MAILED
OCT 11 2007
FCC Mail Room

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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks | ) | EB Docket No. 06-119<br>WC Docket No. 06-63 |
| | ) | |

**ORDER ON RECONSIDERATION**

**Adopted: October 2, 2007** **Released: October 4, 2007**

By the Commission:

## I. INTRODUCTION

1. In this Order, we consider six petitions for reconsideration and/or clarification (Petitions)[1] of the Order that adopted Section 12.2 of the Commission's rules which requires that certain local exchange carriers (LECs), including incumbent LECs (ILECs) and competitive LECs (CLECs), and commercial mobile radio service (CMRS) providers have an emergency backup power source for all assets that are normally powered from local AC commercial power.[2] For the reasons set forth below, we grant in part and deny in part the Petitions. We modify Section 12.2 to address several meritorious issues raised in the Petitions. This modification will facilitate carrier compliance and reduce the burden on LECs and CMRS providers, while continuing to further important homeland security and public safety goals.

## II. BACKGROUND

2. In January 2006, Chairman Kevin J. Martin established the Katrina Panel pursuant to the Federal Advisory Committee Act, Public Law 92-463, as amended.[3] The mission of the Katrina Panel was to review the impact of Hurricane Katrina on communications infrastructure in the areas affected by the hurricane and to make recommendations to the Commission regarding ways to improve disaster

[1] *See* Petition for Clarification or, Alternatively, Reconsideration filed by The American Association of Paging Carriers (AAPC) on August 10, 2007 (AAPC Petition); Petition for Reconsideration filed by the DAS Forum on August 10, 2007 (DAS Forum Petition); Petition for Clarification and Reconsideration filed by MetroPCS Communications, Inc. (MetroPCS) on August 10, 2007 (MetroPCS Petition); Petition for Clarification or Reconsideration filed by NextG Networks, Inc. (NextG) on August 10, 2007 (NextG Petition); Petition for Reconsideration filed by PCIA – The Wireless Infrastructure Association (PCIA) on August 10, 2007 (PCIA Petition); and Petition for Clarification and/or Reconsideration filed by The United States Telecom Association on August 10,2007 (USTelecom Petition). *See also Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding*, Public Notice, Report No. 2827 (rel. Aug. 14, 2007). CTIA also filed a Petition for Reconsideration but withdrew its Petition on September 28, 2007. *See* Petition for Reconsideration filed by CTIA – The Wireless Association® (CTIA) on August 10, 2007 (CTIA Petition).

[2] *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Order, 22 FCC Rcd 10541 (2007) (*Katrina Panel Order*). *See also* 47 C.F.R. § 12.2.

[3] 5 U.S.C. App. 2 (1988).

preparedness, network reliability and communications among first responders such as police, fire fighters, and emergency medical personnel.[4] The Katrina Panel submitted its report on June 12, 2006.[5] The Katrina Panel's report described the impact of the worst natural disaster in the Nation's history, as well as the overall public and private response and recovery efforts. The Commission's goal is to take the lessons learned from that disaster and build upon them to promote more effective, efficient response and recovery efforts, as well as heightened readiness and preparedness.

3. The Commission issued a Notice of Proposed Rulemaking (*Notice*) on June 19, 2006 inviting comment on what actions the Commission should take to address the Katrina Panel's recommendations.[6] On July 26, 2006, the Commission issued a Public Notice asking commenters to address the applicability of the Katrina Panel's recommendations to all types of natural disasters (*e.g.*, earthquakes, tornadoes, hurricanes, forest fires) as well as other types of incidents (*e.g.*, terrorist attacks, influenza pandemic, industrial accidents).[7] The Public Notice also asked parties to address whether the Panel's recommendations are broad enough to take into account the diverse topography of our Nation, the susceptibility of a region to a particular type of disaster, and the multitude of communications capabilities a region may possess.[8] The Commission received over 100 comments and reply comments in response to the *Notice*.

4. In June 2007, the Commission released the *Katrina Panel Order* directing the Public Safety and Homeland Security Bureau (PSHSB) to implement several of the recommendations made by the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks (Katrina Panel).[9] Among other things, the Commission adopted a rule requiring some communications providers to have emergency/backup power. The backup power rule adopted specifically states:

> Local exchange carriers (LECs), including incumbent LECs (ILECs) and competitive LECs (CLECs), and commercial mobile radio service (CMRS) providers must have an emergency backup power source for all assets that are normally powered from local AC commercial power, including those inside central offices, cell sites, remote switches and digital loop carrier system remote terminals. LECs and CMRS providers should maintain emergency backup power for a minimum of 24 hours for assets inside central offices and eight hours for cell sites, remote switches and digital loop carrier system remote terminals that are normally powered from local AC commercial power. LECs that meet the definition of a Class B company as set forth in Section 32.11(b)(2) of the Commission's rules and non-nationwide CMRS providers

[4] *See* the Katrina Panel Charter *available at* http://www.fcc.gov/eb/hkip/HKIPCharter.pdf (last visited September 9, 2007); *see also* the Notice of Establishment of the Commission's Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, 71 Fed. Reg. 933 (2006).

[5] Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, *Report and Recommendations to the Federal Communications Commission,* June 12, 2006 (Katrina Panel Report).

[6] *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Notice of Proposed Rulemaking, EB Docket No. 06-119, 21 FCC Rcd 7320 (2006) (*Notice*).

[7] *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 21 FCC Rcd 8583 (2006) (*July 26 Public Notice*).

[8] *Id.*

[9] *Katrina Panel Order*, 22 FCC Rcd 10541 (2007).

with no more than 500,000 subscribers are exempt from this rule.[10]

5. On August 2, 2007, the Commission released an Order that extended the effective date of Section 12.2 of the Commission's rules, the backup power rule adopted in the *Katrina Panel Order*, to October 9, 2007.[11] The Commission did so on its own motion in order to provide additional time to consider the issues raised by CTIA in its Motion for Administrative Stay and to hear from other concerned parties on the issues raised in that motion.[12]

6. As indicated above, seven petitions were filed seeking reconsideration and/or clarification of the backup power rule adopted by the Commission in the *Katrina Panel Order*.[13] The petitioners assert that the Commission should rescind, modify and/or clarify the backup power rule adopted in the *Katrina Panel Order*. The Commission also received five timely comments to these petitions and several additional *ex parte* comments.

## III. DISCUSSION

7. Petitioners argue that the Commission should rescind or substantially modify the backup power rule.[14] Among other things, several petitioners assert that the rule should be modified to implement the Network Reliability and Interoperability Council (NRIC) best practice as recommended by the Katrina Panel and that the Commission should clarify that the rule applies only to assets directly related to the provision of critical communications services.[15] Finally, some petitioners argue that, if the Commission wants to pursue implementation of a backup power rule, it should issue a Notice of Inquiry or Notice of Proposed Rulemaking.[16]

8. Administrative Procedure Act (APA) Notice and Comment. Several petitioners contend that the Commission's adoption of the backup power rule violated the Administrative Procedure Act (APA)[17] by failing to provide adequate notice that it was considering the adoption of that rule and failing to provide opportunity to comment.[18] They argue that the *Notice* was too general to adequately support the backup power rule ultimately adopted and that the final rule deviates too sharply from the initial proposals to satisfy the notice and comment requirements.[19] Petitioners contend that the *Notice* never discussed the backup power issue in terms of a potential mandate and only asked how the Commission could best

[10] 47 C.F.R. § 12.2.

[11] *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Order, EB Docket No. 06-119, WC Docket No. 06-63, 22 FCC Rcd 14246 (*Delay Order*).

[12] *See* CTIA's Motion for Administrative Stay filed July 31, 2007; NextG's Request for Partial Stay of the Commission's Back Up Power Rule filed July 31, 2007 and Errata filed August 1, 2007; and PCIA's Comments in Support of Stay Requests filed August 2, 2007. *See also* CTIA's Motion for Administrative Stay filed September 24, 2007.

[13] As noted before, one of these petitions was subsequently withdrawn.

[14] *See, e.g.*, AAPC Petition at 1-5; PCIA Petition at 8, 19-20; T-Mobile September 4, 2007 Comments in Support of Petitions for Reconsideration (T-Mobile Reply) at 16-18; USTelecom Petition at 1-13.

[15] *See, e.g.*, USTelecom Petition at 3.

[16] *See, e.g.*, PCIA Petition at 5.

[17] *See* 5 U.S.C. § 553(b) (APA requirements relating to notice).

[18] *See, e.g.*, PCIA Petition at 3-4, 15-19; T-Mobile Reply at 8; USTelecom Petition at 9-13.

[19] *Id.*

encourage implementation of the Katrina Panel's backup power recommendation that the Commission encourage the implementation of *NRIC VII Recommendation 7-7-5204*.[20] Petitioners also assert that the *Notice* did not suggest that the physical scope of the backup power recommendation might extend to all cell sites other remote assets or that the Commission intended to select a specific durational requirement for emergency power, let alone an eight- or twenty-four hour standard.[21]

9. Section 553(b) and (c) of the APA requires agencies to give public notice of a proposed rule making that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved" and to give interested parties an opportunity to submit comments on the proposal.[22] The notice "need not specify every precise proposal which [the agency] may ultimately adopt as a rule"; it need only "be sufficient to fairly apprise interested parties of the issues involved."[23] In particular, the APA's notice requirements are satisfied where the final rule is a "logical outgrowth" of the actions proposed.[24]

10. In this instance, the Commission provided adequate notice in compliance with the APA regarding the backup power rule. The Katrina Panel Report repeatedly stated that the lack of adequate backup power for communications facilities was a critical problem after Katrina that caused communications network interruptions and hampered recovery efforts.[25] These findings provided the context for the Report's recommendation that the Commission encourage the NRIC best practice that states: "[s]ervice providers, network operators and property managers should ensure availability of emergency/backup power (*e.g.*, batteries, generators, fuel cells) to maintain critical communications services during times of commercial power failures . . . ."[26] In the *Notice*, the Commission noted that the Katrina Panel observed significant challenges to maintenance and restoration of communications services after Hurricane Katrina, due in part to problems with access to key resources such as power and/or generator fuel.[27] The Commission also noted that the Katrina Panel recommended that the Commission encourage the implementation of certain NRIC best practices intended to promote the reliability and

[20] *See, e.g.*, T-Mobile Reply at 5; USTelecom Petition at 9-13.

[21] *See, e.g.*, MetroPCS Petition at 6-7; PCIA Petition at 3-4, 15-19; T-Mobile Reply at 5, 8; US Telecom Petition at 9-13.

[22] *See* 5 U.S.C. § 553(b), (c).

[23] *Nuvio Corp. v. FCC*, 473 F.3d 302, 310 (D.C. Cir. 2006) (internal quotations omitted).

[24] *Public Service Commission of the District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 1990).

