

FEDERAL COMMUNICATIONS COMMISSION**47 CFR Parts 0 and 20**

[WT Docket No. 05–265; FCC 11–52]

Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services**AGENCY:** Federal Communications Commission.**ACTION:** Final rule.

SUMMARY: In this document, the Federal Communications Commission (FCC) adopts a rule that requires facilities-based providers of commercial mobile data services to offer data roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to certain limitations, thereby advancing the Commission's goal of ensuring that all Americans have access to competitive broadband mobile data services.

DATES: Effective June 6, 2011, except for § 20.12(e)(2) which contains information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of this amendment.

FOR FURTHER INFORMATION CONTACT: Peter Trachtenberg, Wireless Telecommunications Bureau, (202) 418–7369, e-mail

Peter.Trachtenberg@fcc.gov. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an e-mail to *PRA@fcc.gov* or contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Second Report and Order in WT Docket No. 05–265; FCC 11–52, adopted April 7, 2011, and released on April 7, 2011. The full text of the Second Report and Order is available for public inspection and copying during business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. It also may be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554; the contractor's Web site, <http://www.bcpweb.com>; or by calling (800) 378–3160, facsimile (202) 488–5563, or e-mail *FCC@BCPIWEB.com*. Copies of the public notice also may be obtained via the Commission's Electronic

Comment Filing System (ECFS) by entering the docket number WT Docket No. 05–265. Additionally, the complete item is available on the Federal Communications Commission's Web site at <http://www.fcc.gov>.

Synopsis of the Second Report and Order**I. Introduction**

1. In this Second Report and Order (Second R&O), the Commission promotes consumer access to nationwide mobile broadband service by adopting a rule that requires facilities-based providers of commercial mobile data services to offer data roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to certain limitations. Widespread availability of data roaming capability will allow consumers with mobile data plans to remain connected when they travel outside their own provider's network coverage areas by using another provider's network, and thus promote connectivity for and nationwide access to mobile data services such as e-mail and wireless broadband Internet access. The rule the Commission adopts today also serves the public interest by promoting investment in and deployment of mobile broadband networks, consistent with the recommendations of the National Broadband Plan. The deployment of mobile data networks is essential to achieve the goal of making broadband connectivity available everywhere in the United States, and the availability of data roaming will help ensure the viability of new wireless data network deployments and thus promote the development of competitive facilities-based service offerings for the benefit of consumers. Today's actions will therefore advance the Commission's goal of ensuring that all Americans have access to competitive broadband mobile data services.

2. The Commission adopts the data roaming rule based on its authority under the Act, including several provisions of Title III, which provides the Commission with authority to manage spectrum and establish and modify license and spectrum usage conditions in the public interest. This rule will apply to all facilities-based providers of commercial mobile data services regardless of whether these entities are also providers of commercial mobile radio service (CMRS). To resolve disputes arising pursuant to the rule the Commission adopts here, the Commission provides that parties may file a petition for declaratory ruling

under Section 1.2 of the Commission's rules or file a formal or informal complaint under the rule established herein depending on the circumstances specific to each dispute. Also, in order to facilitate the negotiation of data roaming arrangements, the Commission provides guidance on factors that the Commission could consider when evaluating any data roaming disputes that might be brought before the agency.

II. Discussion**A. The Public Interest in a Data Roaming Rule**

3. After carefully considering the arguments in the record, the Commission concludes that it will serve the public interest to adopt a data roaming rule. Specifically, the Commission requires providers of commercial mobile data services to offer data roaming arrangements on commercially reasonable terms and conditions, subject to specified limitations as set forth below, pursuant to the Commission's authority under the Communications Act. The Commission concludes that adopting a roaming rule tailored for mobile data services will best promote consumer access to seamless mobile data coverage nationwide, appropriately balance the incentives for new entrants and incumbent providers to invest in and deploy advanced networks across the country, and foster competition among multiple providers in the industry, consistent with the National Broadband Plan. Broadband deployment is a key priority for the Commission, and the deployment of commercial mobile data networks will be essential to achieve the goal of making broadband connectivity available everywhere in the United States. As discussed above, the Commission's determination to adopt a commercial mobile data roaming rule is supported by the overwhelming majority of commenters and evidence in the record.

4. Commercial mobile data services provided over advanced mobile broadband technologies have become an increasingly significant part of the lives of American consumers and the shape of the mobile industry. Mobile data services increasingly are used for a variety of both personal and business purposes, including back-up communications during emergencies and for accessibility. Data traffic has risen sharply over the past few years as a result of the increased adoption of smartphones combined with increased data consumption per device. The Commission's data roaming rule will maximize consumers' ability to use and

benefit from wireless broadband data services wherever they are by enhancing the ability of all facilities-based providers, including small and regional providers, to provide nearly nationwide data coverage through roaming arrangements.

5. As data services increasingly become the focus of the mobile wireless services, consumers increasingly expect their providers to offer competitive broadband data services, and the availability of data roaming arrangements can be critical to providers remaining competitive in the mobile services marketplace. The Commission agrees that the availability of roaming capabilities is and will continue to be a critical component to enable consumers to have a competitive choice of facilities-based providers offering nationwide access to commercial mobile data services. As more and more consumers use mobile devices to access a wide array of both personal and business services, they have become more reliant on their devices. These consumers expect to be able to have access to the full range of services available on their devices wherever they go. Providers with local or regional service areas need roaming arrangements to offer nationwide coverage, and there may be areas where building another network may be economically infeasible or unrealistic. Even where providers have invested in and built out broadband networks in a regional service territory, a service provider's inability to offer roaming easily can deter customers from subscribing. For example, Cincinnati Bell represents that "[d]ue to the limited availability of nationwide roaming partners for 3G and 4G services, [it] is seeing a steady defection of its customers to the national carriers even though Cincinnati Bell offers a superior network in its operating area." Availability of such roaming arrangements also may be particularly important for consumers in rural areas—where mobile data services may be solely available from small rural providers. According to BendBroadband, its mobile broadband product is "not commercially viable for most consumers primarily because we cannot offer mobility outside of our service area, due to our inability to secure reasonable rates and terms for data roaming." A data roaming requirement will therefore help to ensure that, as consumers become increasingly reliant on wireless devices, continuity of spectrum-based services is preserved across networks and geographic regions.

6. The Commission also concludes that the data roaming rule that the Commission adopts today will encourage investment in and deployment of broadband networks by multiple service providers, including large nationwide providers, regional providers, and small providers. Given that mobile broadband networks, particularly "fourth-generation" networks, are still at an early stage of development, significant network investment and deployment will also be critical to nationwide broadband access and for the promotion of competitive choice in broadband services. This data roaming rule will promote mobile broadband network deployment, investment, and competition, consistent with the goals of the National Broadband Plan, by helping to ensure the viability of new data network deployments.

7. The Commission is persuaded by the evidence that roaming arrangements help encourage investment by ensuring that providers wanting to invest in their networks can offer subscribers a competitive level of mobile network coverage. Roaming arrangements can help provide greater assurance to service providers that, if they make the investment to expand or upgrade their facilities, they will be able to offer competitive service options to their customers through a combination of local or regional facilities-based service and roaming arrangements. Sprint and T-Mobile state that data roaming arrangements will allow service providers to compete more effectively and thus greater certainty in access to such arrangements will give them "the resources and the confidence to continue to invest in their businesses, including in the construction of new network infrastructure." SouthernLINC explains that "when carriers are considering whether to invest in the deployment of new technologies and services, the availability of data roaming assures the carriers that they will be able to meet customers' expectations of seamless connectivity for these services. This in turn provides carriers with the certainty they need to move forward with these much-needed investments." NTELOS reports that its roaming agreement with Sprint led to its ability to upgrade virtually its entire network to EV-DO Revision A. Clearwire asserts that a data roaming obligation supports long-term facilities-based entry into new markets, and that once providers enter into new markets they will continue to build out networks to contain business costs associated with roaming. Further, as argued by several commenters

representing rural providers—Blooston Rural Carriers, OPASTCO and NTCA, RCA, and RTG—the lack of roaming for commercial mobile wireless services may deter providers from investing in broadband at the exact time such investment is sorely needed. The Chief Financial Officer of regional provider Cellular South, for example, states that "investment banks and other sources of investment capital are likely to make the judgment that a small rural or regional carrier that cannot obtain data roaming agreements with the large national carriers will find it more difficult to attract and retain customers" and that "[s]uch a judgment would lead to the withholding of investment capital which, in turn, would hamstring the carrier's efforts to deploy advanced broadband infrastructure." MetroPCS contends that in order to ensure that smaller, rural and mid-tier carriers invest now in LTE, they need to know that they will have access to LTE roaming once they have upgraded.

8. The availability of roaming arrangements can also provide additional incentives to enter a market by allowing network providers without a presence in an area a competitive level of local coverage during the early period of investment and buildout. The Commission finds that encouraging new entry and local or regional deployments serves the public interest, given that such network deployments, particularly when these deployments are coupled with roaming availability beyond the network service area, would provide consumers with greater competitive choices in mobile broadband. Previously, the Commission found that lack of roaming can constitute a significant hurdle to new competition and can delay or deter entry into a market because a provider seeking to provide service in a new geographic area, without the ability to supplement its networks with roaming and whose initial facilities would necessarily be limited, would be required to compete with incumbents that had been developing and expanding their networks for many years.

9. The record in this proceeding supports these findings. Bright House Networks, for example, contends that a data roaming requirement would remove a barrier to entry and a Senior Vice President of the company states that such a requirement would be key to Bright House investing more. T-Mobile notes that the ability to roam has enabled the company to "build a facilities-based footprint over time as its customer base grows," and asserts that a roaming rule will enable it to "invest in new facilities in smaller markets that

would not be economical to build out unless T-Mobile could use roaming to serve the adjacent more sparsely populated areas,” and thus promote rural investment. In addition, according to US Cellular, new wireless providers entering the wireless marketplace today face far more daunting prospects than did their predecessors of decades ago unless they can offer their customers both voice and data roaming on a seamless nationwide basis. SkyTerra (now LightSquared) states that the absence of a data roaming obligation can discourage service providers from entering the market and building upon existing networks. SkyTerra further states that without a data roaming obligation, its potential customers would likely be discouraged from purchasing terrestrial-based services from SkyTerra, especially in the initial stages of SkyTerra’s network build out.

10. Accordingly, the Commission finds that availability of roaming arrangements helps provide consumers with greater competitive choices in mobile broadband by encouraging investment and network deployments and ensuring that providers wanting to invest in their networks or to enter into a new market can offer subscribers a competitive level of mobile network coverage and service. By removing barriers to customer acquisition by providers in smaller or remote areas, the rule the Commission adopts today will encourage greater use of spectrum and additional sustainable investment in broadband networks serving these areas.

11. The Commission finds the roaming rule that the Commission adopts, discussed in greater detail below, also will provide incentives for host providers to invest and deploy advanced data networks, and avoid potential disincentives for those providers to invest. The Commission agrees with AT&T and Verizon Wireless that there are pro-competitive benefits that flow from providers differentiating themselves on the basis of coverage in their licensed service areas, including in rural and remote areas. The Commission finds that the terms and scope of the roaming rule that the Commission adopts will protect these benefits, maintain incentives for host providers to invest and deploy advanced data networks, and avoid potential disincentives for those providers to invest. First, host providers will be paid for providing data roaming service, and the Commission adopts a general requirement of commercial reasonableness for all roaming terms and conditions, including rates, rather than a more specific prescriptive regulation of rates requested by some

commenters. This will give host providers appropriate discretion in the structure and level of such rates that they offer. As the Commission found in the *Order on Reconsideration*, “the relatively high price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to ‘piggy back’ on another carrier’s network.” The Commission notes that the pro-investment incentives that providers will have as a consequence of the high cost of roaming are reflected in the terms and conditions offered by mobile data service providers, which commonly include authorizing termination of service or other actions if a subscriber’s roaming on other networks becomes too large a part of the subscriber’s service use. At a minimum, these roaming limitations demonstrate that providers are unlikely to rely on roaming arrangements in place of network deployment as the primary source of their service provision, nor will such arrangements lead to reduced investment by requesting providers.

12. Finally, as discussed more fully below, the Commission provides that, if providers bring disputes to the Commission, the Commission will take into account factors including the impact on buildout incentives and the extent and nature of providers’ existing build-out in determining the commercial reasonableness of proffered terms. As the Commission has concluded before, a case-by-case determination of commercial reasonableness in the event of a dispute preserves incentives to invest and protects consumers by facilitating their access to nationwide service.

