer people living in multiple tenant environments some of the same consumer benefits – competition and choices – as single-family homeowners. I’m pleased to support today’s Order as the Commission fulfills its commitment to prohibit telecom carriers from entering into or enforcing exclusivity contracts with owners of MTEs.

**STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN**

*Re: Promotion of Competitive Networks in Local Telecommunications Networks*, WT Docket No. 99-217, Report and Order (Mar. 19, 2008).

Robust and fair competition across the communications landscape brings with it the benefits of consumer choice, lower prices, and greater innovation. So I am pleased to support this Order which eliminates a potential barrier to competition and choice in telecommunications service for the millions of Americans who live in apartment buildings, condominiums, and other so-called multiple tenant environments (MTEs).

This Order addresses the use of exclusive agreements between providers of telecommunications services and owners of residential MTEs. By finding that exclusive access arrangements amount to an unreasonable practice under the Communications Act, we remove a potential barrier that could hinder new entrants from offering telecommunications services to residential consumers in MTEs.

This Order builds on the steps we took last year to improve consumers' access to video services. In last year's Order, we banned the use of exclusive access arrangements for the provision of video services to multiple dwelling units. I am encouraged that we address such contracts for telecommunications services today. Whether it is voice or video, people living in apartment buildings and condominiums should not be shackled to one provider. This action alone will not solve our competition and broadband challenges, but it takes a worthy step by opening the door for many people to exercise their right to choose their own provider.

**STATEMENT OF  
COMMISSIONER DEBORAH TAYLOR TATE**

*Re: Promotion of Competitive Networks in Local Telecommunications Markets, First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 99-217, 15 FCC Rcd 22983 (2000); Parties Asked to Refresh Record Regarding Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, CC Docket No. 96-98, Public Notice, 22 FCC Rcd 5632 (2007).*

In the *Video Nonexclusivity Order* issued on November 13, 2007, the Commission banned exclusivity clauses in the video market and, in so doing, also agreed to consider the issues raised in the 2000 *Competitive Networks Further Notice of Proposed Rulemaking*.

I am pleased that today we fulfill that commitment by extending to residential buildings the prohibition against exclusivity contracts for telecommunications services (a ban that was already in place for commercial buildings). These market-opening competitive safeguards continue the policies and reasoning that the Commission recently adopted in the video context. I think we all recognize that exclusivity contracts in perpetuity are not in keeping with our pro-competitive market-opening policies and should be banned. In the interest of regulatory parity, it is essential that we seek to apply our rules consistently across all platforms in a timely manner. By taking this action we advance the 1996 Act's goals of enhancing choice for consumers no matter where they live.

**STATEMENT OF  
COMMISSIONER ROBERT M. McDOWELL**

*Re: Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, Report and Order*

Today, the Commission helps millions of Americans who live in apartments enjoy the same benefits of telecommunications competition that have been available to businesses since 2001. They too will now have a choice of telecommunications providers and not be hampered by exclusive contracts. Additionally, incumbent telecommunications service providers and new entrants will be on an equal footing when serving residential consumers in MTEs. I am hopeful that this decision will spur more competition among telecommunications providers in all MTEs. As I have said before, as regulators we need to make sure that competition for all services, and across all platforms does not stop, literally at the doorstep of any multi-unit building in America.