[25] *See* Katrina Panel Report at i ("lack of power and/or fuel" was one of the "three main problems that caused the majority of communications network interruptions"); *id.* at 5-6 ("[T]he duration of power outages far outlasted most generator fuel reserves, leading to the failure of otherwise functional infrastructure."); *id.* at 9 ("In general, cellular/PCS base stations were not destroyed by Katrina, although some antennas required adjustment after the storm. Rather, the majority of the adverse effects and outages encountered by wireless providers were due to a lack of commercial power or a lack of transport connectivity to the wireless switch . . . ."); *id.* at 14 ("While the communications industry has generally been diligent in deploying backup batteries and generators and ensuring that these systems have one to two days of fuel or charge, not all locations had them installed. . . Where generators were installed and operational, the fuel was generally exhausted prior to restoration of power."); *id.* at 17 ("Backup generators and batteries were not present at all facilities. Where they were deployed, most provided only enough power to operate particular communications facilities for 24-48 hours – generally a sufficient period of time to permit the restoration of commercial power in most situations, but not enough for a catastrophe like Hurricane Katrina.").

[26] *Id.* at 39.

[27] *Notice*, 21 FCC Rcd at 7323.

resiliency of the 911 and E911 architecture, including a recommendation that service providers and network operators should "ensure" availability of emergency backup power capabilities (located on-site, when appropriate).[28] The Commission sought comment on how the Commission can best encourage implementation of these recommendations consistent with our statutory authority and jurisdiction and welcomed further suggestions on measures that could be taken to strengthen 911 and E911 infrastructure and architecture.[29] The Commission also invited "broad comment on the Independent Panel's recommendations and on the measures the Commission should take to address the problems identified" and to build upon the lessons learned from Hurricane Katrina and promote greater resiliency and reliability of communications infrastructure, heightened readiness and preparedness, and more effective, efficient response and recovery efforts, in the future.[30]

11. Further, in the *Notice*, the Commission sought comment on whether it should rely on voluntary consensus recommendations or whether it should rely on other measures for enhancing readiness and promoting more effective response efforts.[31] The *Notice* also invited comment on whether the Katrina Panel's observations warranted additional measures or steps beyond the report's specific recommendations and welcomed suggestions and recommendations of different actions or additional measures beyond the Katrina Panel's recommendations.[32] In its report and recommendations, the Katrina Panel found that the lack of power and/or fuel was one of three main problems that caused the majority of communications network interruptions and significant impediments to the recovery effort in the aftermath of Hurricane Katrina.[33] The Katrina Panel Report also noted that during and after the hurricane, the power needed to support the communications networks was generally unavailable throughout the region and that backup batteries and generators were required for communications systems to continue to operate.[34] The Katrina Panel further noted that "the majority of the adverse effects and outages encountered by wireless providers were due to a lack of commercial power or a lack of transport connectivity to the wireless switch."[35] Additionally, the Katrina Panel Report stated that "[w]ireless providers cited security for their personnel, access and fuel as the most pressing needs and problems affecting restoration of wireless service" and that the loss of power in the wireline telephone network also had a huge impact on the ability of public safety systems to function.[36] The Katrina Panel noted that electric utility networks had a high rate of survivability following Hurricane Katrina due, in part, to the

---

[28] *Id.* at 7326. *See also* Katrina Panel Report at 39 (recommending that, in order to ensure a more robust E911 service, the FCC should encourage the implementation of the following NRIC best practice:

> Service providers, network operators and property managers should ensure availability of emergency/backup power (*e.g.*, batteries, generators, fuel cells) to maintain critical communications services during times of commercial power failures, including natural and manmade occurrences (*e.g.*, earthquakes, floods, fires, power brown/blackouts, terrorism). The emergency/backup power generators should be located onsite, when appropriate. *See NRIC VII Recommendation 7-7-5204.*)

[29] *Id.*

[30] *Id.* at 7320, 7322.

[31] *Id* at 7322.

[32] *Id.*

[33] Katrina Panel Report at i, 13, 17-18 (problems with maintaining and restoring power for communications infrastructure significantly affected the recover process).

[34] *Id.* at 14.

[35] *Id.* at 9.

[36] *Id.* at 7, 9.

fact that they were built with significant onsite backup power supplies (batteries and generators).[37] Although the Katrina Panel found that "the communications industry has generally been diligent in deploying backup batteries and generators and ensuring that these systems have one to two days of fuel or charge," it also noted that not all locations had such backup batteries or generators installed and that, because all locations were not able to exercise and test the backup equipment in any systemic fashion, some generators and batteries did not function during the crisis.[38] Although the power outages during and after Hurricane Katrina were exceptionally long, the Panel's observations clearly emphasized the importance of power supply to resiliency of communications networks.

12. Taken together, the questions raised in the *Notice* as well as the Katrina Panel Report's findings regarding the lack of emergency power were sufficient to put interested parties on notice that the Commission was considering how to address the lack of emergency backup power, including through the possible adoption of an emergency backup power rule. Specifically, the *Notice* sought comment on how the Commission could best encourage implementation of various NRIC best practices, including ensuring the availability of emergency backup power.[39] Even if that language were not read to propose a mandatory rule, the *Notice* still gave ample notice that this was a possibility. The *Notice* specifically inquired about "whether [the Commission] should rely on voluntary consensus recommendations, as advocated by the [Katrina] Panel, or whether [it] should rely on *other measures* for enhancing readiness and promoting more effective response efforts,"[40] a line of inquiry that the Commission reiterated in the *July 26 Public Notice*.[41] Moreover, the D.C. Circuit has held that the ultimate adoption of a mandatory rule can constitute the logical outgrowth of a voluntary standard.[42] Thus, because parties could have anticipated that the rule ultimately adopted was "possible," it is considered a "logical outgrowth" of the original proposal, and there is no violation of the APA's notice requirements.[43]

13. Indeed, we note that the National Emergency Number Association (NENA) did propose a backup power requirement in response to the *Notice*.[44] In addition, St. Tammany Parish Communications District 1 told the Commission that "[v]oluntary consensus measures . . . have fallen short many times" and that "it is imperative that [wireline] and wireless telephone providers be required to demonstrate they have adequate backup procedures in place."[45] Carriers also commented on the importance of having

[37] *Id.* at 12.

[38] *Id.* at 14, 17-18.

[39] *Notice*, 21 FCC Rcd at 7326 ¶ 16 (emphasis added).

[40] *Notice*, 21 FCC Rcd at 7322 ¶ 7 (emphasis added).

[41] *July 26 Public Notice*, 21 FCC Rcd at 8583; *see also* Separate Statement of Commissioner Copps ("I am especially pleased that we seek comment on whether voluntary implementation is enough or whether we need to consider other measures.").

[42] *See New York v. EPA*, 413 F.3d 3, 44 (D.C. Cir. 2005) (EPA's adoption of certain mandatory environmental requirements following earlier proposal of a "menu of alternatives" approach by which state governments would be allowed to choose any or all of these requirements, was a "readily foreseeable outcome[] that could result from the proposal" and thus was the logical outgrowth of that proposal).

[43] *See Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004) (discussing APA notice requirements and the "logical outgrowth" test).

[44] *See* NENA's August 7, 2006 comments in response to the *Notice* at 6. *Cf. Rybachek v. EPA*, 904 F.2d 1276, 1288 (9th Cir. 1990) (finding that final rule was "logical outgrowth" of earlier proposal where agency issued NPRM mentioning only the possibility of case-by-case imposition of environmental requirements but issued final rule mandating these requirements after public comments recommended mandates).

[45] Comments of St. Tammany Parish Communications District 1, at 1-2.

backup power. CTIA observed that wireless carriers "must ensure network reliability and reliance" and that, to do so, they "provision their cell sites and switches with batteries to power them when electrical grids fail" and "maintain permanent generators at all of the switches and critical cell sites, as well as an inventory of backup power generators to recharge the batteries during extended commercial power failures."[46] USTA likewise gave examples of telephone companies that had already deployed backup power capabilities that enabled their cell networks to remain in operation for several days after a loss of main power.[47] In light of these comments, we do not find credible the argument that the *Notice* failed to apprise parties that the Commission would address the issue of backup power in this proceeding.

14. Petitioners' argument that the Commission did not give adequate notice that it might select a specific durational requirement for emergency power, such as twenty-four or eight hours, also lacks merit. Had we adopted a general backup power requirement that did not require a minimum amount of backup power, we would have risked creating an illogical and meaningless requirement that would have allowed providers to have only one minute of backup power. Thus, parties should have realized that an emergency backup power mandate would inevitably include a specific durational requirement.

15. Statutory Authority. PCIA asserts that Section 1 of the Communications Act, the statutory authority upon which the Commission adopted the backup power rule, is patently inadequate statutory authority.[48] PCIA contends that Section 1 of the Communications Act, as amended, (the "Act")[49] is only a general grant of jurisdiction that, absent other specific authority, does not authorize the Commission to impose requirements to maintain backup power at cell sites.[50] PCIA argues that the Commission's ancillary authority under Section 1 of the Act does not empower it to act where such action would be "ancillary to nothing."[51]

16. The Commission's Section 1 ancillary jurisdiction covers circumstances where: (1) the Commission's general jurisdictional grant under Title I covers the subject of the regulations, and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.[52] This two-part test for ancillary jurisdiction was developed by the Supreme Court in

[46] CTIA–The Wireless Association Comments ("CTIA Comments") at 8.

[47] Comments of the United States Telecom Association at 5-6.

[48] PCIA Petition at 15-16.

[49] 47 U.S.C. § 151.

[50] PCIA Petition at 15-16 (citing *Am. Library Ass'n v. FCC,* 406 F.3d 689 and *Motion Picture Assn of America, Inc. v. FCC,* 309 F.3d 796).

[51] PCIA Petition at 15 (citing *Am. Library Ass'n,* 406 F.3d at 702 and *United States v. Southwestern Cable Co.*, 392 US 157, 178 (1968)). PCIA further states that it "agrees with CTIA that the Commission's reliance on only Section 1 is an insufficient statutory basis to sustain the new regulation," citing the CTIA July 31, 2007 Motion for Stay at 8-11. CTIA also states that Section 1, standing alone, is not the type of clear expression of Congressional intent that is necessary to impose such a heavy obligation on the wireless industry and, indeed, this would be particularly anomalous in the context of CMRS, which since its inception has been largely deregulated at the federal level (citing *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1245 (11th Cir. 2006) (describing the "the pro-competitive, deregulatory framework for [wireless service providers] prescribed by Congress.") (quotation omitted)). *See* CTIA's July 31, 2007 Motion for Stay at 10-11. Finally, CTIA asserts that, even in cases in which the Commission has relied on Section 1 in addition to other provisions of Title I of the Act, such as Section 4(i), 47 U.S.C. § 154(i), to adopt regulations pursuant to its ancillary authority, the courts have routinely rejected such efforts. *See* CTIA's July 31, 2007 Motion for Stay at 9-11.