13. The data roaming rule the Commission adopts today also adequately addresses AT&T’s argument that a data roaming requirement would weaken host providers’ investment incentives by leaving them with “no control” over the terms under which they will carry roaming traffic and thus unable to manage the additional network congestion caused by such traffic. Under the Commission’s data roaming rule, providers will have the ability to negotiate commercially reasonable measures to safeguard the quality of service against network congestion that may result from roaming traffic or to prevent harm to the network. This rule also includes the ability to offer individualized, commercially reasonable terms, including rates, and to evaluate a number of factors on a case-by-case basis in determining commercial reasonableness. The Commission finds that this approach strikes the best

balance between concerns over the potential for congestion or other harms from roaming traffic and the significant benefits that data roaming arrangements can provide to consumers.

14. The Commission rejects arguments by AT&T and Verizon Wireless that a data roaming rule is unnecessary because data roaming agreements are occurring without regulation. The Commission finds that providers have encountered significant difficulties obtaining data roaming arrangements on advanced “3G” data networks, particularly from the major nationwide providers. For example, Cellular South states that after constructing its own EVDO facilities in some portions of its service area, its requests for data roaming on large carriers’ compatible networks were “rebuffed” for over a year. OPA/STCO and NTCA state that “rural wireless carriers’ attempts to enter into negotiations with the nationwide wireless providers for data roaming agreements are many times rejected out of hand, with a citation to the lack of a data roaming requirement in the Commission’s rules” and that “[t]his trend has increased as the mobile wireless industry has begun to transition to 3G wireless services.”

15. The Commission observes that AT&T has largely refused to negotiate domestic 3G roaming arrangements until recently, even though it launched its 3G service in 2005 and was providing coverage to 275 major metropolitan areas in May 2008. For example, RTG has stated that “collectively, its members have not been able to enter into 3G data roaming agreements with AT&T.” In addition, according to RCA, AT&T indicated “recently” that “it will not negotiate any 3G data roaming agreements unless it helps to fill-in its nationwide coverage map.” AT&T itself stated in its Reply Comments filed July 12, 2010 that it had just “begun to offer 3G roaming arrangements * * *.” In mid-November, 2010, it stated that it was “actively negotiating” several domestic 3G agreements but did not indicate that it had entered into any such agreements. On March 24, 2011, AT&T filed an ex parte with the Commission indicating that it had entered into a domestic HSPA+ roaming agreement, with Mosaic Telecommunications—apparently, its first roaming agreement for data service above 2.5G.

16. Commenters also assert difficulties reaching agreements with Verizon Wireless. Cox Communications states that obtaining an initial response to a request to negotiate a roaming agreement with Verizon Wireless

required nearly four months and that negotiations over the terms of Verizon Wireless's requirement for a nondisclosure agreement consumed another four months; and thus, actual negotiations over terms and conditions of a roaming agreement did not even begin for eight months after Cox's initial request. RTG and RCA assert that Verizon Wireless has "told numerous RTG members that it will not enter into EV-DO (3G) roaming agreements in areas where it already has 3G coverage," and therefore is not open to 3G roaming agreements for customers of smaller providers that serve areas where Verizon Wireless has its own network coverage. Although Verizon Wireless indicates that it currently has a number of EV-DO roaming arrangements with other providers (including with several providers that it asserts are members of RCA), it had only nine EV-DO roaming agreements as of April, 2010 even though its EV-DO network has been in operation since October of 2003 and as of June 2007, covered more than 210 million pops with EV-DO Rev. A. The Commission notes again the importance of roaming to consumers in rural areas, where mobile data services may be solely available from small rural providers, and therefore the past difficulties of rural providers in obtaining data roaming presents a serious concern.

17. The Commission is also concerned that the recent successes by some providers in obtaining 3G data roaming agreements or offers may have been the result of large providers seeking to defuse an issue under active Commission consideration and may not accurately reflect the ability of requesting providers to obtain data roaming arrangements in the future if the Commission were to decide not to adopt any data roaming rules. For example, although the Commission determined in 2007 that CMRS providers were not entitled to voice roaming within their own licensed service areas (the "home roaming" exclusion) in part because it contemplated that providers would negotiate home roaming agreements, the Commission concluded in the *Order on Reconsideration* that "the adoption of an automatic roaming obligation with a home roaming exclusion appears to have significantly reduced the incentive to make home roaming available, and will lead to a reduction in the availability of home roaming arrangements over time." Consolidation in the mobile wireless industry has reduced the number of potential roaming partners for some of the

smaller, regional and rural providers. In addition, this consolidation may have simultaneously reduced the incentives of the largest two providers to enter into such arrangements by reducing their need for reciprocal roaming. The Commission also notes that AT&T and Verizon Wireless are only now deploying "fourth-generation" Long Term Evolution networks. Based on the record before it, the Commission finds it likely that these providers will not be willing to offer roaming arrangements that cover these networks any time in the near future, except in very limited circumstances. The Commission agrees with many of the commenters that, given the coverage of these nationwide providers, there is a serious risk they might halt the negotiations of roaming on their advanced mobile data networks altogether in the future in the absence of Commission oversight, harming competition and consumers. Given these developments in the mobile services marketplace, and in light of past difficulties that providers have experienced obtaining data roaming arrangements, the Commission finds that adopting a balanced, flexible requirement will help to promote the availability of data roaming in the future. The Commission notes that the Commission intends to closely monitor further development of the commercial mobile broadband data marketplace and stand ready to take additional action if necessary to help ensure that the Commission's goals in this proceeding are achieved.

18. In sum, the Commission concludes that there are substantial benefits that will be derived from adoption of the data roaming rule set forth herein, and that these benefits substantially outweigh the minimal costs associated with the rule. The Commission reaches this conclusion even though it is not possible to quantify with precision the benefits and costs based on the information the Commission has before it, and even though many of the benefits are not subject to quantification. Adoption of the rule, which is designed to promote access to nationwide mobile broadband service and enhance incentives for providers to invest in deployment of broadband facilities, is necessary to help ensure that the benefits of mobile broadband services will be more fully realized. Absent such a rule, there will be a significant risk that fewer consumers would have nationwide access to competitive mobile broadband services, and that even voice roaming will ultimately be rolled back as voice becomes a data application.

19. The benefits of adopting the proposed data roaming obligation are substantial. The rule promotes the availability of commercially reasonable data roaming arrangements that might not otherwise be available. Consistent with the record comments submitted by providers of all sizes serving a large portion of consumers throughout all parts of this country, millions of American consumers who otherwise might not have full access to mobile broadband services will benefit from adoption of the rule.

20. Furthermore, the Commission finds that the rule will promote significant investment in facilities-based broadband networks throughout the country. As discussed above, several providers state that a data roaming obligation is necessary to provide an acceptable level of risk for the investment in data capabilities for their network, as it increases their chances of being able to offer their subscribers the nationwide coverage needed for a viable product offering. Based on the information in the record, the Commission expects that there could be billions of dollars of additional investment in upgraded facilities and/or expanded coverage, providing consumers with substantial benefits while also creating thousands of jobs.

21. With the added investment and deployment of broadband services by multiple providers, additional benefits will result from increased competition. As discussed above, several commenters have stated that a data roaming obligation is necessary for them to provide competitive services, and enables them to upgrade existing services or build out facilities-based coverage in new markets. The benefits of competition include likely lower prices for such services, which will result in direct consumer surplus as well as greater utilization of broadband data services. In addition, less expensive mobile broadband services increase the availability of these services to consumers, which in turn creates incentives for edge providers to develop innovative new services that use this capability. Although the benefits cannot be calculated with precision, a rough estimate is that the benefits from the increased competition would be in the billions of dollars per year.

22. By comparison with the benefits of adopting a data roaming rule that promotes the availability of data roaming arrangements, the Commission finds that the potential costs of adopting the rule that requires providers to offer data roaming arrangements on

commercial reasonable terms and conditions are small.

23. As discussed above, the two major opponents of a data roaming obligation—Verizon Wireless and AT&T—assert that adoption of such an obligation could discourage investment by providers, particularly in rural areas, which in turn would reduce mobile broadband availability and utilization. The rule adopted in this Order, however, allows host providers to control the terms and conditions of proffered data roaming arrangements, within a general requirement of commercial reasonableness. For the reasons stated above, the Commission concludes that such terms would preserve providers' incentive to invest in their networks. Indeed, neither AT&T nor Verizon state that they would invest less under a roaming obligation and therefore do not expect the roaming rule to reduce the investment of host networks.

24. Another potential cost is the possibility that requesting providers will substitute roaming for investment in coverage and accordingly under-invest in deploying new infrastructure. Again, however, the Commission's rule obligates the host provider only to offer data roaming on commercially reasonable terms and conditions. As discussed above, such a standard will provide the requesting provider with sufficient incentive to invest in facilities, except where doing so would be economically infeasible or unrealistic regardless of the availability of roaming agreements. Further, the Commission provides that the data roaming obligation does not create mandatory resale obligations.

25. An additional potential cost could result from harm to the host provider's network that might result from congestion or technical problems. To enable a host provider to safeguard its quality of service against network congestion, the order expressly provides that host providers are permitted to negotiate commercially reasonable measures to safeguard against network congestion that might result from data roaming traffic. The host provider thus would have the flexibility to account for the additional traffic roaming would generate, and therefore avoid harmful congestion. Similarly, the rule expressly provides that it is reasonable for a provider not to offer a data roaming arrangement to a requesting provider that is not technologically compatible, or where it is not technically feasible to provide roaming for the particular data service for which roaming is requested, or where any changes to the host provider's network required to

accommodate roaming are not economically reasonable.

26. Thus, the Commission concludes that there are substantial benefits that will be derived from adoption of the data roaming rule set forth herein, and that these benefits substantially outweigh the minimal costs associated with the rule.

B. Scope and Requirements of the Data Roaming Rule

27. As discussed above, the Commission concludes that the public interest would be served by adopting a data roaming rule. The Commission will require that facilities-based providers of commercial mobile data services offer data roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to certain limitations specified below. The Commission determines that the data roaming rule the Commission adopts should apply to all facilities-based providers of commercial mobile data services. In establishing this rule, the Commission seeks to balance various competing interests, and the Commission finds that it is appropriate to specify certain grounds on which, under the rule adopted today, providers of commercial mobile data services can reasonably refuse to offer a data roaming arrangement. The Commission also clarifies that under the data roaming rule adopted herein, providers of commercial mobile data roaming services are permitted to negotiate commercially reasonable measures to safeguard quality of service against network congestion that may result from roaming traffic or to prevent harm to their networks. The Commission discusses the rule and limitations and the standard of commercial reasonableness in more detail below.

28. *Covered Entities.* Consistent with the comments addressing the scope of covered entities, the Commission determines that the data roaming requirement should apply to all facilities-based providers of commercial mobile data services. For purposes of data roaming, the Commission defines a "commercial mobile data service" as any mobile data service that is not interconnected with the public switched network but is (1) provided for profit; and (2) available to the public or to such classes of eligible users as to be effectively available to the public. The scope of the current roaming obligation in Section 20.12 covers the CMRS providers' provision of mobile voice and data services that are interconnected with the public switched network, as well as their provision of text messaging and push-to-talk services. The rule

adopted herein will complement the current roaming obligation in Section 20.12 and cover mobile services that fall outside the scope of that obligation. Under the Commission's decision today, as long as a provider provides mobile data services that are for profit and available to the public or to such classes of eligible users as to be effectively available to the public, it will be covered by the rule adopted herein regardless of whether the provider also provides any CMRS and without regard to the mobile technology it is utilizing to provide services. Thus, the scope includes MSS/ATC providers that offer commercial mobile data services that meet these requirements. In addition, the data roaming rule adopted herein covers all facilities-based providers of commercial mobile data services, including those constructing network facilities to offer service on a wholesale basis. Further, providers of commercial mobile data services are covered without regard to the devices used to access or receive their services. This approach is supported by those parties in the record that commented on this issue, will help to achieve technological neutrality in the data roaming obligation, and will ensure that the rule the Commission adopts is adequate in the face of rapid changes in commercial mobile technology and the commercial mobile ecosystem overall.

29. *Application of the Commercial Mobile Data Roaming Rule.* The rule the Commission adopts today requires all facilities-based providers of commercial mobile data services to offer data roaming arrangements to other such providers on commercially reasonable terms and conditions. As noted above, the Commission concludes that this rule serves the public interest by promoting connectivity for and nationwide access to mobile data services and by promoting investment in and deployment of mobile broadband networks, among other benefits. When a request for data roaming negotiations is made, as a part of the duty of providers to offer data roaming arrangements on commercially reasonable terms and conditions, a would-be host provider has a duty to respond promptly to the request and avoid actions that unduly delay or stonewall the course of negotiations regarding that request. The Commission will determine whether the terms and conditions of a proffered data roaming arrangement are commercially reasonable on a case-by-case basis, taking into consideration the totality of the circumstances.