[52] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968) (*Southwestern Cable*) (upholding the FCC regulatory authority over cable television).

*Southwestern Cable.*[53]

17. To fulfill the first prong of the ancillary jurisdiction test, the subject of the regulation must be covered by the Commission's general grant of jurisdiction under Title I of the Communications Act, which encompasses "all interstate and foreign Communication by wire or radio."[54] In the instant rule making, this first prong of the ancillary jurisdiction test is met because the backup power rule adopted by the Commission in the *Katrina Panel Order* pertains to the provisioning of "interstate and foreign commerce in communication by wire and radio."[55] The second prong of the ancillary jurisdiction test requires that the subject of the regulation must be reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.[56] It cannot seriously be disputed that the backup power requirement is "reasonably ancillary to the effective performance" of the Commission's responsibilities to promote public safety. Section 1 itself makes clear that one of the Commission's missions is to "make available . . . [a] wire and radio communication service with adequate facilities . . . for the purpose of *promoting safety of life and property* through the use of wire and radio communications." 47 U.S.C. § 151 (emphasis added). Section 1 thus requires the Commission to "consider public safety" and to "take into account its *duty* to protect the public." *Nuvio Corp. v. FCC*, 473 F.3d 302, 307 (2006); *see also id.* at 311 (Kavanaugh, J., concurring) ("the FCC possesses statutory authority . . . to address the public safety threat by banning providers from selling voice services until the providers can ensure adequate 911 connections"). And as this Court has recognized, it is well "within the Commission's statutory authority" to " 'make such rules and regulations . . . as may be necessary in the execution' " of its section 1 responsibilities."[57] Section 303(r) also provides ample authority to support the Commission's action here. Section 303(r) provides that the Commission may "[m]ake such rules and regulations . . . as may be necessary to carry out the provisions of this Act.[58]

18. The presence of a backup power source installed by all local exchange carriers (LECs), including incumbent LECs (ILECs) and competitive LECs (CLECs), as well as commercial mobile radio service (CMRS) providers for all assets that are normally powered from local commercial power including those inside central offices, cell sites, remote switches and digital loop carrier system remote terminals will facilitate communication for the purposes of national defense and the promotion of "safety of life and property" during emergencies. Communications networks cannot operate without a power source. The Commission must therefore be mindful of an adequate power supply, particularly in emergencies, if it is to discharge its core responsibilities under Section 1 of the Communications Act to regulate communications for the promotion of national defense, public safety and the protection of property. If commercially supplied power is incapacitated, the communications network will also fail. The backup power rule adopted by the Commission is a short-term attempt to sustain communication in a severe emergency for the purposes of promoting the Commission's salient purpose pursuant to Section 1 to regulate interstate communications by wire and radio.

19. PCIA's reliance on the broadcast flag ruling by the U.S. Court of Appeals for the District of Columbia (Court) is misplaced. In that case, the Court found that the Commission had not satisfied the

---

[53] *Id.* This test was subsequently applied by the Supreme Court in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) *(Midwest Video I)* and *United States v. Midwest Video Corp.*, 440 U.S. 689 (1979) *(Midwest Video II).*

[54] *Southwestern Cable,* 392 U.S. at 167. *See also Am. Library Ass'n,* 406 F.3d at 693.

[55] 47 U.S.C. § 151.

[56] *Southwestern Cable,* 392 U.S. at 178.

[57] *Rural Telephone Coalition v. FCC,* 838 F.2d 1307, 1315 (D.C. Cir. 1988) (quoting 47 U.S.C. § 154(i)).

[58] 47 U.S.C. § 303(r). *See also* 47 U.S.C. § 332.

second prong of the ancillary jurisdiction test because the restriction on recording digital television programs that were transmitted by cable or over-the-air broadcast exceeded the Commission's authority to regulate the transmission of communications by wire and radio given that the restriction pertained to a regulation imposed outside the course of the act of transmitting the communication.[59] In this case, by contrast, backup power is necessary for the communication to be transmitted at all.

20. Arguments Regarding Lack of Record Support, Consideration of Important Factors or Reasoned Basis for Rule. Petitioners contend that the backup power rule is arbitrary and capricious because the Commission failed to explain why a mandatory obligation including an inflexible minimum 8 or 24 hour period was necessary and why it rejected less restrictive alternatives to the rule, such as a voluntary best practices regime as recommended by the Katrina Panel.[60] Several petitioners also allege that the Commission failed to consider the impact of the rule, failed to consider important aspects of the very problem it sought to redress, and failed to explain why present carrier preparedness plans are inadequate.[61] Additionally, several petitioners argue that the backup power rule adopted lacks record support.

21. Petitioners argue that there is no record evidence to support the backup power mandate in general, or the eight or 24-hour minimum in particular.[62] Some petitioners note that the comments described in the Order when discussing the backup power rule do not concern CMRS providers at all, do not suggest any mandatory minimum standard, or have nothing to do with backup power.[63] However, the rule adopted by the Commission enjoyed strong factual support. First, as described *supra* at ¶ 11, the Katrina Panel repeatedly emphasized the importance of power supply to resiliency of communications networks. Further, it noted that backup generators and batteries were not present at all facilities.[64] Additionally, the Katrina Panel Report stated that power for radio base stations and battery/chargers for portable radio devices are carefully planned for public safety systems; however, "generators are typically designed to keep base stations operating for 24 to 48 hours."[65] This language, along with the Katrina Panel's recognition that 24-48 hours is generally a sufficient time to permit the restoration of power in most situations,[66] clearly provides support for requiring LECs and CMRS providers to maintain backup power for a minimum of 24 hours for assets located inside central offices. The 24 hour requirement imposes relatively less burden while still generally providing sufficient time for restoration of commercial power or for carriers to allocate additional power sources. Further, the Commission recognized the burdens of ensuring longer durations of backup power at other locations, which have subsequently been detailed by petitioners, and reasonably required only 8 hours of backup power for such locations,

[59] *Am. Library Ass'n*, 406 F.3d at 703-704.

[60] *See, e.g.* PCIA Petition at 6; September 4, 2007 Comments of Sprint Nextel (Sprint Nextel Reply) at 4; USTelecom Petition at 3, 10-12.

[61] *See, e.g.* NextG Petition at 2-13; T-Mobile Reply at 8; USTelecom Petition at 2-3, 7-13.

[62] *See, e.g.*, MetroPCS Petition at ii, 4, 6-7; PCIA Petition at 15-18; USTelecom Petition at 9-13.

[63] *See, e.g.*, DAS Forum Petition at 5-7; Sprint Nextel Reply at 2-3; USTelecom at 12 (noting that NENA's comments addressed only wireline providers central offices and did not discuss any specific time frame for backup power and that St. Tammany Parsh's comments discussed only backup procedures and made no mention of backup power.).

[64] Katrina Panel Report at 17.

[65] *Id.* at 7. NENA further states that its representative on the Katrina Panel urged that wireless sites should include generators with a minimum of five days fuel supply and backup battery systems rated for a minimum of eight hours. *See* NENA's September 11, 2007 Comments at 1-3.

[66] *Id.* at 17.

including, but not limited to, cell sites, remote switches and digital loop carrier system remote terminals.[67] This will provide at least eight hours for commercial power restoration or carrier actions to obtain additional backup power sources.[68]

22. Additionally, the Katrina Panel's recommendation was that the Commission encourage the implementation of the NRIC VII Recommendation 7-7-5204. That recommendation states that "[s]ervice providers, network operators and property managers should ensure availability of emergency/backup power. . ." The terms "service providers" and "network operators" clearly include CMRS providers. In the *Katrina Panel Order*, the Commission noted that NENA recommended that "the FCC or state commissions, as appropriate, require all telephone central offices to have an emergency backup power source."[69] NENA states that, in its comments in the Katrina Panel Docket, it chose to mention telephone central offices as emblematic, not exhaustive, of critical switching points in wire and wireless networks, and it also endorsed the broader scope of NRIC Recommendation 7-7-5204.[70]

23. The Commission determined that a mandatory backup power requirement would be in the public interest. Although several carriers described their backup power plans, the Katrina Panel Report made clear the importance of backup power for resilient communications and restoration of communications services that have been disrupted. The report further made clear that, although many carriers do have backup power or backup power plans, not all locations have backup power. The Katrina Panel also noted that because those communications providers did not necessarily test and exercise their backup power sources in a systematic fashion, generators and batteries might not function during the crisis.[71] Imposing a backup power rule would ensure that more communications assets have backup power and that providers ensure the availability of this power. Access to communications technologies during times of emergency is critical to the public, public safety personnel, hospitals, and schools, among others. Therefore, because the benefits of ensuring resilient communications during times of crises are so great, the Commission determined that a backup power rule was in the public interest. Moreover, it is important that both LEC and CMRS providers have backup power, because the public, public safety personnel, and hospitals, among others, rely heavily on both types of providers. In fact, many Americans now rely on only a wireless phone and public safety entities, hospitals and others are increasingly relying on wireless technologies.[72] As the Katrina Panel Report and commenters note, lack of commercial power was one of the main causes of wireless outages during Hurricane Katrina, access to fuel was one of the

---

[67] 47 C.F.R. § 12.2.

[68] In the US Telecom Petition and a Verizon Wireless *Ex Parte*, both providers reported that the majority of their remote sites have backup power. *See* USTelecom Petition at 2,8 (noting that the vast majority of all network remote terminals have onsite backup battery power typically designed to an eight hour engineering standard, although the actual life of the battery at any point in time depends on numerous factors and some remote terminals are too small to support a battery); Verizon Wireless *Ex Parte* filed September 4, 2007 (stating that Verizon Wireless' internal design standard is for eight hours or more of backup power (generators, batteries or both) at every cell site where possible, that the majority of its cell sites have on-site generators or batteries capable of providing backup power for much longer than eight hours, that only a small percentage of sites have only batteries that will not last for eight hours, and that only a handful of sites have no on-site backup power at all).

[69] *Katrina Panel Order,* 22 FCC Rcd at 10565 ¶ 76; NENA Comments at 6.

[70] NENA's September 11, 2007 Comments at 1-3.

[71] *Id.* at 14, 17-18.

[72] *See, e.g., Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Eleventh Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 21 FCC Rcd 10947, 11010, ¶ 158 (2006) ("In the last three years alone, the total mobile telephone subscriber base has increased 50 percent.").

wireless providers' most pressing needs during that catastrophe, and it is important that both wireless and wireline carriers ensure network reliability and resiliency by provisioning their sites with back up power.[73]

24. Petitioners also allege that the Commission failed to consider burdens and important matters, some of which affect the ability of carriers to comply with the rule. They contend that legal impediments, including contractual obligations and inconsistency with federal, state and local environmental, safety, building and zoning laws will make compliance with the rule difficult, if not impossible and could result in preemption issues regarding state and local laws.[74] Petitioners note that carriers have site leases with contractual obligations that regulate the placement, installation and operation of power sources.[75] Additionally, petitioners assert that compliance with the backup power rule could result in threats to public health and safety. For instance, petitioners state that the installation of a generator and its combustible fuel on the roof of a school or public building, where many transmitters are located, may pose a risk to public health and safety even when in compliance with law.[76] Further, petitioners assert that the Commission failed to properly consider the length of time it would reasonably take for providers to comply with the rule. They contend that compliance will take a significant amount of time and the time allowed by the *Katrina Panel Order* is insufficient, because providers must obtain permits, do site inspections, conduct structural engineering analysis, renegotiate leases, obtain permits, ensure compliance with legal requirements, evaluate backup power needs, and order and install the necessary equipment.[77] Petitioners also assert that compliance will take time because thousands of "non-critical" sites do not have backup power and many of the sites that do have backup power do not have the amount required.[78] As discussed in greater detail below, petitioners also argue that physical and other practical limitations make it difficult or impossible to comply with the backup power rule. Finally, petitioners argue that the Commission did not adequately consider the economic burden the rule will impose.[79]

---

[73] *See, supra* ¶¶ 11, 13.

[74] *See, e.g.*, DAS Forum Petition at 6-7, 10; MetroPCS Petition at ii, 8-12; PCIA Petition at 9; T-Mobile Reply at 9.

[75] Petitioners state that, in order to comply with the rule, carriers would be required to maintain a large number of battery and fuel-powered generators at cell sites. Because these power systems contain lead, sulfuric acid, oils and flammable liquids, they are subject to a host of federal, state, and local environmental and safety laws that strictly limit their placement and use. They note that, at a multi-carrier site, compliance with the rule could require the addition of several thousand pounds of additional weight, which would implicate local building code limitations. Petitioners note that placement and operation of diesel generators raises environmental issues and implicate federal and state environmental laws are implicated by the rule. They state that state and local government laws and ordinances require permits before installing new diesel generators and issuance of such permits can be delayed while authorities negotiate to address concerns re: noise pollution, ventilation, fuel leakage, etc. Petitioners argue that site leases that contractually limit the placement of such equipment will have to be renegotiated prior to installation. *See, e.g., id.*

[76] *See, e.g.*, DAS Forum at 9; MetroPCS Petition at 8-9; T-Mobile Reply at 10. Because several petitioners refer to the CTIA Petition, we note that CTIA also noted that a rooftop location could expose the equipment to lightning or other weather conditions that could compromise the equipment, making it more susceptible to fuel leakage and fire; that the location of such equipment in a church steeple may not provide adequate ventilation; and that pollutants emitted by diesel generators have been identified as leading contributors to a variety of environmental and health problems. *See* CTIA Petition at 18-19.

[77] *See, e.g.*, PCIA Petition at 5, 10; T-Mobile Reply at 7, 9, 11-12; USTelecom at 8; Verizon Wireless *Ex Parte* at 2-3.

[78] *Id.*

[79] *See, e.g.*, MetroPCS Petition at 5, 13; NextG Petition at 2-3, 10-15; PCIA Petition at 5; Sprint Nextel Reply at 3-4.

25. We find that Petitioners' arguments regarding legal impediments and threat to public health and safety to be compelling and modify Section 12.2 to state that LECs and CMRS providers are not required to meet the backup power requirement if they demonstrate, through the reporting requirement described below, that such compliance is precluded by: (1) federal, state, tribal or local law; (2) risk to safety of life or health; or (3) private legal obligation or agreement. With respect to private legal obligations or agreements, LECs and CMRS providers should make efforts to revise agreements to enable rule compliance where possible, for example through renegotiations or renewals. Obviously, the Commission will disapprove of attempts to circumvent the rule through private agreements. We believe such exemptions are warranted because those impediments create a substantial burden for LECs and CMRS providers to overcome in order to comply with the rule that in some cases may be insurmountable. In the case of risk to safety of life or health, such an exemption is obviously in the public interest. As noted, *supra* at ¶ 7, some petitioners assert that the Commission should clarify that the backup power rule applies only to assets directly related to the provision of critical communications services.[80] We agree that the requirement should be clarified to apply only to assets necessary to the provision of communications services and modify the rule accordingly. We decline, however to limit the rule to "critical" communications services, because, although that term was included in the NRIC best practice recommended by the Katrina Panel, it is not well defined and we believe, for public safety and public interest reasons, all assets necessary to the provision of communications services should have backup power. We also agree with AT&T that on-site power sources satisfy the requirement of this rule if such sources were originally designed to provide the minimum backup power capacity level required herein and the provider has implemented reasonable methods and procedures to ensure that batteries are regularly checked and replaced when they deteriorate.[81] Finally, we find that the requirement should not be limited to assets normally powered from local "AC" commercial power. Regardless of the type of commercial power used, assets necessary to maintain communications should have backup power and be as reliable and resilient as possible. We also note that the NRIC best practice recommended by the Katrina Panel did not limit its recommendation in this way. Accordingly, we delete the reference to "AC" in the rule.

26. While today we address concerns raised by LECs and CMRS providers regarding their obligation to ensure emergency backup power, given the importance of backup power reserves during times of emergency, we will seek information regarding the extent to which LECs and CMRS providers are in compliance with this rule. Accordingly, we also modify Section 12.2 of our rules to require LECs and CMRS providers to file reports with the Commission that identify the following information: (1) an inventory listing of each asset that was designed to comply with the backup power mandate; (2) an inventory listing of each asset where compliance is precluded due to risk to safety or life or health; (3) an inventory listing of each asset where compliance is precluded by private legal obligation or agreement; (4) an inventory listing of each asset where compliance is precluded by Federal, state, tribal or local law; and (5) an inventory listing of each asset designed with less than the required emergency backup power capacity and that is not otherwise precluded from compliance for one of the three reasons identified in paragraph 25, above.[82] LECs and CMRS providers must file these reports within six months of the

[80] *See, e.g.,* MetroPCS Petition at 13; NENA September 11, 2007, Comments at 3; NextG Petition at 17; Sprint Nextel Reply at 2; USTelecom Petition at 3.

[81] AT&T *Ex Parte* Notice filed September 27, 2007; *see also* Verizon Wireless *Ex Parte* filed September 4, 2007 (noting that batteries begin to deteriorate the minute they are installed and, although Verizon Wireless has methods and procedures in place that insure that batteries are regularly checked and replaced when they deteriorate, it cannot guarantee that every battery designed to provide 8 hours of backup power will actually do so).

[82] LECs that meet the definition of a Class B company as set forth in Section 32.11(b)(2) of the Commission's rules and non-nationwide CMRS providers with no more than 500,000 subscribers are exempt from the rule and the reporting requirements in paragraphs 26-27.

effective date of this requirement, and must include a description of facts supporting the basis of the LEC's or CMRS provider's claim of preclusion from compliance. For example, claims that a LEC or CMRS provider cannot comply with the backup power mandate due to a legal constraint must include the citation(s) to the relevant laws and, in order to be deemed precluded from compliance, the law or other legal constraint must prohibit the LEC or CMRS provider from complying with the backup power requirement. The mere need to obtain a permit or other approval will not be deemed to preclude compliance with the backup power requirement. Claims that a LEC or CMRS provider cannot comply with the backup power mandate with respect to a particular asset due to a private legal obligation or agreement must include the relevant terms of the obligation or agreement and the dates on which the relevant terms of the agreement became effective and are scheduled to expire. Claims that a LEC or CMRS provider cannot comply with the backup power mandate with respect to a particular asset due to risk to safety of life or health must include a description of the particular public safety risk and sufficient facts to demonstrate substantial risk of harm. We direct the PSHSB to develop an appropriate auditing program to ensure that carriers' exclusion filings are reasonable and accurate.

27. LECs or CMRS providers identifying assets designed with less than the required emergency backup power capacity and not otherwise precluded from compliance for one of the three reasons listed above must comply with the backup power requirement or file, within 12 months from the effective date of the rule, a certified emergency backup power compliance plan that is subject to Commission review. That plan must describe how, in the event of a commercial power failure, the LEC or CMRS provider intends to provide emergency backup power to 100 percent of the area covered by any non-compliant asset, relying on on-site and/or portable backup power sources or other sources as appropriate. The emergency backup power must be sufficient for service coverage as follows: a minimum 24 hours of emergency backup power for assets inside central offices and eight hours for other assets such as cell sites, remote switches, and digital loop carrier system remote terminals. The provider must be able to ensure backup power is available for 100 percent of the area covered by any non-compliant asset pursuant to the emergency backup power compliance plan on the date that the plan is filed. All reports and plans required by Section 12.2 of the Commission's rules will be automatically afforded confidentiality, because the information in those reports and plans is sensitive, for both national security and/or commercial reasons. This reporting requirement should not be burdensome in light of many LEC and CMRS provider arguments that they already have business continuity plans that address the issue of backup power and in light of the fact that the plan is not due until 12 months after the effective date of the modified rule which will require Office of Management and Budget approval before going into effect. In any event such burdens are outweighed by the importance of having backup power for communications assets.

28. Petitioners argue that the Commission failed to consider the length of time it would reasonably take for CLECs and CMRS providers to comply with the rule and that it will take significant time to evaluate backup power needs, conduct structural engineering analyses, renegotiate leases if needed, prepare necessary applications for permits and other authorizations, ensure compliance with all applicable building codes and environmental regulations, coordinate with counsel, architects, construction personnel and government officials, order and receive the necessary equipment, and properly install the backup power source.[83] We note that the *Katrina Panel Order* was released on June 8, 2007, almost four months ago, and LECs and CMRS providers have known of the backup power requirement since that

[83] *See, supra* n77. Some petitioners also note that the rule will result in an increased demand for batteries and generators that might cause a production strain and limit the timely availability of these resources. However, they have provided no proof in support of these assertions and for the reasons stated in this paragraph, we believe providers will have adequate time to comply with the rule. Moreover, rule modifications we adopt today will decrease the amount of backup power sources that will need to be installed.

time. Further, the modified backup power rule adopted herein will not go into effect until OMB approves the new information collection, giving providers additional time to come into compliance. To the extent LECs and CMRS providers identify non-compliant assets, they will receive even more time to file emergency backup power compliance plans. In addition, the modifications to the rule mitigate these concerns by exempting assets from compliance when precluded by law, private legal obligation or agreement, or risk to safety of life or health and by allowing an emergency backup power compliance plan in cases where assets do not comply with the 8-24 hour rule and are not subject to the exceptions. As such, we believe that it will be feasible for providers to comply with the rule.