30. The duty to offer data roaming arrangements on commercially reasonable terms and conditions is

subject to certain limitations. In particular: (1) Providers may negotiate the terms of their roaming arrangements on an individualized basis; (2) it is reasonable for a provider not to offer a data roaming arrangement to a requesting provider that is not technologically compatible; (3) it is reasonable for a provider not to offer a data roaming arrangement where it is not technically feasible to provide roaming for the particular data service for which roaming is requested and any changes to the host provider's network necessary to accommodate roaming for such data service are not economically reasonable; and (4) it is reasonable for a provider to condition the effectiveness of a data roaming arrangement on the requesting provider's provision of mobile data service to its own subscribers using a generation of wireless technology comparable to the technology on which the requesting provider seeks to roam.

31. The Commission concludes that it serves the public interest to include these limitations in recognition of the particular technical and policy issues that arise with respect to the provision of data services. As discussed above, the Commission recognizes that the commercial mobile broadband data marketplace, particularly 4G deployment, is still in a critical early stage. It encompasses many different services offered in conjunction with many different devices employing wide-ranging technologies and exacting varying network demands. In light of that continuing evolution, the Commission finds that the scope the Commission establishes for the roaming rule is sufficiently flexible to apply to a wide range of ever changing technologies and commercial contexts, and should afford parties negotiating commercial mobile data services roaming agreements a solid framework within which to arrange their negotiations and ultimately reach agreement on commercially reasonable terms. Below, the Commission further discusses and clarifies each of these limitations in turn.

32. First, providers may negotiate the terms of their roaming arrangements on an individualized basis. In other words, providers may offer data roaming arrangements on commercially reasonable terms and conditions tailored to individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms. Conduct that unreasonably restrains trade, however, is not commercially reasonable. As discussed below, the Commission may consider a range of

individualized factors in addressing disputes over the commercial reasonableness of the terms and conditions of the proffered data roaming arrangements. Giving providers flexibility to negotiate the terms of their roaming arrangements on an individualized basis ensures that the data roaming rule best serves the Commission's public interest goals discussed herein, and the boundaries of the rule are narrowly tailored to execute the Commission's spectrum management duties under the Act.

33. Second, it is commercially reasonable for providers not to offer a data roaming arrangement to a requesting provider that is not technologically compatible. The Commission clarifies, however, that technological compatibility does not necessarily require the same air interface in the network infrastructure of the two providers. Technological compatibility can be achieved by using mobile equipment that can communicate with the host provider's network. For example, requesting providers that operate on different bands or technologies than the host might achieve technological compatibility by providing subscribers with multi-band and multi-mode user devices.

34. Even if providers are technologically compatible, however, roaming for a particular service may not be feasible for other technical reasons. Accordingly, it is also commercially reasonable for a provider to refuse to enter into a data roaming arrangement for a particular data service where it is not technically feasible to provide roaming for such service and where any changes to its network that are necessary to accommodate such data roaming are economically unreasonable. With regard to these grounds for reasonably refusing to enter into a roaming arrangement, the Commission disagrees with commenters that they are too vague or would be too open to interpretation by providers seeking to delay or deny roaming access. As noted above, identical conditions already apply to requests for push-to-talk and text-messaging roaming arrangements. Further, the Commission finds that these grounds will offer parties negotiating roaming agreements reasonable flexibility to negotiate terms without, for example, unduly hampering a host provider with the burden of either adopting technologies which it has not already adopted in order to accommodate the requesting provider's technology or undertaking economically unreasonable changes to its network.

35. Finally, the Commission provides that it is commercially reasonable for a provider to condition the effectiveness of a roaming arrangement on the requesting provider's provision of mobile data service using a generation of wireless technology comparable to the technology on which the requesting provider seeks to roam. The Commission notes that as with technological compatibility, this does not mean that the requesting provider must have exactly the same air interface as the host provider. Rather, this focuses on capabilities, including data rates, of the generation of mobile wireless technology that is being used to provide services to subscribers. Permitting a service provider to condition the effectiveness of a roaming arrangement in this circumstance provides additional incentives for the requesting provider to invest in and upgrade its network to offer advanced services to its subscribers and ensures that the requesting provider is not merely reselling the host provider's services. This limitation prevents providers, for example, from only building a 2G network, providing their customers with 3G capable handsets, and then relying on roaming arrangements to provide nationwide 3G coverage, and thus reasonably addresses concerns raised by AT&T. To prevent undue delay in negotiations, the Commission clarifies that a host provider may not decline to enter into a roaming agreement with a requesting provider on the grounds that the requesting provider is not actually providing service at the time of the request for negotiations, but may tie the effectiveness of the agreement to the requesting provider offering the underlying service to its subscribers with a generation of wireless technology comparable to the technology on which it would roam. The Commission finds that incorporating this limitation as part of the scope of the data roaming rule is in the public interest and critical to ensuring facilities are deployed, helping to alleviate concerns about providers merely reselling commercial mobile data services on other networks. While the Commission agrees that providers have many different legitimate business and technological reasons for rolling out services in certain markets and not in others, the Commission finds that requiring, at a minimum, the underlying service to be offered by the requesting provider with a generation of wireless technology comparable to the technology on which it seeks to roam best balances competing interests of affording data roaming while also encouraging facilities-based service.

36. This limitation is also consistent with the Commission's previous roaming decisions where the Commission has consistently limited roaming obligations to provisioning of certain services on technologically compatible networks. The limitation on covered services coupled with the technologically compatible networks requirement was sufficient to ensure that the generations of wireless technologies used were comparable. The commercial mobile data services marketplace, however, encompasses a broad array of generations of wireless technology and many different applications—many of which may require different technical considerations and offer different data speeds. Some of these also may be more competitively attractive than others. The Commission seeks to encourage facilities-based offerings of advanced mobile data services by providers and usage of data roaming arrangements to supplement such offerings. Accordingly, it serves the public interest to focus on capabilities, including data rates, of the generation of mobile wireless technology that is being used to provide services to subscribers.

37. The Commission declines to adopt certain other requirements proposed by AT&T, which suggests that, in order to preserve the proper incentives for investment, the Commission establish an "equal network" rule that would limit data roaming to only providers that use the same radio technologies and air interfaces and that have substantial networks of their own. For the reasons discussed above, the Commission concludes, contrary to AT&T's argument, that providers will not have heightened incentives under the rule adopted here to scale back their own deployments and "free-ride" on the superior investments of others.

38. The Commission finds it is unnecessary to adopt a requirement of identical interfaces. The Commission requires that the air interfaces be comparable in terms of capabilities, which should achieve the same benefits as a requirement of identical interfaces while providing greater technological flexibility in the rule. Further, the Commission agrees with Leap and RCA that adopting a "substantial network" requirement could be problematic. An inability to negotiate a roaming arrangement before making a substantial build out could deter new entrants and small, rural, and mid-sized providers from investing in broadband at the exact time such investment is sorely needed. The Commission are concerned that a "substantial network" requirement could hamper or dampen facilities-based

build-out in rural areas by unduly limiting the role of roaming in network buildout. The Commission also disagrees with AT&T that, absent this requirement, providers will have heightened incentives to scale back their own deployments and "free-ride" on the superior investments of others. As discussed above, the relatively high price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to scale back deployments in favor of relying on another provider's network. Further, although the Commission does not find that lack of "substantial" networks deployments is categorically a commercially reasonable ground for declining to enter into a roaming arrangement, the Commission may consider the extent and nature of providers' build-out as one of the relevant factors in determining whether the proposed terms and conditions of a particular data roaming arrangement are commercially reasonable.

39. *Reasonable safeguards against congestion.* With respect to any issues concerning network capacity, network integrity, or network security, the Commission notes that under the rule that the Commission is adopting providers of commercial mobile data services are free to negotiate commercially reasonable measures to safeguard quality of service against network congestion that may result from roaming traffic or to prevent harm to their networks. The Commission expects any measures, methods, or practices to manage the roaming traffic to be part of the roaming terms and conditions offered by the host providers in their roaming arrangements given that once providers enter into a data roaming arrangement, the arrangement will govern the terms under which roaming is provided. Any issues arising in connection with the negotiation of these measures will be resolved in accordance with the dispute resolution procedures the Commission adopts in this Order. The Commission notes that reasonable measures to safeguard against network congestion from roaming traffic are supported by a number of commenters, and are already a feature of many commercially negotiated roaming arrangements. The Commission cautions, however, that host providers may not engage in stonewalling behavior or refuse to negotiate because of concerns over the impact of roaming traffic on network congestion.

40. The Commission declines to further detail the specific measures that may be adopted to safeguard subscriber quality of service, as proposed by AT&T.

As discussed herein, the commercial mobile data services marketplace encompasses an array of generations of wireless technology and many different services—many of which may require different technical considerations in resolving network congestion. Providers should have significant flexibility to negotiate safeguards subject to commercial reasonableness, and a dispute over the reasonableness of any particular measure can be addressed under the dispute resolution procedures, on a case-by-case basis based on the totality of circumstances. The Commission does not agree with AT&T that its approach will lead to "constant second-guessing" by the Commission.

41. The Commission also declines to specify, as suggested by Clearwire, that data roaming be limited to "best efforts access" to the host provider's network. The Commission does not see the benefit in prohibiting parties from negotiating other access terms in their roaming arrangement.

42. Host providers of commercial mobile data roaming services also are authorized to negotiate commercially reasonable measures to ensure that data roaming does not compromise the security and integrity of their networks. The Commission is aware of the risks network operators face from harmful devices on their networks and note that the Commission has previously considered the need for providers to protect their networks when it adopted open platform provisions for the 700 MHz Band C Block. It would also be appropriate for providers of commercial mobile data roaming service to take reasonable measures to ensure that network performance will not be significantly degraded.

43. We emphasize again that we intend to closely monitor further development of the commercial mobile broadband data marketplace and stand ready to take additional action if necessary to help ensure that our goals in this proceeding are achieved.

C. Legal Authority

44. The Commission finds that the Commission has the authority to require facilities-based providers of commercial mobile data services to offer data roaming arrangements to other such providers on commercially reasonable terms and conditions. As discussed above, the Commission finds that the rule the Commission adopts today serves the public interest by promoting connectivity for, and nationwide access to, mobile broadband. By promoting consumer access to advanced wireless services, the data roaming rule will

enhance the unique social and economic benefits that a mobile service provides. The data roaming rule will also serve the public interest by promoting competition and investment in and deployment of mobile broadband services. Broadband deployment is a key priority for the Commission, and the deployment of mobile data networks will be essential to achieve the goal of making broadband connectivity available everywhere in the United States. As noted earlier, mobile broadband networks, particularly “fourth-generation” networks, are still at an early stage of deployment. Both nationwide and non-nationwide providers have obtained licenses, including AWS and 700 MHz spectrum licenses, which will be used to provide innovative wireless data services to consumers. The Commission finds that the availability of data roaming will help ensure the viability of new data network deployments and promote the development of competitive service offerings for the benefit of consumers.

45. The Commission’s authority under Title III allows it to adopt requirements to serve these public interest objectives. Spectrum is a public resource, and Title III of the Act provides the Commission with broad authority to manage spectrum, including allocating and assigning radio spectrum for spectrum based services and modifying spectrum usage conditions in the public interest. The Commission is charged with maintaining control “over all the channels of radio transmission” in the United States. Section 301 states that “[i]t is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.” The issuance of a Commission license does not convey any ownership or property interests in the spectrum and does not provide the licensee with any rights that can override the Commission’s proper exercise of its regulatory power over the spectrum. Section 316 authorizes the Commission to adopt new conditions on existing licenses if it determines that such action “will promote the public interest, convenience, and necessity.” Further, the Commission may utilize its rulemaking powers to modify licenses when a new policy is based upon the general characteristics of an industry. Section 303 provides the Commission

with authority to establish operational obligations for licensees that further the goals and requirements of the Act if the obligations are in the “public convenience, interest, or necessity” and not inconsistent with other provisions of law. Section 303 also authorizes the Commission, subject to what the “public interest, convenience, or necessity requires,” to “[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class.”

46. The Commission finds that these provisions establish its authority to adopt rules facilitating roaming with respect to commercial mobile data services. Specifically, the Commission finds that it is within its authority to manage spectrum and to impose conditions on licensees where necessary to promote the public interest, convenience, and necessity to adopt data roaming rules. As discussed above, the Commission finds that the data roaming rule the Commission adopts today serves the public interest by facilitating consumer access to ubiquitous mobile broadband service. As more and more consumers use mobile devices to access a wide array of both personal and business services, they have become more reliant on their devices. These consumers expect to be able to have access to the full range of services available on their devices wherever they go. By promoting connectivity for, and ubiquitous access to, mobile broadband, the rule the Commission adopts today supports consumer expectations and helps ensure that consumers are able to fully utilize and benefit from the availability of wireless broadband data services.

47. As discussed earlier, the data roaming rule the Commission adopts today also supports the Commission’s goal of encouraging investment and innovation and the efficient use of spectrum. The Commission agrees with commenters that adopting a data roaming rule will encourage service providers to invest in and upgrade their networks to be able to compete with other providers and control their costs. By encouraging build-out and deployment of advanced data services, the rule the Commission adopts today helps ensure that spectrum is being put to its best and most efficient use. Data roaming also furthers the goals under Section 706(a) and (b) of the Telecommunications Act of 1996, including encouraging new deployment of advanced services to all Americans by promoting competition and by removing barriers to infrastructure investment, including the barriers to new entrants. The Commission

estimated that more than 10 million Americans live in rural census blocks with two or fewer mobile service providers. Data roaming will encourage service providers to invest in and upgrade their networks and to deploy advanced mobile services ubiquitously, including in rural areas.

48. The Commission disagrees with AT&T and Verizon Wireless’s argument that the Commission lacks authority to impose data roaming rules because data roaming is a private mobile radio service, as defined in section 332 of the Act and thus any common carrier regulation of data roaming is prohibited under the terms of the statute. Section 332(c)(2) provides that “a person engaged in the provision of a service that is a private mobile service shall not * * * be treated as a common carrier for any purpose * * *” AT&T and Verizon Wireless argue that Section 332(c)(2) prohibits the Commission from imposing any roaming obligation for provisioning of commercial mobile data services that do not interconnect with the public switched networks because non-interconnected commercial mobile data services are not CMRS but private mobile radio service (PMRS). AT&T argues that roaming obligations clearly amount to common carrier obligations and that, under the Supreme Court’s decision in *FCC v. Midwest Video Corporation (Midwest Video II)*, such regulations are prohibited. In *Midwest Video II*, the Supreme Court found that obligations requiring cable television systems to allocate channels for educational, government, public, and leased access users had “relegated cable systems, *pro tanto*, to common-carrier status.” The Court noted that the rules required operators to make these channels available on a first-come non-discriminatory basis, prohibited cable operators from influencing the content of access programming, and also put limits on charges for access. The Court found that this “common carrier status” violated the Act’s prohibition against deeming broadcasters to be common carriers, because at the time, cable regulations rested on the FCC’s authority to regulate broadcasting. AT&T argues that requiring carriers to offer data roaming “on reasonable request, on reasonable terms and rates, and free from unreasonable discrimination” would similarly treat such providers as common carriers in violation of the prohibition against common carrier treatment in the definition of “private mobile service.”

49. Contrary to the arguments of AT&T and Verizon Wireless, to adopt a data roaming rule as discussed herein, the Commission does not need to

determine that a mobile service should be classified as CMRS. Section 332 does not bar the Commission from establishing spectrum usage conditions based upon its Title III authority. As discussed above, Title III generally provides the Commission with authority to regulate “radio communications” and “transmission of energy by radio.”

Among other provisions, Title III gives the Commission the authority to classify radio stations. It also establishes the basic licensing scheme for radio stations, allowing the Commission to grant, revoke, or modify licenses. The Commission has imposed operating conditions on licensees regardless of the type of service they provide.

50. In this Order, the Commission imposes an obligation with limitations on facilities-based providers of commercial mobile data services to offer data roaming arrangements to other facilities-based providers of commercial mobile data services on an individualized case-by-case basis, subject to a standard of commercial reasonableness as well as certain specified limitations set forth herein. Imposing such a requirement is consistent with the Commission’s authority to impose certain operating conditions on any spectrum authorization holders, including private mobile radio licensees, if it serves the public interest. The data roaming rule will complement the current roaming rules applicable to interconnected services, improve efficiency of spectrum use, encourage competition and increase sharing opportunities between private mobile services and other services. In particular, the Commission finds that the rule the Commission adopts today is consistent with the requirements of sections 332(a)(2)–(4) of the Act. Sections 332(a)(2)–(4) provide that, in managing the spectrum made available for use by private mobile services, the Commission shall consider whether its actions will: improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands; encourage competition and provide services to the largest feasible number of users; or increase interservice sharing opportunities between private mobile services and other services. The Commission finds that, by promoting competition, investment, and new entry while facilitating consumer access to ubiquitous mobile broadband service, the rule the Commission adopts today will serve these objectives.

51. The Commission also finds that the data roaming rules we adopt do not

amount to treating mobile data service providers as “common carriers” under the Act. As AT&T and Verizon Wireless recognize, a “*sine qua non*” of common carrier treatment is “the undertaking to carry for all people indifferently. The extent of the obligation the Commission imposes today is to offer, in certain circumstances, individually negotiated data roaming arrangements with commercially reasonable terms and conditions. The rule the Commission adopts will allow individualized service agreements and will not require providers to serve all comers indifferently on the same terms and conditions. Providers can negotiate different terms and conditions on an individualized basis, including prices, with different parties. The commercial reasonableness of terms offered to a particular provider may depend on numerous individualized factors, including the level of competitive harm in a given market and the benefits to consumers; the extent and nature of the requesting provider’s build-out; whether the requesting provider is seeking roaming for an area where it is already providing facilities-based service; and the impact of granting the request on the incentives for either provider to invest in facilities and coverage, services, and service quality. In addition, providers may reasonably choose not to offer a roaming arrangement to a requesting provider that is not technologically compatible or refuse to enter into a roaming arrangement where it is not technically feasible to provide roaming for the service for which it is requested. A provider is not required to make changes to its network that are economically unreasonable, and it is reasonable for a provider to condition the effectiveness of a roaming arrangement on the requesting provider’s provision of mobile data service to its own subscribers using a generation of wireless technology comparable to the technology on which the requesting provider seeks to roam. Providers of commercial mobile data services also are free to negotiate commercially reasonable measures to safeguard quality of service against network congestion that may result from roaming traffic or to prevent harm to their networks. In addition, the rule the Commission adopts does not impose any form of common carriage rate regulation or obligation on providers of mobile data services to publicly disclose the rates, terms, and conditions of their roaming agreements. Under the agreements to which negotiations may lead, providers will have flexibility with regard to roaming charges, subject to a

general requirement of commercial reasonableness. Further, actual provisioning of data roaming under those arrangements and any practices in connection with such arrangements will be subject to individually negotiated contractual provisions, unlike a common carrier obligation under Sections 201 and 202 of the Act which covers all charges and practices in connection with such services. In view of these boundaries, the Commission finds that the rule the Commission adopts today to execute its spectrum management duties under the Act does not subject a spectrum-based commercial mobile data service provider to Title II nor does it treat these providers as common carriers with respect to their regulatory status and obligations.

52. *Imposition of the Data Roaming Rule under Title III does not amount to Regulatory Taking.* Verizon Wireless argues that imposing data roaming obligations amounts to a physical and regulatory taking. Verizon Wireless claims that data roaming is a physical taking of wireless carriers’ property rights in their network infrastructure by authorizing third parties to occupy the physical space available on carrier networks at will. Verizon Wireless also claims that data roaming would constitute a regulatory taking because it would interfere with licensees’ reasonable expectations not to have common carrier regulations imposed on information services. The Commission disagrees. Under Section 304 of the Communications Act, the issuance of an FCC license does not provide the licensee with any rights that can override the Commission’s proper exercise of its regulatory power over the spectrum: “[n]o station license shall be granted by the Commission until the applicant therefore shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.” Further, under the data roaming rule, the host provider will be compensated for service it provides consistent with the commercially reasonable terms it negotiates in the roaming agreement. There can be no taking if that compensation is “just.” It does not appear to be possible that compensation could be “unjust” if it is commercially reasonable. Commercially reasonable terms may also include measures that allow the host provider to safeguard the quality of service and allow measures to

prevent harm to the host provider's network.

53. *Commission's Title II Authority.* Several commenters argue that data roaming is a telecommunications service under Title II. MetroPCS, for example, asserts that the transmission service provided by a third-party wireless roaming carrier (the Roaming Partner) to facilitate data roaming is only telecommunications and that the transmission provided by the Roaming Partner is functionally equivalent to the telecommunications services provided for voice roaming. MetroPCS asserts that "the separate, severable, non-integrated transmission service provided by a third-party wireless Roaming Partner is properly viewed as purely a transmission service that qualifies under long-standing Commission precedent as 'telecommunications' and as a 'telecommunications service.'" Leap argues that the Commission can act pursuant to its Title II authority, stating that "the Commission could define data roaming as a telecommunications service because during data roaming, the host carrier is providing pure data transmission to another carrier." The Commission finds that the Commission need not decide whether data roaming services provisioned in this manner are or are not telecommunications services. In any case, the Commission imposes the data roaming rule described herein based on its authority under Title III.

D. Dispute Resolution

54. To the extent that a complaint proceeding is an appropriate procedural vehicle to resolve a particular dispute arising out of the negotiation of a data roaming arrangement, the Commission finds that it is in the public interest to establish a complaint process similar to the complaint process available under the current roaming obligations. Specifically, to ensure consistent Commission processes for resolving all voice and data roaming disputes where a complaint is the appropriate procedural vehicle, the Commission will use the procedural complaint processes established in the Commission's Part 1, Subpart E rules for data roaming to the extent discussed herein. Disputes will be resolved based on the totality of the circumstances. The remedy of damages will not be available for data roaming complaints.

55. Parties may file a formal or informal complaint under the Commission's Part I, Subpart E rules or file a petition for declaratory ruling under Section 1.2 of the Commission's rules to resolve any disputes arising out of the data roaming rule adopted herein. These procedural mechanisms are

currently available for resolving voice roaming disputes, and the Commission finds that it is in the public interest to ensure a consistent Commission process for resolving both voice and data roaming complaints. Moreover, some roaming disputes will involve both data and voice and are likely to have factual issues common to both types of roaming. The approach the Commission is taking allows, but does not require, a party to bring a single proceeding to address such a dispute, rather than having to bifurcate the matter and initiate two separate proceedings under two different sets of procedures. This, in turn, will be more efficient for the parties involved, as well as for the Commission, and should result in faster resolution of such disputes.

56. With respect to remedies, the Commission excludes provisions applicable to damages in this context. The Commission notes that the remedy of damages after hearing on a complaint is specifically provided for in Section 209 of the Communications Act and applicable to claims arising out of Section 208 complaints. This means that if a complaint alleges violations with respect to both voice and data roaming, damages potentially are available as a remedy for only the portion of the complaint that deals with roaming obligations arising out of Sections 201, 202, and 208 of the Act.

57. When roaming-related complaints or petitions for declaratory ruling are filed, the Commission intends to address them expeditiously. Further, the Commission notes that the Accelerated Docket procedures, including pre-complaint mediation, will be available to data roaming complaints. Several commenters requested use of the Commission's Accelerated Docket procedures to resolve all roaming complaints. Although all roaming complaints will not automatically be placed on the Accelerated Docket, an affected provider can seek consideration of its complaint under the Commission's Accelerated Docket rules and procedures where appropriate.

58. The Commission notes that the duty to offer data roaming arrangements on commercially reasonable terms and conditions will allow greater flexibility and variation in terms and conditions, as parties will negotiate their rights and obligations under the agreements. The Commission expects providers to include any material practices regarding provisioning of roaming in the agreement (e.g., any practice to manage roaming traffic in times of congestion) because many disputes arising out of provisioning of roaming will be subject to the roaming contract provisions and

generally applicable laws. To provide parties with additional certainty regarding rights and obligations and to facilitate timely resolution of disputes, the Commission provides the following clarifications and guidance.

59. During ongoing negotiations, parties can seek Commission dispute resolution—including a determination whether the host provider has met its duty. The Commission will consider claims regarding the commercial reasonableness of the negotiations, providers' conduct, and the terms and conditions of the proffered data roaming arrangement. With respect to claims regarding the commercial reasonableness of the proffered terms and conditions, including prices, the Commission staff may, in resolving such claims, require both parties to provide to the Commission their best and final offers (final offers) that were presented during the negotiation. For example, if negotiations fail to produce a mutually acceptable set of terms and conditions, including rates, the Commission staff may require parties to submit on a confidential basis their final offers, including price, in the form of a proposed data roaming contract. These submissions would enable Commission staff, if it so chose, to resolve a particular roaming dispute in which a violation of Commission rules is found by ordering the parties to enter into a data roaming agreement pursuant to the terms of the complainant's commercially reasonable final offer or to otherwise rely on the submitted offers in determining an appropriate remedy. In cases where no violation of Commission rules is found, the complainant would be free, but not obligated, to enter into a roaming agreement on the proffered terms of the would-be host. The Commission staff also could order the parties to resume negotiations. The Commission staff's determination of the appropriate steps in resolving a particular dispute would depend in part of an assessment of the actions of both the host provider and the requesting provider.