29. Several petitioners argue that compliance with the backup power rule is burdensome due to physical and other practical limitations, that the required space might not be available at many sites, and that providers may be forced to modify structures containing cell transmitters or to build new structures.[84] They assert, for example, that roofs and floors need to be designed to support the weight of power sources, that many rooftop cell sites were not engineered with the additional weight requirements made necessary by the backup power rule, and that many of those structures may simply not be able to physically support the weight of additional batteries or a generator.[85] Petitioners also argue that there is not enough space at many cell sites to add additional backup power sources and note that cell transmitters are often placed in locations with limited room, such as building rooftops, church steeples and inside buildings.[86] USTelecom notes that some remote terminals are physically too small to support a backup battery or a battery over a certain size.[87] T-Mobile reports that, in the case of liquid propane-fueled generators, Occupational Safety and Health Administration requirements mandate a 10-foot radius clearance between the liquid propane fuel tank and its ignition source.[88] T-Mobile argues that this could substantially increase the amount of space needed to install a backup power source.[89]

30. We are not convinced that LECs and CMRS providers should be excused from having emergency backup power solely because they have chosen to place their assets at locations with limited weight or space capacities. The ultimate goal of this rule is to ensure that carriers have sufficient emergency backup power, particularly during times of emergencies. We recognize that, in order to comply with the rule, some carriers may have to modify sites to accommodate additional equipment or, in some cases, find other, more suitable, locations for their assets. We believe, however, that any such burdens are far outweighed by the ultimate goal of this rule. For similar reasons, we also reject the notion that carriers should be excused from complying with the rule for vague "practical" reasons. Having said this, however, a carrier could be excused from the rule to the extent that the carrier can demonstrate that an asset with purported physical constraints fall into one of the three exceptions listed above. Additionally, where assets do not comply with the 8-24 hour rule and are not subject to the exceptions, we

[84] *See, e.g.*, DAS Forum Petition at 9, 4-5; MetroPCS Petition at ii, 9-13; T-Mobile Reply at 11; USTelecom Petition at 2; Verizon Wireless *Ex Parte* filed September 4, 2007 at 2-3.

[85] *Id.*

[86] *Id.* PCIA asserts that the backup power rule is at odds with federal efforts to limit the physical presence of cell sites and the policy of promoting collocation. PCIA Petition at 8-10; *see also* T-Mobile Reply at 10-11. While we recognize the desire to collocate and the flexibility afforded by collocation, the goal of ensuring reliable and resilient communications outweighs any benefits afforded by collocation. Further, the backup power rule, particularly as amended in this Order on Reconsideration, does not necessarily prevent collocation.

[87] USTelecom Petition at 2, 8.

[88] T-Mobile Reply at 11; see also PCIA Petition at 9 (stating that fire codes require safety zones around propane and diesel tanks).

[89] *Id.*

now allow an emergency backup power compliance plan.

31. Although petitioners argue that the economic burden that the backup power rule will impose is substantial, the record before the Commission showed that several carriers have already deployed back-power power capabilities, some of which allow them to remain in operation for several days in the event of a loss of main power.[90] In any event, we find that the benefits of ensuring sufficient emergency backup power, especially in times of crisis involving possible loss of life or injury, outweighs the fact that carriers may have to spend resources, perhaps even significant resources, to comply with the rule.[91] Petitioners assert that compliance may be costly; however, the record does not show that it is "cost-prohibitive" for carriers. Moreover, the rule modifications, including new exemptions described above and the provision that providers file an emergency backup power compliance plan to ensure 100 percent coverage in areas covered by non-compliant assets, will decrease any economic burden substantially. Finally, we find that the goal of ensuring that carriers' networks have sufficient emergency backup power outweighs the economic burden described by petitioners and particularly the reduced economic burden in light of the rule modifications adopted herein. The need for backup power in the event of emergencies has been made abundantly clear by recent events, and the cost of failing to have such power may be measured in lives lost.

32. Some Petitioners argue that, contrary to the ultimate goal of protecting the provision of services, the backup power rule will not advance, but will actually risk undermining, carriers' emergency preparedness goals and efforts to achieve important business continuity and disaster recovery goals.[92] Petitioners contend that the rule deprives carriers of the flexibility necessary to make intelligent and efficient plans for network resiliency as well as giving carriers the flexibility to respond to disasters in real time while remaining in compliance with the Commissions rules.[93] Petitioners assert that, by diverting manpower and resources away from more appropriate efforts to tailor emergency communications plans, and by denying carriers the ability to move resources away from areas not impacted to those that have been impacted, the rule undermines rather than promotes the important goal of public safety.[94]

33. We recognize that carriers need some level of flexibility in the design and deployment of their networks. This need, however, must be balanced with the critical goal of ensuring that communications networks has sufficient backup power, particularly during times of disaster. The modifications we make today strike a fair and equitable balance of these two interests. The modified rule we adopt today will ensure that LECs, including ILECs and CLECs, as well as CMRS providers maintain sufficient level of emergency backup power for assets that are necessary to maintain communications and

---

[90] *See, supra* ¶ 13. *See also* T-Mobile Reply at 7 (T-Mobile already provides varying degrees of backup power at 95 percent of its cell sites, most have less than 8 hours of power but some have more than 8 hours).

[91] Although its petition has been withdrawn several commenters reference the CTIA Petition, and we note that CTIA asserted that the reasons the Commission gave for encouraging but not requiring other Katrina Panel recommendations apply with equal force to the backup power issue. For instance, like the implementation of diverse 911 circuits, CTIA contends that mandatory minimum backup power is "cost-prohibitive in certain cases." CTIA Petition at 24, n.33; *see also Katrina Panel Order,* 22 FCC Rcd at 10564-65 ¶ 75. However, the costs of implementing diverse 911 circuits are often shouldered by PSAPs which depend on limited sources of public funding and do not have the financial resources of commercial companies.

[92] *See, e.g.*, MetroPCS Petition at 13; PCIA Petition at 8, 19-20; USTelecom Petition at 1-3, 7-9.

[93] *See, e.g.,* MetroPCS Petition at ii, 6-7, 13; PCIA Petition at 8, 19-20; Sprint Nextel Reply at 2-3; USTelecom Petition at 2, 7.

[94] *Id.*

that are normally maintained by commercial power. At the same time, the modifications adopted herein provide some level flexibility, both in terms of the exceptions provided and the requirements for submission of an emergency backup power compliance plan in cases where providers are not compliant. Moreover, inclusion of on-site back up power does not preclude the ability of carriers to maintain strategic stores of fuel, batteries or other backup equipment in other localities as a further layer of redundancy. Petitioners argue that enforcement could also lead to the termination or disruption of wireless cell sites, threatening the availability of service, including E-911 service.[95] Petitioners further contend that carriers may have little choice but to shut down or move certain transmitters rather than risk operating in violation of the new rule or endangering public health and safety.[96] NENA disagrees and contends that these arguments suggest that cellular providers should be immune from any disruptive regulatory discipline.[97] We believe that the exemptions now provided along with the requirement to develop an emergency backup power compliance plan in cases where assets do not comply with the 8-24 hour rule and are not subject to the exceptions described herein will mitigate these concerns.

34. Paging Carriers. The American Association of Paging Carriers (AAPC) argues that the Commission did not intend to apply the backup power rule to paging carriers and should so clarify. Alternatively, AAPC asserts that, if the Commission did intend for this rule to apply to paging carriers, the Commission should reconsider and exclude paging carriers[98] or instead adopt the Katrina Panel's actual recommendation on this issue, as set forth in the Katrina Panel Report. The backup power rule adopted in the *Katrina Panel Order* requires commercial mobile radio service (CMRS) providers to have emergency backup power. CMRS providers that have no more than 500,000 subscribers are exempt from this rule. Therefore, paging carriers that are CMRS providers with more than 500,000 subscribers must comply with the rule. Paging services are a critical part of emergency response. Many first responders, hospitals and critical infrastructure providers rely on paging services during emergencies.[99] Therefore, it is critical that these services be available during crises. Backup power at paging carrier facilities will help ensure the availability of these services. The importance of paging services is further demonstrated by the fact that paging carriers participate in the Commercial Mobile Service Alert Advisory Committee and are subject to the Commission's Part 4 outage reporting rules. For these reasons and those set forth below,

---

[95] *See, e.g.* MetroPCS Petition at ii, 4, 8-13; PCIA Petition at 6, 12; NextG Petition at 1-3, 13-19.

[96] *Id.*

[97] NENA takes issue with the claim that forced shutdown of non-compliant sites will threaten public safety. NENA asserts this argument suggests that cellular providers should be immune from any disruptive regulatory discipline because so many 9-1-1 callers use wireless phones. NENA notes that wireless carriers made an analogous argument in 1993, during the early consideration of 9-1-1 caller location rules, suggesting that cellular telephony, of itself, was such a boon to 9-1-1 access that precise caller location should not be required. NENA Comments filed September 11, 2007 at 3.

[98] AAPC argues that the rule should not apply to entities defined by Section 20.9(1) and (6) of the rules, or to Narrowband PCS licenses as defined by Section 24.5 of the rules. AAPC Petition at 4. As noted herein, we find that the rule should apply to CMRS providers, as defined in Section 20.9 of the Commission's rules.

[99] *See, e.g.,* Testimony of Bruce Deer, American Association of Paging Carriers before the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Meeting Transcript at 123 (March 5, 2006)("And we realize that today, still, with all of the advent of all of the communications methods of electronic forms that hospitals still use predominantly pagers for emergency communications to reach their doctors and their emerging medical staffs."); Testimony of Vincent Kelly, President and Chief Executive Officer, USA Mobility before the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Meeting Transcript at 132 ("[P]aging devices continue to play a critical role for first responders and are still used extensively by policy [sic] officers, fire fighters, rescue workers. In addition, hospitals and health care clinics a well as government agencies rely heavily on paging services.")

we modify Section 12.2 to clarify that the rule applies to CMRS providers, *as defined in Section 20.9 of the Commission's rules.*

35. AAPC argues that the Commission intended to exclude paging carriers from this backup power rule. AAPC asserts that the *Katrina Panel Order* bases the CMRS classification in Section 12.2 on a definition developed for the *E-911 Proceeding*[100] and, because paging carriers do not provide E-911 service, the inference is that the Commission intended to exclude paging carriers from this rule. The parts of the *Katrina Panel Order* cited by AAPC, however, do not define CMRS providers, but instead provide an exemption for non-nationwide CMRS providers with no more than 500,000 subscribers. In a footnote, the Commission merely stated that this exemption is based on the Tier III CMRS definition. AAPC contends that the etymology of the backup power rule supports a finding that the Commission intended to exclude paging carriers and to apply the rule only to entities that are required to provide E-911 service as defined in Section 20.18 of the Commission's rules.[101] AAPC notes that the Katrina Panel made its backup power recommendation "in order to ensure a more robust E-911 service" and that, when requesting public comment on this recommendation, the Commission explained that the Panel "recommends that the Commission encourage the implementation of certain NRIC best practices intended to promote the reliability and resiliency of the 911 and E911 architecture."[102] However, the backup power rule includes no such limitations and, in the *Notice*, the Commission specifically sought comment on whether the Katrina Panel's observations warranted additional measures or steps beyond the report's specific recommendations and welcomed suggestions and recommendations regarding additional measures or actions beyond the Panel's recommendations.[103] The Commission also sought comment on whether it should rely on voluntary consensus recommendations, as advocated by the Katrina Panel, or whether it should rely on other measures for enhancing readiness and promoting more effective response efforts. Further, AAPC argues that the deliberate use of the term "cell sites" in the rule supports the conclusion that the Commission did not intend that the rule apply to paging carriers because paging carriers do not operate cell sites in their networks.[104] The reference to cell sites, however, is only one example of an asset that is normally powered from local commercial power and the assets identified in the rule are not an exhaustive list.[105]