60. With respect to disputes filed before reaching an agreement regarding the commercial reasonableness of a would-be host provider's proffered terms and conditions, the Commission finds that it is in the public interest to provide a possible avenue for the requesting provider to obtain data roaming service on an interim basis during the pendency of the dispute. Accordingly, in a case where a requesting provider disputes the commercial reasonableness of a roaming arrangement offered by a would-be host and none of the limitations is

applicable, the Commission staff may, if requested and in appropriate circumstances, order the host provider to provide data roaming on its proffered terms, during the pendency of the dispute, subject to possible true-up once the roaming agreement is in place. Similarly, if the Commission staff chooses to require submission of final offers as discussed above, in appropriate circumstances the Commission staff could order the host provider to provide data roaming in accordance with its final offer, subject to possible true-up. The ability to obtain data roaming service on an interim basis during the pendency of the dispute would enable the requesting provider's subscribers to obtain data roaming coverage without undue delay while the Commission staff considers the dispute. Alternatively, the parties may agree prior to the filing of the dispute to an interim roaming arrangement that will govern during the pendency of the dispute. Further, in the event a would-be host provider violates its duty by actions that unduly delay or stonewall the course of negotiations, the Commission stands ready to move expeditiously with fines, forfeitures, and other appropriate remedies, which should reduce any incentives to delay data roaming negotiations.

61. After the parties have entered into a data roaming agreement, the terms of the agreement generally will govern the data roaming rights and obligations of the parties, and disputes relating to performance, validity, or interpretation of the agreement will be subject to review in court under the relevant contract law, with certain exceptions. For instance, parties may bring before the Commission a claim that a host provider's conduct during negotiations violated the federal duty to offer a data roaming arrangement with commercially reasonable terms and conditions. In addition, the requesting provider may show that a host provider engaged in undue delay, or negotiated without any intent to perform. Further, the Commission provides that a requesting provider could file a complaint or petition for declaratory ruling regarding the commercial reasonableness of the agreed terms and conditions to the extent such claims are based on new information that the requesting provider reasonably did not know prior to signing the agreement. Because the standard of commercial reasonableness is one that we expect to accommodate a variety of terms and conditions in data roaming, and to discourage frivolous claims regarding the reasonableness of the terms and conditions in a signed agreement, the

Commission will presume in such cases that the terms of a signed agreement meet the reasonableness standard and will require a party challenging the reasonableness of any term in the agreement to rebut that presumption.

62. The Commission further clarifies that the Enforcement Bureau has delegated authority to resolve complaints arising out of the data roaming rule. The Commission notes that the Wireless Telecommunications Bureau has delegated authority to resolve other disputes with respect to the data roaming rule adopted herein. The Commission also notes that whether or not the appropriate procedural vehicle is a complaint under Section 20.12(e) or a petition for declaratory ruling under Section 1.2 may vary depending on the circumstances of each case. If a dispute arises regarding data roaming, parties are encouraged to contact Commission staff for procedural guidance and for negotiations using the Commission's informal dispute resolution processes.

63. Some commenters propose other measures for resolving data roaming disputes or roaming disputes in general, such as mandatory mediation or arbitration. Although the Commission is not adopting any such mandatory processes, the Commission notes that providers are free to negotiate and mutually agree to other processes, such as third party mediation or arbitration, as a means to resolve the roaming dispute.

64. A few commenters propose that the Commission adopts a time limit for roaming negotiations to limit the opportunity for host carriers to delay in negotiating roaming agreements. The Commission declines to adopt a specific time limit because some data roaming negotiations may be more complex or fact-intensive than others and are likely to require more time. A single time limit for all negotiations would not be appropriate in such cases. As part of the requirement to offer a data roaming arrangement, the Commission expects parties to proceed with such negotiations in a timely manner and to avoid stonewalling behavior or undue delays. If a provider involved in a data roaming negotiation believes that another provider is delaying the negotiation unduly, it may ask the Commission to set a time limit for that particular negotiation. The Commission will consider such requests on a case-by-case basis.

65. *Determination of Commercial Reasonableness.* The Commission will assess whether a particular data roaming offering includes commercially reasonable terms and conditions or

whether a provider's conduct during negotiations, including its refusal to offer data roaming, is commercially reasonable, on a case-by-case basis, taking into consideration the totality of the circumstances. As discussed above, providers can negotiate different terms and conditions, including prices, with different parties, where differences in terms and conditions reasonably reflect actual differences in particular cases. Further, providers of commercial mobile data services can negotiate commercially reasonable measures to safeguard quality of service against network congestion that may result from data roaming traffic or to prevent harm to their networks. Conduct that unreasonably restrains trade, however, is not commercially reasonable.

66. In the interconnected services context, the Commission listed factors it will take into account in resolving roaming disputes that are brought before it. Some parties have asked the Commission to use these factors, or others, in resolving disputes that arise with respect to data roaming. These factors relate to public interest benefits and costs of a data roaming arrangement offered in a particular case, including the impact on investment, competition, and consumer welfare and whether a particular data roaming offering is commercially reasonable. The Commission finds it is therefore appropriate to take them into account, as listed below, and to the extent relevant in the data roaming context. The Commission emphasizes that each case will be decided based on the totality of the circumstances. With that in mind, the Commission clarifies that, to guide it in determining the reasonableness of the negotiations, providers' conduct, and the terms and conditions of the proffered data roaming arrangements, including the prices, the Commission may consider the following factors, as well as others:

- Whether the host provider has responded to the request for negotiation, whether it has engaged in a persistent pattern of stonewalling behavior, and the length of time since the initial request;
- Whether the terms and conditions offered by the host provider are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement;
- Whether the parties have any roaming arrangements with each other, including roaming for interconnected services such as voice, and the terms of such arrangements;
- Whether the providers involved have had previous data roaming arrangements with similar terms;

- The level of competitive harm in a given market and the benefits to consumers;

- The extent and nature of providers' build-out;

- Significant economic factors, such as whether building another network in the geographic area may be economically infeasible or unrealistic, and the impact of any "head-start" advantages;

- Whether the requesting provider is seeking data roaming for an area where it is already providing facilities-based service;

- The impact of the terms and conditions on the incentives for either provider to invest in facilities and coverage, services, and service quality;

- Whether there are other options for securing a data roaming arrangement in the areas subject to negotiations and whether alternative data roaming partners are available;

- Events or circumstances beyond either provider's control that impact either the provision of data roaming or the need for data roaming in the proposed area(s) of coverage;

- The propagation characteristics of the spectrum licensed to the providers;

- Whether a host provider's decision not to offer a data roaming arrangement is reasonably based on the fact that the providers are not technologically compatible;

- Whether a host provider's decision not to enter into a roaming arrangement is reasonably based on the fact that roaming is not technically feasible for the service for which it is requested;

- Whether a host provider's decision not to enter into a roaming arrangement is reasonably based on the fact that changes to the host network necessary to accommodate the request are not economically reasonable;

- Whether a host provider's decision not to make a roaming arrangement effective was reasonably based on the fact that the requesting provider's provision of mobile data service to its own subscribers has not been done with a generation of wireless technology comparable to the technology on which the requesting provider seeks to roam;

- Other special or extenuating circumstances.

67. The Commission emphasizes that these factors are not exclusive or exhaustive and that providers may argue that the Commission should consider other relevant factors in determining the commercial reasonableness of the negotiations, providers' conduct, and the terms and conditions of the proffered data roaming arrangements, including the prices. In addition, in making this determination the

Commission also will consider all relevant precedents and decisions by the Commission.

E. Other Issues

68. *Advertising.* In the *Second Further Notice*, the Commission sought comment on whether it should "clarify that a carrier that obtains automatic roaming from another carrier does not have a right to advertise that it offers its subscribers roaming on a particular host carrier's network absent a voluntary agreement of the host carrier" and whether such measure would help to "prevent free riding on the value of the host carrier's brand name recognition and service quality reputation." The Commission now clarifies that it does not intend the rule it adopts today to be construed as permitting a provider that obtains roaming from another provider to use the trade name of a host provider when it advertises extended coverage due to roaming, unless the parties to the roaming agreement agree otherwise. Although Cellular South argues any such restrictions are not necessary or appropriate, the Commission agrees with AT&T that providers can make significant capital and marketing investments with respect to differentiating the quality and brand image of their networks from competitors. Also, the Commission is concerned that construing the rule the Commission adopts as allowing a roaming provider to engage in unauthorized use of a competitor's brand name recognition and/or service quality reputation as a means of differentiating the roaming provider's own service may indeed encourage the use of roaming as *de facto* resale. The Commission has previously stated with regard to automatic roaming for voice and data services for CMRS providers that "automatic roaming obligations can not be used as a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks." As requested, the Commission also further clarifies that the Commission does not intend the data roaming rule it establishes in this order to disturb any provider's existing right, under applicable law, to advertise the geographic reach of their services, as extended by roaming agreements, and to use data roaming to expand their advertised service area, where under applicable law there is no unauthorized use of a competitor's brand name and/or image associated with such advertising.

69. *Spectrum Sharing.* In the *Second Further Notice*, the Commission sought comment on what other actions might be appropriate to address spectrum capacity needs that may arise out of data

roaming or to help ensure that spectrum is utilized to the fullest extent possible, including, for example, whether facilitating spectrum sharing arrangements between a host provider and a requesting provider would be helpful or appropriate. After review of the record, the Commission finds there is an insufficient basis to make a determination on spectrum sharing in the context of data roaming services at this time. The one comment addressing the issue does so briefly in a footnote and provides no detail on how such a requirement would be implemented. Given the very limited record on this option, the Commission finds that requiring spectrum sharing arrangements as a condition for commercial mobile data services roaming arrangements is not warranted at this time.

III. Procedural Matters

A. Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (the "RFA"),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Order on Reconsideration and Second Further Notice of Proposed Rulemaking in WT Docket No. 05-265.² The Commission sought written public comment on the proposals in the Second Further Notice, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

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

2. In the *Second Further Notice* that the Commission adopted in conjunction with the *Order on Reconsideration* in 2010, the Commission sought to refresh and further develop the record by requesting additional comment on whether to extend roaming obligations to mobile data services, including mobile broadband Internet access, that are provided without interconnection to the public switched telephone network.⁴ The objective of the rule

¹ See 5 U.S.C. 603. The RFA, see 5 U.S.C. 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104-121, Title II, 110 Stat. 857 (1996).

² Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, 25 FCC Rcd 4181 (2010).

³ See 5 U.S.C. 604.

⁴ The Commission had received several proposals concerning data roaming in response to the *Further Notice*, including a request by SpectrumCo that the Commission reconsider its decision to limit the

adopted is to require providers of commercial mobile data services to offer data roaming arrangements on commercially reasonable terms and conditions, pursuant to the Commission's authority under the Communications Act. In addition, the Commission also clarifies that providers of commercial mobile data roaming services are permitted to negotiate commercially reasonable measures to safeguard quality of service against network congestion that may result from roaming traffic or to prevent harm to their networks.

3. This rule will apply to all facilities-based providers of commercial mobile data services regardless of whether these entities are also providers of commercial mobile radio service (CMRS).⁵ For purposes of data roaming, the Commission defines a "commercial mobile data service" as any mobile data service that is not interconnected with the public switched network but is (1) provided for profit; and (2) available to the public or to such classes of eligible users as to be effectively available to the public.

4. Below, the Commission describes the duty of providers of commercial mobile data services to offer data roaming arrangements on commercially reasonable terms and conditions subject to certain limitations. When a request for data roaming negotiations is made, as a part of the duty of providers to offer data roaming arrangements on commercially reasonable terms and conditions, a would-be host provider has a duty to respond promptly to the request and avoid actions that unduly delay or stonewall the course of negotiations regarding that request. The Commission will determine whether the terms and conditions of a proffered data roaming arrangement are commercially reasonable on a case-by-case basis,

automatic roaming obligation only to services that use the public switched network. See *Second Further Notice*, 25 FCC Rcd at 4212-13 ¶ 63. The Commission noted that issues in SpectrumCo's petition for reconsideration were being addressed in the *Second Further Notice*. *Id.* at 4185 ¶ 9.

⁵ For purposes of this proceeding, "commercial mobile data service" is defined as any mobile data service that is not interconnected with the public switched network but is (1) provided for profit; and (2) available to the public or to such classes of eligible users as to be effectively available to the public. 47 CFR 20.12. The current roaming obligation in Section 20.12 applies to CMRS carriers' provision of mobile voice and data services that are interconnected with the public switched network, as well as their provision of text messaging and push-to-talk services. The data roaming rule adopted herein will cover mobile services that fall outside the scope of the current automatic roaming obligation if provided for profit; and available to the public or to such classes of eligible users as to be effectively available to the public.

taking into consideration the totality of the circumstances. The duty to offer data roaming arrangements on commercially reasonable terms and conditions is subject to certain limitations. In particular: (1) Providers may negotiate the terms of their roaming arrangements on an individualized basis; (2) it is reasonable for a provider not to offer a data roaming arrangement to a requesting provider that is not technologically compatible; (3) it is reasonable for a provider not to offer a data roaming arrangement where it is not technically feasible to provide roaming for the particular data service for which roaming is requested and any changes to the host provider's network necessary to accommodate roaming for such data service are not economically reasonable; and (4) it is reasonable for a provider to condition the effectiveness of a data roaming arrangement on the requesting provider's provision of mobile data service to its own subscribers using a generation of wireless technology comparable to the technology on which the requesting provider seeks to roam.⁶

2. Legal Basis

5. The authority for the actions taken in this Second Report and Order is contained in Sections 1, 4(i), 4(j), 301, 303, 304, 309, 316, and 332 of the Communications Act of 1934, as amended, and Section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. 151, 154(i), 154(j), 301, 303, 304, 309, 316, 332, and 1302.

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

6. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁷ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁸ A "small business

⁶ In other words, a provider offering service only through, for example, a 1xRTT or GPRS/EDGE network, would not be able to rely on the data roaming obligation for this service to obtain roaming on a later generation EV-DO or UMTS/HSPA network until it starts offering the later generation service.

⁷ 5 U.S.C. 601(6).

⁸ 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

concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁹

7. In the following paragraphs, the Commission further describes and estimates the number of small entity licensees that may be affected by the rules the Commission proposes in this Second Report and Order. This rule will apply to all facilities-based providers of commercial mobile data services regardless of whether these entities are also providers of commercial mobile radio service (CMRS).

8. This FRFA analyzes the number of small entities affected on a service-by-service basis. When identifying small entities that could be affected by the Commission's new rules, this FRFA provides information that describes auction results, including the number of small entities that were winning bidders. However, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily reflect the total number of small entities currently in a particular service. The Commission does not generally require that licensees later provide business size information, except in the context of an assignment or a transfer of control application that involves unjust enrichment issues.

9. *Wireless Telecommunications Carriers (except Satellite)*. Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.¹⁰ Prior to that time, such firms were within the now-superseded categories of "Paging" and "Cellular and Other Wireless Telecommunications."¹¹ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.¹² For the category of

the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the *Federal Register*."

⁹ 15 U.S.C. 632.

¹⁰ U.S. Census Bureau, 2007 NAICS Definitions, "Wireless Communications Carriers (Except Satellite)", NAICS code 517210"; <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

¹¹ U.S. Census Bureau, 2002 NAICS Definitions, "517211 Paging"; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>; U.S. Census Bureau, 2002 NAICS Definitions, "517212 Cellular and Other Wireless Telecommunications"; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

¹² 13 CFR 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

Wireless Telecommunications, Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.¹³ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.¹⁴ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.¹⁵ Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

10. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a “small business” for C- and F-Block licenses as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.¹⁶ For F-Block licenses, an additional small business size standard for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹⁷ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.¹⁸ 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 claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small business status won approximately 40 percent of the 1,479 licenses in the first auction for the D, E, and F Blocks.¹⁹ On April 15, 1999, the Commission completed the re-auction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22.²⁰ Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

11. On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 claimed small business status.²¹ Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No. 58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses.²² On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71.²³ Of the 12 winning bidders in that auction, five claimed small business status and won 18 licenses.²⁴ On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block Broadband PCS licenses in Auction No. 78.²⁵ Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.²⁶

12. *Narrowband Personal Communications Service.* In 1994, the Commission conducted an auction for Narrowband PCS licenses. A second auction was also conducted later in 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less.²⁷ Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.²⁸ 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.²⁹ 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.³⁰ 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.³¹ The SBA has approved these small business size standards.³² A third auction was conducted in 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.³³ Three of these claimed status as a small or very small entity and won 311 licenses.

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

¹³ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-ds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-lang=en.

¹⁴ See *Trends in Telephone Service* at Table 5.3.

¹⁵ See *id.*

¹⁶ See *Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule*; WT Docket No. 96–59, GN Docket No. 90–314, Report and Order, 11 FCC Rcd 7824, 7850–52, paras. 57–60 (1996) (“*PCS Report and Order*”); see also 47 CFR 24.720(b).

¹⁷ See *PCS Report and Order*, 11 FCC Rcd at 7852, para. 60.

¹⁸ See *Alvarez Letter 1998*.

¹⁹ See *Broadband PCS, D, E and F Block Auction Closes*, Public Notice, Doc. No. 89838 (rel. Jan. 14, 1997).

²⁰ See *C, D, E, and F Block Broadband PCS Auction Closes*, Public Notice, 14 FCC Rcd 6688 (WTB 1999). Before Auction No. 22, the Commission established a very small standard for the C Block to match the standard used for F Block. *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97–82, *Fourth Report and Order*, 13 FCC Rcd 15743, 15768, para. 46 (1998).

²¹ See *C and F Block Broadband PCS Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 2339 (2001).

²² See *Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58*, Public Notice, 20 FCC Rcd 3703 (2005).

²³ See *Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71*, Public Notice, 22 FCC Rcd 9247 (2007).

²⁴ *Id.*

²⁵ See *Auction of AWS–1 and Broadband PCS Licenses Closes; Winning Bidders Announced for Auction 78*, Public Notice, 23 FCC Rcd 12749 (WTB 2008).

²⁶ *Id.*

²⁷ 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 ¶ 46 (1994).

²⁸ 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).

²⁹ Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476 ¶ 40 (2000).

³⁰ *Id.*

³¹ *Id.*

³² See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

³³ See “Narrowband PCS Auction Closes,” *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

years.³⁴ The Commission awards “very small entity” bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years.³⁵ The SBA has approved these small business size standards for the 900 MHz Service.³⁶ The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR was completed in 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels was conducted in 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.³⁷ A second auction for the 800 MHz band was conducted in 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.³⁸

14. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels was conducted in 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard.³⁹ In an auction completed in 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.⁴⁰ Of the 22 winning bidders, 19 claimed “small business” status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

15. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the

800 and 900 MHz bands. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR 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. In addition, the Commission does not know how many of these firms have 1500 or fewer employees.⁴¹ The Commission assumes, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

16. *AWS Services (1710–1755 MHz and 2110–2155 MHz bands (AWS–1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS–2); 2155–2175 MHz band (AWS–3))*. For the AWS–1 bands, the Commission has defined a “small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, and a “very small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million.⁴² In 2006, the Commission conducted its first auction of AWS–1 licenses.⁴³ In that initial AWS–1 auction, 31 winning bidders identified themselves as very small businesses.⁴⁴ Twenty-six of the winning bidders identified themselves as small businesses.⁴⁵ In a subsequent 2008 auction, the Commission offered 35 AWS–1 licenses.⁴⁶ Four winning bidders identified themselves as very small businesses, and three of the winning bidders identified themselves as a small business.⁴⁷ For AWS–2 and

AWS–3, although the Commission does not know for certain which entities are likely to apply for these frequencies, the Commission notes that the AWS–1 bands are comparable to those used for cellular service and personal communications service. The Commission has not yet adopted size standards for the AWS–2 or AWS–3 bands but has proposed to treat both AWS–2 and AWS–3 similarly to broadband PCS service and AWS–1 service due to the comparable capital requirements and other factors, such as issues involved in relocating incumbents and developing markets, technologies, and services.⁴⁸

17. *Rural Radiotelephone Service*. The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.⁴⁹ A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (“BETRS”).⁵⁰ In the present context, the Commission will use the SBA’s small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.⁵¹ There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

18. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses in the 2305–2320 MHz and 2345–2360 MHz bands. The Commission defined “small business” for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the

⁴¹ See generally 13 CFR 121.201, NAICS code 517210.

⁴² See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Report and Order*, 18 FCC Rcd 25,162, App. B (2003), modified by Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Order on Reconsideration*, 20 FCC Rcd 14,058, App. C (2005).

⁴³ See “Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66,” AU Docket No. 06–30, *Public Notice*, 21 FCC Rcd 4562 (2006) (“*Auction 66 Procedures Public Notice*”).

⁴⁴ See “Auction of Advanced Wireless Services Licenses Closes; Winning Bidders Announced for Auction No. 66,” *Public Notice*, 21 FCC Rcd 10,521 (2006) (“*Auction 66 Closing Public Notice*”).

⁴⁵ See *id.*

⁴⁶ See *AWS–1 and Broadband PCS Procedures Public Notice*, 23 FCC Rcd at 7499. Auction 78 also included an auction of broadband PCS licenses.

⁴⁷ See “Auction of AWS–1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9,

2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period,” *Public Notice*, 23 FCC Rcd 12,749 (2008).

⁴⁸ Service Rules for Advanced Wireless Services in the 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz Bands et al., *Notice of Proposed Rulemaking*, 19 FCC Rcd 19,263, App. B (2005); Service Rules for Advanced Wireless Services in the 2155–2175 MHz Band, *Notice of Proposed Rulemaking*, 22 FCC Rcd 17,035, App. (2007); Service Rules for Advanced Wireless Services in the 2155–2175 MHz Band, *Further Notice of Proposed Rulemaking*, 23 FCC Rcd 9859, App. B (2008).

⁴⁹ The service is defined in § 22.99 of the Commission’s Rules, 47 CFR 22.99.

⁵⁰ BETRS is defined in §§ 22.757 and 22.759 of the Commission’s Rules, 47 CFR 22.757 and 22.759.

⁵¹ 13 CFR 121.201, NAICS code 517210.

³⁴ 47 CFR 90.814(b)(1).

³⁵ *Id.*

³⁶ See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999.

³⁷ See “Correction to Public Notice DA 96–586 ‘FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,’” *Public Notice*, 18 FCC Rcd 18367 (WTB 1996).

³⁸ See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

³⁹ See “800 MHz Specialized Mobile Radio (SMR) Service General Category (851–854 MHz) and Upper Band (861–865 MHz) Auction Closes; Winning Bidders Announced,” *Public Notice*, 15 FCC Rcd 17162 (2000).

⁴⁰ See, “800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 1736 (2000).

three preceding years.⁵² The SBA has approved these definitions.⁵³ The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

19. *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, the Commission applies the small business size standard under the SBA rules applicable. The SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.⁵⁴ For this service, the SBA uses the category of Wireless Telecommunications Carriers (except Satellite). Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.⁵⁵ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

20. *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*, the Commission adopted a small business size standard for defining “small” and “very small”

businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁵⁶ This small business standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.⁵⁷ A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.⁵⁸ The SBA has approved these small size standards.⁵⁹ Auctions of Phase II licenses commenced on and closed in 1998.⁶⁰ In the first auction, 908 licenses were auctioned in three different-sized geographic areas: Three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.⁶¹ Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.⁶² A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.⁶³ In 2007, the Commission conducted a fourth auction of the 220 MHz licenses.⁶⁴ Bidding credits were offered to small businesses. A bidder with attributed average annual gross revenues that exceeded \$3 million and did not exceed \$15 million for the preceding three years (“small business”) received a 25 percent discount on its winning bid. A bidder with attributed

average annual gross revenues that did not exceed \$3 million for the preceding three years received a 35 percent discount on its winning bid (“very small business”). Auction 72, which offered 94 Phase II 220 MHz Service licenses, concluded in 2007.⁶⁵ In this auction, five winning bidders won a total of 76 licenses. Two winning bidders identified themselves as very small businesses won 56 of the 76 licenses. One of the winning bidders that identified themselves as a small business won 5 of the 76 licenses won.

21. *700 MHz Guard Band Licenses.* In the *700 MHz Guard Band Order*, the Commission adopted size standards for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁶⁶ A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.⁶⁷ Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.⁶⁸ SBA approval of these definitions is not required.⁶⁹ In 2000, the Commission

⁶⁵ See “Auction of Phase II 220 MHz Service Spectrum Licenses Closes, Winning Bidders Announced for Auction 72, Down Payments due July 18, 2007, FCC Forms 601 and 602 due July 18, 2007, Final Payments due August 1, 2007, Ten-Day Petition to Deny Period, *Public Notice*, 22 FCC Rcd 11573 (2007).

⁶⁶ Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, 15 FCC Rcd 5299 (2000). Service rules were amended in 2007, but no changes were made to small business size categories. See Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, WT Docket No. 06–150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94–102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01–309, Biennial Regulatory Review—Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03–264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 06–169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06–229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96–86, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8064 (2007).

⁶⁷ *Id.* at 5343 ¶ 108.

⁶⁸ *Id.*

⁶⁹ *Id.* at 5343 ¶ 108 n.246 (for the 746–764 MHz and 776–704 MHz bands, the Commission is exempt from 15 U.S.C. 632, which requires Federal agencies to obtain Small Business Administration

⁵² Amendment of Part 90 of the Commission’s Rules to Provide For the Use of the 220–222 MHz Band by the Private Land Mobile Radio Service, *Third Report and Order*, 12 FCC Rcd 10943, 11068–70 ¶¶ 291–295 (1997).