36. AAPC requests, in the event that the Commission did intend to apply the backup power rule to paging carriers, that the rule be modified to ensure that it does not apply to paging carriers. AAPC argues that it is unreasonable to lump paging networks together with other types of CMRS networks for purposes of this rule without considering the particular engineering and cost characteristics of paging networks themselves. Although AAPC argues that applying the requirement to all paging base stations and terminals would be particularly troubling for paging carriers,[106] the burden will be mitigated by the

[100] AAPC Petition at 2. In support of this assertion, AAPC cites the *Katrina Panel Order* at ¶ 78 & n. 103, Appendix C (Final Regulatory Flexibility Analysis) at ¶ 27 & nn. 59-60, citing *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems (Order to Stay),* CC Docket No. 97-102, 17 FCC Rcd 14841, 14848 & ¶ 22 (2002) (the "*E-911 Proceeding*")."

[101] AAPC Petition *at* 3-4.

[102] *Notice,* 21 FCC Rcd 7320, 7326 ¶ 16; Katrina Panel Report at 39.

[103] *Notice*, 21 FCC Rcd at 7320-7323.

[104] AAPC Petition at 4.

[105] The rule states, in part, that LECs and CMRS providers must have an emergency backup power source for all assets that are normally powered from local commercial power, including those inside central offices, cell sites, remote switches and digital loop carrier system remote terminals. 47 C.F.R. § 12.2.

[106] AAPC notes that, unlike cellular and broadband PCS networks, paging networks make substantial use of simulcasting and "fill-in" transmitters to assure adequate signal penetration in buildings and to cover terrain-

(continued....)

rule modifications adopted herein. Additionally, the burden for paging carriers would not necessarily be any more onerous for paging carriers than for other CMRS providers. Paging providers use a variety of facilities to provide coverage which are, in most cases not that different from the facilities of other CMRS providers. The fill-in facilities employed by paging providers are similar in size and power requirements as those used by other CMRS providers. In many instances, paging providers use high-powered transmitters that are located in multiple transmitter sites. While there may be challenges to overcome such as space, zoning and structural limitations for these facilities, they are no more onerous than those faced by other CMRS providers. In addition, the backup power rule might be less burdensome for paging carriers than for other CMRS providers, because the number of fill-in paging sites that paging carriers deploy is likely less than the more extensive deployment of assets required by other CMRS providers. AAPC asserts that the Commission should define CMRS as those services that are identified in Section 20.18(a) of the Commission's rules, as it did for purposes of Section 605(a) of the WARN Act, where the Commission defined the statutory phrase "commercial mobile service."[107] That definition, however was limited to Section 605(a) of the WARN Act and was done for specific purposes of that section of the Act that are not relevant to the backup power rule.[108] Further, the membership of the Commercial Mobile Service Alert Advisory Committee established pursuant to the WARN Act includes paging carriers. In light of these factors, we decline to modify the rule as suggested by AAPC, and clarify that paging carriers are required to comply.

37. Distributed Antenna System (DAS) Nodes and other non-traditional sites. NextG, MetroPCS and other petitioners ask the Commission to clarify that DAS Nodes and other "non-traditional" sites, such as cellular repeater sites, micro-cell and pico-cell locations, electric poles, light poles, and flagpoles, are not "cell sites" as the term is used in the Commission's new backup power rule.[109] In the alternative, these petitioners request that the Commission reconsider and amend the rule to eliminate the backup power requirement for DAS Nodes and other "non-traditional" sites.[110] Other petitioners make similar arguments for "non-traditional" sites and emphasize the burden of complying with the backup power rule due to physical constraints and economic resources.[111] NextG explains that it provides telecommunications services to wireless carriers via a network architecture that uses fiber-optic cable and small antennas mounted in the public rights-of-way on infrastructure such as utility poles, street lights and

---

(...continued from previous page)
shielded areas. AAPC states that, in emergency conditions, not all base stations are usually required to maintain an acceptable level of service. According to AAPC, the design of paging networks involve engineering and cost trade-offs that do not fit neatly into a matrix that the Commission can or should promulgate into law. AAPC acknowledges that paging carriers typically do have backup power sources for their critical base station sites, but they may not have backup power at all sites. AAPC Petition at 4-5.

[107] AAPC Petition at 3, *citing Implementation of a Grant Program for Remote Community Alert Systems Pursuant to Section 605(a) of the Warning, Alert, and Response Network (WARN) Act,* Declaratory Ruling, *PS Docket No. 07-8,* 21 FCC Rcd 7214 (2007).

[108] The reasons this definition was adopted for Section 605(a) included: (1) because including current MSS offerings in the definition of "commercial mobile service" could render meaningless the grant program of Section 605(a), we cannot equate "commercial mobile service" with the Commission's definition of CMRS; (2) defining "commercial mobile service" to include only carriers that are obligated to provide E911 service focuses limited resources on communities that need them most: namely, those communities that have no access to wireless E911 service. *See Id.*

[109] *See, e.g.,* NextG Petition at 8-10, DAS Forum Petition at 3-4, MetroPCS Petition at 12-13, and Independent Telephone and Telecommunications Alliance August 30, 2007 Comments (ITTA Reply) at 1-4.

[110] *See, e.g.,* NextG Petition at 1-3. *See also id.*

[111] *See, e.g.,* MetroPCS Petition at ii; 12-13.

traffic signal poles. NextG argues that DAS Nodes should not be treated as a cell site because the DAS Node does not include some of the features typically associated with a cell site. The antenna is not associated with a base station or network switching equipment at the DAS Node site.[112] NextG and MetroPCS maintain that even if the Commission does treat the DAS Node as a cell site this equipment should be exempt from the backup power rule because it is "technologically, financially, and politically infeasible" to install eight hours of backup power.[113] DAS Forum argues that the impact due to the loss of power to a portion of a DAS network is far less than the loss of power to a traditional cell site because the balance of the DAS network continues to function when one node is damaged.[114]

38. We decline to exempt DAS Nodes or other sites from the emergency backup power rule.[115] Rather, we believe that to the extent these systems are necessary to provide communications services, they should be treated similarly to other types of assets that are subject to the rule. We note that many of the arguments made by petitioners are similar to the physical constraint arguments raised by other parties. As we stated earlier, we see no reason why LECs and CMRS providers who choose to place assets at locations with limited physical capacities should generally be excused from compliance with the rule. We realize that many providers have begun to use DAS and other small antenna systems as part of their communications networks. That fact alone, however, is far outweighed by the need to ensure a reliable communications network. To the extent petitioners raise concerns regarding legal impediments, private agreement constraints and safety risk issues, we note that the modifications to the rule we make today should address those concerns. DAS Forum and PCIA argue that the backup power rule will adversely impact the public interest and Commission policy goals, because the increased expense of compliance will prevent wireless carriers from further deploying their networks in this manner and that this will decrease capacity, coverage and reliability and affect emergency communications and wireless E911 coverage.[116] Petitioners have not presented sufficient evidence that the backup power rule will prevent wireless carriers from deploying their networks, particularly in light of the reduced burden of compliance that will result from the rule modifications we adopt in this Order on Reconsideration. Moreover, as noted above, the Commission finds that the benefits of ensuring backup power for communications assets outweighs any economic burden that LECs and CMRS providers may incur as a result of this rule.

## IV. CONCLUSION

39. For the reason stated above, we deny petitioners' requests that we rescind Section 12.2 of the Commission's rules, but find that the petitioners have presented an adequate basis for modifying this backup power rule as detailed above and in Appendix B.

## V. PROCEDURAL MATTERS

40. Supplemental Final Regulatory Flexibility Analysis. As required by Section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 604, the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis of the possible impact of the rule changes contained in this Order on

[112] NextG Petition at 1, 8.

[113] NextG Petition at 2-3, 10-13; MetroPCS also argues that compliance would be burdensome, impractical and, in many instances impossible – particularly at remote sites, where MetroPCS claims that it will be forced to discontinue services in some instances. MetroPCS Petition at 4, 8-13.

[114] DAS Forum Petition at 3-5.

[115] We also again clarify that the list in the rule is not exhaustive and the inclusion of the term "cell sites" does not limit the rule's applicability.

[116] *See, e.g.*, DAS Forum Petition at 3; NextG Petition at 2-4, 10-17.

Reconsideration on small entities. The Supplemental Final Regulatory Flexibility Act analysis is set forth in Appendix C, *infra*. The Commission's Consumer & Government Affairs Bureau, Reference Information Center, will send a copy of this Order, including the Supplemental Final Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

41. Final Paperwork Reduction Act of 1995 Analysis. This Order on Reconsideration contains new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public, the Office of Management and Budget ("OMB") and other Federal agencies to comment on the information collection requirements contained in this Order on Reconsideration, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due 60 days from date of publication of the Order on Reconsideration in the Federal Register. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." In this present document, we have assessed the effects of requiring LECs and CMRS providers to have back-up power or emergency back-up power compliance plans and to file reports regarding compliance with these requirements as set forth in Section 12.2 of our rules. We have specifically exempt LECs that meet the definition of a Class B company set forth in Section 32.11(b)(2) of our rules,[117] and non-nationwide CMRS providers with no more than 500,000 subscribers. We find that this imposes minimal regulation on small entities to the extent consistent with our goal of advancing our public safety mission.

42. Congressional Review Act Analysis. The Commission will send a copy of this Order on Reconsideration 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).

43. Alternative Formats. Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities by sending an e-mail to FCC504@fcc.gov or calling the Consumer and Governmental Affairs Bureau at (202) 418-0530, TTY (202) 418-0432.

## VI. ORDERING CLAUSES

44. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i)-(k), 4(o), 201, 218, 219, 301, 303(g), 303(j), 303(r), 332, 403, 405, 621(b)(3) and 621(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(k), 154(o), 201, 218, 219, 301, 303(g), 303(j), 303(r), 332, 403, 405, 541(b)(3), and 541(d), and Sections 1.3 and 1.106 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.106, that this Order on Reconsideration in EB Docket No. 06-119 and WC Docket No. 06-63 IS ADOPTED.