⁵⁷ *Id.* at 11068 ¶ 291.

⁵⁸ *Id.*

⁵⁹ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998 (*Alvarez to Phythyon Letter 1998*).

⁶⁰ See generally “220 MHz Service Auction Closes,” *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

⁶¹ See “FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made,” *Public Notice*, 14 FCC Rcd 1085 (WTB 1999).

⁶² See “Phase II 220 MHz Service Spectrum Auction Closes,” *Public Notice*, 14 FCC Rcd 11218 (WTB 1999).

⁶³ See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

⁶⁴ See “Auction of Phase II 220 MHz Service Spectrum Scheduled for June 20, 2007, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 72,” *Public Notice*, 22 FCC Rcd 3404 (2007).

⁵² Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (WCS), *Report and Order*, 12 FCC Rcd 10785, 10879 ¶ 194 (1997).

⁵³ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

⁵⁴ 13 CFR 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

⁵⁵ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-lang=en.

conducted an auction of 52 Major Economic Area (“MEA”) licenses.⁷⁰ 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 and closed in 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.⁷¹

22. *Upper 700 MHz Band Licenses.* In the *700 MHz Second Report and Order*, the Commission revised its rules regarding Upper 700 MHz licenses.⁷² On January 24, 2008, the Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band were available for licensing: 12 Regional Economic Area Grouping licenses in the C Block, and one nationwide license in the D Block.⁷³ The auction concluded on March 18, 2008, with 3 winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years) and winning five licenses.

23. *Lower 700 MHz Band Licenses.* The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.⁷⁴ The Commission defined a “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.⁷⁵ A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.⁷⁶ Additionally, the lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (MSA/RSA) licenses—“entrepreneur”—which is defined as an entity that, together with

approval before adopting small business size standards).

⁷⁰ See “700 MHz Guard Bands Auction Closes: Winning Bidders Announced,” *Public Notice*, 15 FCC Rcd 18026 (2000).

⁷¹ See “700 MHz Guard Bands Auction Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 4590 (WTB 2001).

⁷² *700 MHz Second Report and Order*, 22 FCC Rcd 15289.

⁷³ See *Auction of 700 MHz Band Licenses Closes*, *Public Notice*, 23 FCC Rcd 4572 (WTB 2008).

⁷⁴ See *Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59)*, *Report and Order*, 17 FCC Rcd 1022 (2002) (“*Channels 52–59 Report and Order*”).

⁷⁵ See *id.*, 17 FCC Rcd at 1087–88 ¶ 172.

⁷⁶ See *id.*

its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.⁷⁷ The SBA approved these small size standards.⁷⁸ An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) was conducted in 2002. Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won licenses.⁷⁹ A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses.⁸⁰ Seventeen winning bidders claimed small or very small business status, and nine winning bidders claimed entrepreneur status.⁸¹ In 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band. All three winning bidders claimed small business status.

24. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.⁸² An auction of A, B and E block 700 MHz licenses was held in 2008.⁸³ Twenty winning bidders claimed small business status (those with attributable average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years). Thirty three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years).

25. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).⁸⁴ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.⁸⁵ According to *Trends in Telephone Service* data, 413 carriers reported that they were engaged in

wireless telephony.⁸⁶ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.⁸⁷ Therefore, more than half of these entities can be considered small.

26. *Air-Ground Radiotelephone Service.* The Commission has previously used the SBA’s small business definition applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.⁸⁸ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and under that definition, the Commission estimates that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined “small business” as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$40 million.⁸⁹ A “very small business” is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$15 million.⁹⁰ These definitions were approved by the SBA.⁹¹ In 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction 65). Later in 2006, the auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

27. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size

⁸⁶ *Trends in Telephone Service*, tbl. 5.3.

⁸⁷ *Id.*

⁸⁸ 13 CFR 121.201, NAICS codes 517210.

⁸⁹ Amendment of Part 22 of the Commission’s Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission’s Rules, Amendment of Parts 1 and 22 of the Commission’s Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service, WT Docket Nos. 03–103, 05–42, *Order on Reconsideration and Report and Order*, 20 FCC Rcd 19663, 19677–83 ¶¶ 28–42 (2005).

⁹⁰ *Id.*

⁹¹ See Letter from Hector V. Barreto, Administrator, SBA, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, FCC (filed Sept. 19, 2005).

⁷⁷ See *id.*, 17 FCC Rcd at 1088 ¶ 173.

⁷⁸ See *Alvarez Letter 1998*.

⁷⁹ See *Lower 700 MHz Band Auction Closes*, *Public Notice*, 17 FCC Rcd 17,272 (2002).

⁸⁰ See *Lower 700 MHz Band Auction Closes*, *Public Notice*, 18 FCC Rcd 11,873 (2003).

⁸¹ See *id.*

⁸² *700 MHz Second Report and Order*, *Second Report and Order*, 22 FCC Rcd 15,289, 15,359 n.434 (2007).

⁸³ See *Auction of 700 MHz Band Licenses Closes*, *Public Notice*, 23 FCC Rcd 4572 (2008).

⁸⁴ 13 CFR 121.201, NAICS code 517210.

⁸⁵ *Id.*

standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite),” which is 1,500 or fewer employees.⁹² Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.⁹³ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. Additionally, the Commission notes that most applicants for recreational licenses in this category of wireless service are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, the Commission estimates that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a “small” business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$15 million dollars. In addition, a “very small” business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$3 million dollars.⁹⁴ There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as “small” businesses under the above special small business size standards.

28. Fixed Microwave Services.

Microwave services include common carrier,⁹⁵ private-operational fixed,⁹⁶

and broadcast auxiliary radio services.⁹⁷ They also include the Local Multipoint Distribution Service (LMDS),⁹⁸ the Digital Electronic Message Service (DEMS),⁹⁹ and the 24 GHz Service,¹⁰⁰ where licensees can choose between common carrier and non-common carrier status.¹⁰¹ The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, the Commission will use the SBA’s definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons is considered small.¹⁰² For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.¹⁰³ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

29. *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.¹⁰⁴ In the 1998 and 1999 LMDS auctions,¹⁰⁵ the

⁹⁷ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission’s Rules. See 47 CFR Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

⁹⁸ See 47 CFR Part 101, Subpart L.

⁹⁹ See 47 CFR Part 101, Subpart G.

¹⁰⁰ See *id.*

¹⁰¹ See 47 CFR 101.533, 101.1017.

¹⁰² 13 CFR 121.201, NAICS code 517210.

¹⁰³ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-lang=en.

¹⁰⁴ See Local Multipoint Distribution Service, *Second Report and Order*, 12 FCC Rcd 12545 (1997).

¹⁰⁵ 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,

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.¹⁰⁶ 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.¹⁰⁷ These definitions of “small business” and “very small business” in the context of the LMDS auctions have been approved by the SBA.¹⁰⁸ 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, the Commission believes 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.

30. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.¹⁰⁹ There are presently approximately 55 licensees in this service. The Commission is unable to estimate at this time the number of licensees that would qualify as small under the SBA’s small business size standard for the category of Wireless Telecommunications Carriers (except Satellite). Under that standard¹¹⁰ a business is small if it has 1,500 or fewer employees.¹¹¹ Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.¹¹² Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

31. *39 GHz Service.* The Commission created a special small business size

began on April 27, 1999, and closed on May 12, 1999. (40 bidders won 161 licenses.)

¹⁰⁶ See *LMDS Order*, 12 FCC Rcd at 12545.

¹⁰⁷ *Id.*

¹⁰⁸ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

¹⁰⁹ This service is governed by Subpart I of Part 22 of the Commission’s Rules. See 47 CFR 22.1001–22.1037.

¹¹⁰ 13 CFR 121.201, NAICS code 517210.

¹¹¹ *Id.*

¹¹² U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-lang=en.

⁹² 13 CFR 121.201, NAICS code 517210.

⁹³ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-lang=en.

⁹⁴ *Amendment of the Commission’s Rules Concerning Maritime Communications*, PR Docket No. 92–257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

⁹⁵ See 47 CFR Part 101, Subparts C and I.

⁹⁶ See 47 CFR Part 101, Subparts C and H.

standard for 39 GHz licenses—an entity that has average gross revenues of \$40 million or less in the three previous calendar years.¹¹³ An additional size standard for “very small business” is: an entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹¹⁴ The SBA has approved these small business size standards.¹¹⁵ The auction of the 2,173 39 GHz licenses began and closed in 2000. The 18 bidders who claimed small business status won 849 licenses.

32. *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.¹¹⁶ In the *218–219 MHz Report and Order and Memorandum Opinion and Order*, the Commission 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.¹¹⁷ 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.¹¹⁸ The SBA has approved of these definitions.¹¹⁹ These size standards will be used in future auctions of 218–219 MHz spectrum.

33. *Incumbent 24 GHz Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band

from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. For this service, the Commission uses the SBA small business size standard for the category “Wireless Telecommunications Carriers (except satellite),” which is 1,500 or fewer employees.¹²⁰ To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007, which supersedes data contained in the 2002 Census, show that there were 1,383 firms that operated that year.¹²¹ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census’ use of the classifications “firms” does not track the number of “licenses”. The Commission believes that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent¹²² and TRW, Inc. It is the Commission’s 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.

34. *Future 24 GHz 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.¹²³ “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.¹²⁴ The SBA has approved these small business size

standards.¹²⁵ These size standards will apply to the future auction, if held.

35. *1670–1675 MHz Services.* This service can be used for fixed and mobile uses, except aeronautical mobile.¹²⁶ An auction for one license in the 1670–1675 MHz band was conducted in 2003. The winning bidder was not a small entity.

36. *3650–3700 MHz Band.* In March 2005, the Commission released a *Report and Order and Memorandum Opinion and Order* that provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (i.e., 3650–3700 MHz).¹²⁷ As of April 2010, more than 1270 licenses have been granted and more than 7433 sites have been registered. The Commission has not developed a definition of small entities applicable to 3650–3700 MHz band nationwide, non-exclusive licensees. However, the Commission estimates that the majority of these licensees are Internet Access Service Providers (ISPs) and that most of those licensees are small businesses.

37. *Internet Service Providers.* The 2007 Economic Census places these firms, whose services might include voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider’s own telecommunications facilities (e.g., cable and DSL ISPs), or over client-supplied telecommunications connections (e.g., dial-up ISPs). The former are within the category of Wired Telecommunications Carriers,¹²⁸ which has an SBA small business size standard of 1,500 or fewer employees.¹²⁹ These are also labeled “broadband.” The latter are within the category of All Other Telecommunications,¹³⁰ which has a size standard of annual receipts of \$25 million or less.¹³¹ These are labeled non-broadband.

38. The most current Economic Census data for all such firms are 2007 data, which are detailed specifically for

¹¹³ 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*, 63 FR 6079 (Feb. 6, 1998).

¹¹⁴ *Id.*

¹¹⁵ See Letter to Kathleen O’Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998).

¹¹⁶ *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, PP Docket No. 93–253, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

¹¹⁷ *Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218–219 MHz Service*, WT Docket No. 98–169, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999).

¹¹⁸ *Id.*

¹¹⁹ See Alvarez to Phytthyon Letter 1998.

¹²⁰ 13 CFR 121.201, NAICS code 517210.

¹²¹ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSZ5&-lang=en.

¹²² 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.

¹²³ *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 at para. 77 (2000); see also 47 CFR 101.538(a)(2).

¹²⁴ *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 at para. 77 (2000); see also 47 CFR 101.538(a)(1).

¹²⁵ See Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

¹²⁶ 47 CFR 2.106; see generally 47 CFR 27.1–.70.

¹²⁷ The service is defined in section 90.1301 *et seq.* of the Commission’s Rules, 47 CFR 90.1301 *et seq.*

¹²⁸ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

¹²⁹ 13 CFR 121.201, NAICS code 517110.

¹³⁰ U.S. Census Bureau, 2007 NAICS Definitions, “517919 All Other Telecommunications”; <http://www.census.gov/naics/2007/def/ND517919.HTM#N517919>.

¹³¹ 13 CFR 121.201, NAICS code 517919 (updated for inflation in 2008).

ISPs within the categories above. For the first category, the data show that 396 firms operated for the entire year, of which 159 had nine or fewer employees.¹³² For the second category, the data show that 1,682 firms operated for the entire year.¹³³ Of those, 1,675 had annual receipts below \$25 million per year, and an additional two had receipts of between \$25 million and \$49,999,999. Consequently, the Commission estimates that the majority of ISP firms are small entities.