45. IT IS FURTHER ORDERED, that the Petitions for Reconsideration filed by The American Association of Paging Carriers, the DAS Forum, MetroPCS Communications, Inc., NextG Networks, Inc., PCIA – The Wireless Infrastructure Association (PCIA), and The United States Telecom Association ARE GRANTED to the extent discussed above, and the remainder of those petitions ARE DENIED.

46. IT IS FURTHER ORDERED that Section 12.2 of the Commission's rules IS AMENDED as specified in Appendix B, and Section 12.2 shall be effective on the date of Federal Register notice announcing OMB approval of the information collection now contained in that rule.

[117] 47 C.F.R. § 32.11(b)(2).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

# APPENDIX A

## List of Petitions for Clarification and/or Reconsideration, Comments, and *Ex Parte* Comments

**EB Docket No. 06-119**
**WC Docket No. 06-63**

Petitions for Reconsideration

1. American Association of Paging Carriers
2. CTIA-The Wireless Association®[118]
3. The DAS Forum
4. MetroPCS Communications, Inc.
5. NextG Networks, Inc.
6. PCIA-The Wireless Infrastructure Association
7. United States Telecom Association

Timely Filed Comments Responding to Petitions for Reconsideration

1. BridgeCom International, Inc.; Broadview Networks, Inc.; Cavalier Telephone, LLC; DeltaCom, Inc.; Eureka Telecom, Inc. d/b/a InfoHighway Communications; IDT Corporation; Integra Telecom, Inc.; McLeodUSA Telecommunications Services, Inc.; Mpower Communications Corp.; Norlight Telecommunications, Inc.; Pacific Lightnet, Inc.; RCN Telecom Services, Inc.; RNK, Inc.; Talk America Holdings, Inc.; TDS Metrocom, LLC; U.S. TelePacific Corp. d/b/a TelePacific Telecommunications
2. Independent Telephone and Telecommunications Alliance
3. National Hydrogen Association
4. Sprint Nextel Corporation
5. T-Mobile USA, Inc.

*Ex Parte* Comments

1. AT&T Services, Inc.
2. Cellular South and Rural Cellular Corporation; Leap Wireless; MetroPCS Communications, Inc.; SunCom Wireless; and United States Cellular Corporation
3. CTIA-The Wireless Association®
4. CTIA-The Wireless Association® and United States Telecom Association
5. The DAS Forum
6. Embarq, United States Telecom Association, Verizon, and Windstream
7. The National Emergency Number Association
8. NextG Networks, Inc.
9. PCIA-The Wireless Infrastructure Association
10. United States Telecom Association
11. Verizon
12. Verizon Wireless

[118] CTIA withdrew this Petition on September 28, 2007.

## APPENDIX B

## Final Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends Part 12 of Chapter I of Title 47 of the Code of Federal Regulations (C.F.R.) as follows:

## PART 12 – REDUNDANCY OF COMMUNICATIONS SYSTEMS

1. Section 12.2 is amended to read as follows:

**§ 12.2 Backup Power.**

(a) Except to the extent set forth in Section 12.2(b) and Section 12.2(c)(4) of the Commission's rules, local exchange carriers, including incumbent local exchange carriers and competitive local exchange carriers (collectively, LECs), and commercial mobile radio service (CMRS) providers, as defined in Section 20.9 of the Commission's rules, must have an emergency backup power source (*e.g.*, batteries, generators, fuel cells) for all assets necessary to maintain communications that are normally powered from local commercial power, including those assets located inside central offices, cell sites, remote switches and digital loop carrier system remote terminals. LECs and CMRS providers must maintain emergency backup power for a minimum of twenty-four hours for assets that are normally powered from local commercial power and located inside central offices, and eight hours for assets that are normally powered from local commercial power and at other locations, including cell sites, remote switches and digital loop carrier system remote terminals. Power sources satisfy this requirement if they were originally designed to provide the minimum backup power capacity level required herein and the provider has implemented reasonable methods and procedures to ensure that the power sources are regularly checked and replaced when they deteriorate. LECs that meet the definition of a Class B company as set forth

in Section 32.11(b)(2) of the Commission's rules and non-nationwide CMRS providers with no more than 500,000 subscribers are exempt from this rule.

(b) LECs and CMRS providers are not required to comply with paragraph (a) for assets described above where the LEC or CMRS provider demonstrates, through the reporting requirement described below, that such compliance is precluded by:

(1) Federal, state, tribal or local law;

(2) Risk to safety of life or health; or

(3) Private legal obligation or agreement.

(c) Within six months of the effective date of this requirement, LECs and CMRS providers subject to this section must file reports with the Chief of the Public Safety & Homeland Security Bureau.

(1) Each report must list the following:

(i) Each asset that was designed to comply with the applicable backup power requirement as defined in paragraph (a);

(ii) Each asset where compliance with paragraph (a) is precluded due to risk to safety of life or health;

(iii) Each asset where compliance with paragraph (a) is precluded by a private legal obligation or agreement;

(iv) Each asset where compliance with paragraph (a) is precluded by Federal, state, tribal or local law; and

(v) Each asset that was designed with less than the emergency backup power capacity specified in paragraph (a) and that is not precluded from compliance under paragraph (b).

(2) Reports listing assets falling within the categories identified in paragraphs (c)(1)(ii) through (iv) must include a description of facts supporting the basis of the LEC's or CMRS provider's claim of preclusion from compliance. For example, claims that a LEC or CMRS provider cannot comply with this section due to a legal constraint must include the citation(s) to the relevant law(s) and, in

order to demonstrate that it is precluded from compliance, the provider must show that the legal constraint prohibits the provider from compliance. Claims that a LEC or CMRS provider cannot comply with this section with respect to a particular asset due to a private legal obligation or agreement must include a description of the relevant terms of the obligation or agreement and the dates on which the relevant terms of the agreement became effective and are set to expire. Claims that a LEC or CMRS provider cannot comply with this section with respect to a particular asset due to risk to safety of life or health must include a description of the safety of life or health risk and facts that demonstrate a substantial risk of harm.

(3) For purposes of complying with the reporting requirements set forth in paragraphs (c)(1)(i) through (v), in cases where more than one asset necessary to maintain communications that are normally powered from local commercial power are located at a single site (*i.e.*, within one central office), the reporting entity may identify all of such assets by the name of the site.

(4) In cases where a LEC or CMRS provider identifies assets pursuant to paragraph (c)(1)(v), such LEC or CMRS provider must comply with the backup power requirement in paragraph (a) or, within 12 months from the effective date of this rule, file with the Commission a certified emergency backup power compliance plan. That plan must certify that and describe how the LEC or CMRS provider will provide emergency backup power to 100 percent of the area covered by any non-compliant asset in the event of a commercial power failure. For purposes of the plan, a provider may rely on on-site and/or portable backup power sources or other sources, as appropriate, sufficient for service coverage as follows: a minimum of 24 hours of service for assets inside central offices and eight hours for other assets, including cell sites, remote switches, and digital loop carrier system remote terminals. The emergency backup power compliance plans submitted are subject to Commission review.

(5) Reports submitted pursuant to this paragraph must be supported by an affidavit or declaration under penalty of perjury and signed and dated by a duly authorized representative of the LEC or CMRS provider with personal knowledge of the facts contained therein.

(6) Information filed with the Commission pursuant to subsection (c) of this rule shall be automatically afforded confidentiality in accordance with the Commission's rules.

(7) LECs that meet the definition of a Class B company as set forth in Section 32.11(b)(2) of the Commission's rules and non-nationwide CMRS providers with no more than 500,000 subscribers are exempt from this reporting requirement.

# APPENDIX C

## Supplemental Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking *(Notice)* in EB Docket No. 06-119.[2] The Commission sought written public comment on the proposals in this docket, including comment on the IRFA. On June 8, 2007, the Commission released an Order in EB Docket No. 06-119 which included a Final Regulatory Flexibility Analysis (FRFA).[3] In this Order on Reconsideration, the Commission includes a Supplemental FRFA which conforms to the RFA.[4]

### A. Need for, and Objectives of, the Rules

2. In the Order released on June 8, 2007, the Commission adopted a rule requiring local exchange carriers (LECs), other than those that meet the definition of a Class B company as set forth in Section 32.11(b)(2) of the Commission's rules,[5] and commercial mobile radio service (CMRS) providers, other than non-nationwide CMRS providers with no more than 500,000 subscribers, to have an emergency backup power source for all assets that are normally powered from local AC commercial power, including those inside central offices, cell sites, remote switches and digital loop carrier system remote terminals. The Commission received seven petitions seeking reconsideration of this rule on various grounds, including the inability of carriers to comply with the rule due to legal constraints (*i.e.*, other Federal, state and local laws precluding compliance with the Commission's rule), constraints due to private legal obligation or agreement that precludes the ability of carriers to store additional backup equipment necessary to comply with the rule, risk to safety of life or health, physical constraints, and economic burden. In response to the petitions for reconsideration, the Commission amends its rule to exempt assets where the LEC or CMRS provider has demonstrated that it cannot comply with the rule due to federal, state, tribal or local law; risk to safety of life or health; or private legal obligation or agreement. The Commission also amended the rule to require LECs and CMRS providers to file reports that list each asset: (1) that was designed to comply with the applicable backup power requirement; (2) where compliance is precluded do to risk to safety of life or health; (3) where compliance is precluded by a private legal obligation or agreement; (4) where compliance is precluded by Federal, state, tribal or local law; and (5) that was designed with less than the required emergency backup power capacity and is not

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, *Notice of Proposed Rulemaking*, 21 FCC Rcd 7320, 7330, Appendix A (2006).

[3] *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Order, 22 FCC Rcd 10541 (2007) (*Katrina Panel Order*).

[4] *See* 5 U.S.C. § 604.

[5] Section 32.11 provides that Class B companies are those companies that have annual revenues from regulated telecommunications operations that are less than the indexed revenue threshold. 47 C.F.R. § 32.11(b)(2). The Wireline Competition Bureau recently announced that the 2006 revenue threshold for Class A to Class B companies is $134 million. *Public Notice*, "Annual Adjustment of Revenue Thresholds," DA 07-1706 (WCB, April 12, 2007). Although Section 32.11, by its terms, applies only to ILECs, we are applying the same revenue categories to CLECs for the purpose of the exception to this requirement.

precluded from compliance for the reasons stated in (2), (3) or (4). For assets in category (5), LECs and CMRS providers must comply with the backup power requirements or file a certified emergency backup power compliance plan that certifies that the LEC or CMRS provider will ensure 100 percent coverage in each of the areas covered by any non-compliant asset. Further, the Commission clarifies that the rule applies only to assets that are necessary to the provision of communications services that are normally powered from local commercial power. Finally, the Commission clarified that that on-site power sources satisfy the requirement of this rule if such sources were originally designed to provide the minimum backup power capacity level required and the provider has implemented reasonable methods and procedures to ensure that batteries are regularly checked and replaced when they deteriorate.