39. *Satellite Telecommunications Providers.* Two economic census categories address the satellite industry. The first category has a small business size standard of \$15 million or less in average annual receipts, under SBA rules.¹³⁴ The second has a size standard of \$25 million or less in annual receipts.¹³⁵

40. The category of Satellite Telecommunications “comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”¹³⁶ Census Bureau data for 2007 show that 512 Satellite Telecommunications firms that operated for that entire year.¹³⁷ Of this total, 464 firms had annual receipts of under \$10 million, and 18 firms had receipts of \$10 million to \$24,999,999.¹³⁸ Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by its action.

41. The second category, *i.e.* “All Other Telecommunications” comprises “establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes

establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.”¹³⁹ For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year.¹⁴⁰ Of this total, 2,347 firms had annual receipts of under \$25 million and 12 firms had annual receipts of \$25 million to \$49,999,999.¹⁴¹ Consequently, the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by its action.

42. *Part 15 Device Manufacturers.* The Commission has not developed a definition of small applicable to unlicensed communications devices manufacturers. Therefore the Commission will utilize the SBA definition applicable to Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. The Census Bureau defines this category as follows: This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.”¹⁴² The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is all firms having 750 or fewer employees.¹⁴³ The U.S. Census data for 2007 indicate that in that year there were 939 active establishments, of which 912 had less than 500 hundred employees and of which 27 had 500 employees or

more.¹⁴⁴ Accordingly, the Commission concludes that the majority of businesses in this category were small.

43. *Telephone Apparatus Manufacturing.* This industry comprises establishments primarily engaged in manufacturing wire telephone and data communications equipment. These products may be standalone or board-level components of a larger system. Examples of products made by these establishments are central office switching equipment, cordless telephones (except cellular), PBX equipment, telephones, telephone answering machines, LAN modems, multi-user modems, and other data communications equipment, such as bridges, routers, and gateways.¹⁴⁵ The SBA has developed a small business size standard for Telephone Apparatus Manufacturing, which is all such firms having fewer than 1,000 employees.¹⁴⁶ U.S. Census data for 2007 indicate that there were 398 establishments that were operational during that year. Of that 398, 393 had less than 100 employees and 5 had 1,000 employees or more.¹⁴⁷ Accordingly, the Commission concludes that the majority of businesses in this category were small.

44. *Other Communications Equipment Manufacturing.* This industry comprises establishments primarily engaged in manufacturing communications equipment (except telephone apparatus, and radio and television broadcast, and wireless communications equipment).¹⁴⁸ The SBA has developed a small business size standard for Other Communications Equipment Manufacturing, which is all such firms having fewer than 750 employees.¹⁴⁹ U.S. Census data for 2007 indicate that there were 452 establishments that were operational in this category of manufacturing during that year. Of that 452, 452 had fewer than 1,000 employees. None had more than 100 employees.¹⁵⁰ Accordingly, the

¹³² U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, “Establishment and Firm Size,” NAICS code 5171103 (released Nov. 19, 2010) (employment size). The data show only two categories within the whole: the categories for 1–4 employees and for 5–9 employees.

¹³³ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, “Establishment and Firm Size,” NAICS code 5179191 (released Nov. 19, 2010) (receipts size).

¹³⁴ 13 CFR 121.201, NAICS code 517410.

¹³⁵ 13 CFR 121.201, NAICS code 517919.

¹³⁶ U.S. Census Bureau, 2007 NAICS Definitions, “517410 Satellite Telecommunications.”

¹³⁷ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=900&-ds_name=EC0751SSSZ4&-lang=en.

¹³⁸ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=900&-ds_name=EC0751SSSZ4&-lang=en.

¹³⁹ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search>.

¹⁴⁰ U.S. Cens http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=900&-ds_name=EC0751SSSZ4&-lang=en.

¹⁴¹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=900&-ds_name=EC0751SSSZ4&-lang=en.

¹⁴² <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=334220&search=2007%20NAICS%20Search>.

¹⁴³ NAICS Code 334220, 13 CFR 121.201(Effective August 8, 2008 to November 4, 2011).

¹⁴⁴ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-ds_name=EC0731SG3&-ib_type=NAICS2007&-NAICS2007=334220.

¹⁴⁵ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

¹⁴⁶ NAICS CODE 334210, 13 CFR 121.201(Effective August 8, 2008 to November 4, 2011).

¹⁴⁷ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-ds_name=EC0731SG3&-ib_type=NAICS2007&-NAICS2007=334210.

¹⁴⁸ <http://www.census.gov/naics/2007/def/ND334290.HTM>.

¹⁴⁹ NAICS CODE 334290, 13 CFR 121.201(Effective August 8, 2008 to November 4, 2011).

¹⁵⁰ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-ds_name=EC0731SG3&-ib_type=NAICS2007&-NAICS2007=334290.

Commission concludes that all of the businesses in this category were small.

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

45. The compliance requirement is that facilities-based providers of commercial mobile data services are required to offer data roaming arrangements to other such providers on commercially reasonable terms and conditions.

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

46. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹⁵¹

47. The adoption of a data roaming rule will benefit small providers in many ways. The record in this proceeding shows that, among other things, many small providers have had difficulty negotiating data roaming agreements with nationwide providers on commercially reasonable terms. The data roaming rule will benefit small providers by helping them to maintain their ability to compete with the major national providers, and ensuring that consumers of such small providers have access to data services when they travel outside of their provider's network coverage. Additionally, the data roaming will help to encourage investment by ensuring that small providers wanting to invest in their networks or expand their coverage into new areas can offer subscribers a competitive level of coverage during the early period of investment and buildout.

48. With respect to data roaming disputes, the Commission establishes a complaint process similar to the complaint process available under the current roaming obligations for interconnected voice and data services. Under the dispute resolution procedures established, providers, including small providers, may file a complaint or file a petition for declaratory ruling to

resolve any disputes arising out of the data roaming rule adopted.

Additionally, although all data roaming complaints will not automatically be placed on the Accelerated Docket, an affected small provider can seek consideration of its complaint under the Commission's Accelerated Docket rules and procedures where appropriate. Furthermore, during ongoing negotiations for data roaming, parties (including small providers) can seek Commission dispute resolution for claims such as, for example, those regarding the commercial reasonableness of the negotiations, providers' conduct, and the terms and conditions of the proffered data roaming arrangement. With respect to claims regarding the commercial reasonableness of the proffered terms and conditions, including prices, the Commission staff may, in resolving such claims, require both parties to provide to the Commission their best and final offers (final offers). This dispute resolution mechanism offers small providers an avenue to have disputes resolved in the event the parties are not able to agree on terms.

49. In light of the benefits described above that small providers will likely receive as a result of the adoption of the data roaming rule, and the extensive and uniform record support from small providers for a data roaming rule consistent with the Commission's approach, the Commission does not address any significant alternatives considered in developing that approach.

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

50. None.

B. Final Paperwork Reduction Act Analysis

70. This document contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the modified information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

71. In this present document, the Commission has assessed the effects of using the procedural complaint processes established in the Commission's Part 1, Subpart E rules, including applicable filing and discovery procedures, to govern the process for data roaming complaints, and find that this will ensure that voice and data roaming complaints are resolved under a consistent Commission process, which will reduce the regulatory burden of understanding and using these processes, and will allow a party to bring a single proceeding to address a roaming dispute that involves both voice and data services. This will, in turn, be more efficient for providers and result in faster resolution of such disputes.

C. Congressional Review Act

72. The Commission will send a copy of this Second Report and Order to Congress and the Government Accountability Office, pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

D. Accessible Formats

73. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY).

IV. Ordering Clauses

74. Accordingly, *it is ordered*, pursuant to the authority contained in Sections 1, 4(i), 4(j), 301, 303, 304, 309, 316, and 332 of the Communications Act of 1934, as amended, and Section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. 151, 154(i), 154(j), 301, 303, 304, 309, 316, 332, and 1302, that this *second report and order* in WT Docket No. 05-265 *is hereby adopted*.

75. *It is further ordered* that Parts 0 and 20 of the Commission's rules, 47 CFR Parts 0 and 20, are *Amended* as set forth in Appendix A, and such rule amendments shall be effective 30 days after the date of publication of the text thereof in the **Federal Register**, except for § 20.12(e)(2), which contains an information collection that is subject to OMB approval.

76. *It is further ordered* that § 20.12(e)(2) and the information collection contained in this Second Report and Order *will become effective* following approval by the Office of Management and Budget. The Commission will publish a document at

¹⁵¹ See 5 U.S.C. 603(c).

a later date establishing the effective date.

77. It is further ordered that, pursuant to Section 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. 155(c), the Enforcement Bureau and the Wireless Telecommunications Bureau are granted delegated authority to resolve any disputes arising out of the data roaming rule, as set forth in this second report and order and the rules in Appendix A.

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

79. It is further ordered that the Commission shall send a copy of this second report and order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

List of Subjects

47 CFR Part 0

Organization and functions (Government agencies).

47 CFR Part 20

Communications common carriers. Federal Communications Commission.

Bulah P. Wheeler, Deputy Manager.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 0 and 20 as follows:

PART 0—COMMISSION ORGANIZATION

■ 1. The authority citation for part 0 continues to read as follows:

Authority: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

■ 2. Amend § 0.111 by revising paragraph (a)(11) introductory text (note remains unchanged) to read as follows:

§ 0.111 Functions of Bureau.

(a) * * * (11) Resolves other complaints against Title III licensees and permittees, including complaints under § 20.12(e) of this chapter.

* * * * *

PART 20—COMMERCIAL MOBILE SERVICES

■ 3. The authority citation for part 20 is revised to read as follows:

Authority: 47 U.S.C. 154, 160, 201, 251–254, 301, 303, 316, and 332 unless otherwise noted. Section 20.12 is also issued under 47 U.S.C. 1302.

■ 4. Revise the heading to part 20 to read as set forth above.

■ 5. Amend § 20.3 by adding the definition “commercial mobile data service” in alphabetical order to read as follows:

§ 20.3 Definitions.

* * * * *

Commercial mobile data service. (1) Any mobile data service that is not interconnected with the public switched network and is:

- (i) Provided for profit; and
(ii) Available to the public or to such classes of eligible users as to be effectively available to the public.

(2) Commercial mobile data service includes services provided by Mobile Satellite Services and Ancillary Terrestrial Component providers to the extent the services provided meet this definition.

* * * * *

■ 6. Amend § 20.12 by adding paragraphs (a)(3) and (e) to read as follows:

§ 20.12 Resale and roaming.

(a) * * *

(3) Scope of Offering Roaming Arrangements for Commercial Mobile Data Services. Paragraph (e) of this section is applicable to all facilities-based providers of commercial mobile data services.

* * * * *

(e) Offering Roaming Arrangements for Commercial Mobile Data Services.

(1) A facilities-based provider of commercial mobile data services is required to offer roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to the following limitations:

(i) Providers may negotiate the terms of their roaming arrangements on an individualized basis;

(ii) It is reasonable for a provider not to offer a data roaming arrangement to a requesting provider that is not technologically compatible;

(iii) It is reasonable for a provider not to offer a data roaming arrangement where it is not technically feasible to provide roaming for the particular data service for which roaming is requested and any changes to the host provider's network necessary to accommodate roaming for such data service are not economically reasonable;

(iv) It is reasonable for a provider to condition the effectiveness of a roaming arrangement on the requesting

provider's provision of mobile data service to its own subscribers using a generation of wireless technology comparable to the technology on which the requesting provider seeks to roam.

(2) A party alleging a violation of this section may file a formal or informal complaint pursuant to the procedures in §§ 1.716 through 1.718, 1.720, 1.721, and 1.723 through 1.735 of this chapter, which sections are incorporated herein. For purposes of § 20.12(e), references to a “carrier” or “common carrier” in the formal and informal complaint procedures incorporated herein will mean a provider of commercial mobile data services. The Commission will resolve such disputes on a case-by-case basis, taking into consideration the totality of the circumstances presented in each case. The remedy of damages shall not be available in connection with any complaint alleging a violation of this section. Whether the appropriate procedural vehicle for a dispute is a complaint under this paragraph or a petition for declaratory ruling under § 1.2 of this chapter may vary depending on the circumstances of each case.

[FR Doc. 2011–10223 Filed 5–5–11; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

[FAC 2005–50; FAR Case 2011–004; Docket 2011–0004; Sequence 1]

RIN 9000–AL88

Federal Acquisition Regulation; Socioeconomic Program Parity

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Correcting amendment.

SUMMARY: This document contains a correction to the interim rule which published in the Federal Register of Wednesday, March 16, 2011 (76 FR 14568). The regulations implement section 1347 of the “Small Business Jobs Act of 2010.”

DATES: Effective on May 6, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Karlos Morgan, Procurement Analyst, at (202) 501–2364. Please cite FAC 2005–50; FAR Case 2011–004.