3. Although the rule now requires that LECs and CMRS providers file a report, and in some circumstances a backup power compliance plan, the amendments to the rule significantly reduce the burden on LECs and CMRS providers by providing appropriate relief from the requirement that they have backup power sources for all assets normally powered by commercial power. As noted above, the modified rule exempts assets where compliance is precluded by risk to safety of life or health, private legal obligation or agreement, or federal, state, tribal or local law, and allows providers with non-compliant assets that are not otherwise exempt to file an emergency backup power plan.

## B. Summary of Significant Issues Raised by the Public

4. MetroPCS Communications, Inc. (MetroPCS) argues that the Commission's burden estimate in the FRFA regarding wireless carriers was based on mistakes of fact and that compliance is not feasible for MetroPCS, which qualifies as a non-nationwide provider with more than 500,000 subscribers.[6] MetroPCS asserts that the Commission erroneously concluded that the requirement will not create an undue burden because several communications providers reported in their comments that they already maintain emergency backup power.[7] MetroPCS contends that, while backup power at switch sites is common, no wireless service provider has reported that it routinely provides 8 hours of backup power at all remote sites.[8] As noted above, several petitioners argued that the Commission did not adequately consider the burden that the backup power rule would impose on LECs and CMRS providers.

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

5. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein.[9] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[10] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[11] A "small business concern" is one

[6] MetroPCS Petition for Clarification and Reconsideration at 7-8, citing FRFA ¶ 24 and n60.

[7] *See* FRFA, ¶ 24.

[8] MetroPCS Petition for Clarification and Reconsideration at 7-8. The American Association of Paging Carriers (AAPC) cites parts of the FRFA that are identical to sections in the *Katrina Panel Order* in support of its arguments that Section 12.2 of the Commission's rules should not apply to paging carriers. AAPC Petition for Clarification or, Alternatively, Reconsideration at 2, n1. Those arguments are fully addressed in the Order on Reconsideration.

[9] 5 U.S.C. § 604(a)(3).

[10] 5 U.S.C. § 601(6).

[11] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity

(continued....)

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).[12]

6. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.[13] A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[14] Nationwide, as of 2002, there were approximately 1.6 million small organizations.[15] The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[16] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[17] We estimate that, of this total, 84,377 entities were "small governmental jurisdictions."[18] Thus, we estimate that most governmental jurisdictions are small.

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 adopts in this Order. The rule changes affect LECs, including both incumbent LECs (ILECs) and competitive LECs (CLECs), and CMRS providers.

8. Since this Order applies to multiple services, this FRFA analyzes the number of small entities affected on a service-by-service basis. In the case of CMRS providers, when identifying small entities that could be affected by the Commission's new rules, this FRFA provides information that describes auctions 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. *Cellular Licensees*. The SBA has developed a small business size standard for small businesses in the category "Cellular and Other Wireless Telecommunications."[19] Under that SBA category, a business is small if it has 1,500 or fewer employees.[20] For the census category of "Cellular and Other Wireless Telecommunications," Census Bureau data for 2002 show that there were 1,397 firms

---

(...continued from previous page)
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." 5 U.S.C. § 601(3).

[12] 15 U.S.C. § 632.

[13] *See* SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

[14] 5 U.S.C. § 601(4).

[15] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[16] 5 U.S.C. § 601(5).

[17] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

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

[19] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517212.

[20] *Id.*

in this category that operated for the entire year.[21] Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.[22] Thus, under this category and size standard, the majority of firms can be considered small.

10. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[23] For Block F, 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.[24] These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.[25] No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the C Block auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[26] On March 23, 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.[27] On January 26, 2001, the Commission completed the auction of 422 C and F PCS licenses in Auction 35.[28] Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

11. *Specialized Mobile Radio.* The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years.[29] 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.[30] The SBA has approved these small business size

[21] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization," Table 5, NAICS code 517212 (issued Nov. 2005).

[22] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

[23] *See* Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7850-7852 ¶¶ 57-60 (1996); *see also* 47 C.F.R. § 24.720(b).

[24] *See* Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7852 ¶ 60.

[25] *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.

[26] FCC News, "Broadband PCS, D, E and F Block Auction Closes," No. 71744 (rel. January 14, 1997).

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

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

[29] 47 C.F.R. § 90.814(b)(1).

[30] *Id.*

standards for the 900 MHz Service.[31] The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.[32] A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.[33]

12. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 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. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. 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.

13. 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 $3 million or $15 million (the special small business size standards), or have no more than 1,500 employees (the generic SBA standard for wireless entities, discussed, *supra*). One firm has over $15 million in revenues. The Commission assumes, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities.

14. *Advanced Wireless Services*. In the *AWS-1 Report and Order*, the Commission adopted rules that affect applicants who wish to provide service in the 1710-1755 MHz and 2110-2155 MHz bands.[34] The *AWS-1 Report and Order* defines 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. The *AWS-1 Report and Order* also provides small businesses with a bidding credit of 15 percent and very small businesses with a bidding credit of 25 percent.

15. *Incumbent Local Exchange Carriers (Incumbent LECs).* As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of

[31] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999. The Commission notes that, although a request was also sent to the SBA requesting approval for the small business size standard for 800 MHz, approval is still pending.

[32] *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).

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

[34] Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, WT Docket No. 02-353, *Report and Order*, 18 FCC Rcd 25162 (2003) (*AWS-1 Report and Order*).

operation."[35] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[36] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[37] According to Commission data,[38] 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action.

16. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[39] According to Commission data,[40] 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are "Other Local Service Providers." Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our action.

17. *Cable and Other Program Distribution.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material."[41] The SBA has developed a small business size standard for

[35] 15 U.S.C. § 632.

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

[37] 13 C.F.R. § 121.201, NAICS code 517110.

[38] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (Feb. 2007). This source uses data that are current as of October 20, 2005.

[39] 13 C.F.R. § 121.201, NAICS code 517110.

[40] *Trends in Telephone Service,* Table 5.3.

[41] U.S. Census Bureau, 2002 NAICS Definitions, "517510 Cable and Other Program Distribution"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM.

Cable and Other Program Distribution, which is: all such firms having $13.5 million or less in annual receipts.[42] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[43] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[44] Thus, under this size standard, the majority of firms can be considered small.

18. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[45] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[46] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[47] Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.[48] Thus, under this second size standard, most cable systems are small.

19. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[49] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[50] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[51] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual

[42] 13 C.F.R. § 121.201, NAICS code 517510.

[43] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[44] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[45] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[46] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

[47] 47 C.F.R. § 76.901(c).

[48] Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[49] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[50] 47 C.F.R. § 76.901(f); *see* Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[51] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

revenues exceed $250 million,[52] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

20. *Paging*. The SBA has developed a small business size standard for the broad economic census category of "Paging."[53] Under this category, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.[54] Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.[55] In addition, according to Commission data,[56] 365 carriers have reported that they are engaged in the provision of "Paging and Messaging Service." Of this total, we estimate that 360 have 1,500 or fewer employees, and five have more than 1,500 employees. Thus, in this category the majority of firms can be considered small.

21. We also note that, in the Paging Second Report and Order, the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[57] In this context, a small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[58] The SBA has approved this definition.[59] An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold.[60] Fifty-seven companies claiming small business status won 440 licenses.[61] An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.[62] One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.[63] We also note that, currently, there are approximately 74,000 Common

[52] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[53] 13 C.F.R. § 121.201, NAICS code 517211.

[54] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization," Table 5, NAICS code 517211 (issued Nov. 2005).

[55] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

[56] *Trends in Telephone Service*, Table 5.3.

[57] Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Second Report and Order*, 12 FCC Rcd 2732, 2811-2812, paras. 178-181 (Paging Second Report and Order); *see also* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 10030, 10085-10088, paras. 98-107 (1999).

[58] Paging Second Report and Order, 12 FCC Rcd at 2811, para. 179.

[59] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

[60] *See* "929 and 931 MHz Paging Auction Closes," Public Notice, 15 FCC Rcd 4858 (WTB 2000).

[61] *Id.*.

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

[63] *See* "Lower and Upper Paging Bands Auction Closes," Public Notice, 18 FCC Rcd 11154 (WTB 2003).

Carrier Paging licenses.

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

22. *Backup Power Supply.* The Order on Reconsideration maintains the requirement that LECs and CMRS providers have an emergency backup power source for all assets necessary to maintain communications that are normally powered from local commercial power, including those inside central offices, cell sites, remote switches and digital loop carrier system remote terminals. Under this existing requirement, LECs and CMRS providers, as defined in Section 20.9 of the Commission's rules, must maintain emergency backup power for a minimum of 24 hours for assets inside central offices and eight hours for assets at other locations such as cell sites, remote switches and digital loop carrier system remote terminals that normally are powered from local commercial power.

23. In the Order on Reconsideration, the Commission clarifies that the assets subject to the rule are those necessary to ensure communications that are normally powered from local commercial power and that CMRS providers, including paging carriers, as defined in Section 20.9 of the Commission's rules, are subject to the rule. The Commission further exempts assets from the rule where LECs and CMRS providers can demonstrate that they can not comply with the rule due to constraints related to federal, state, tribal or local laws, risk to safety of life or health, or private legal obligations or agreements. LECs and CMRS providers must file a report with the Chief of the Public Safety & Homeland Security Bureau that identifies: (1) each asset that was designed to comply with the applicable backup power requirement; (2) each asset where compliance is precluded due to risk to safety of life or health, private legal obligation or agreements, or federal, state, tribal, or local law; and (3) each asset that was designed with less than the required emergency backup power capacity that is not precluded from compliance under (2). Our expectation is that this requirement will not create an undue additional burden, because the exemptions adopted in the Order on Reconsideration will substantially decrease the burden imposed on LECs and CMRS providers and several communications providers reported in their petitions for reconsideration and other filings that they already maintain some level of emergency backup power.[64] Additionally, the Order on Reconsideration also maintains the previously adopted exemption for LECs that meet the definition of a Class B company as set forth in Section 32.11(b)(2) of the Commission's rules, and for non-nationwide CMRS providers with no more than 500,000 subscribers. Further,, providers identifying assets designed with less than the required backup power capacity and not precluded form compliance for one of the three reasons listed above, must either comply with the backup power requirement or file an emergency backup power compliance plan that certifies that the service providers will ensure 100 percent coverage in each of the areas covered by any non-compliant asset. Filing this plan will presumably be less burdensome that implementing a backup power source for these assets in compliance with the rule. Many providers have also reported that they already have business continuity

[64] *See* USTelecom Petition at 2,8 (noting that the vast majority of all network remote terminals have onsite backup battery power typically designed to an eight hour engineering standard, although the actual life of the battery at any point in time depends on numerous factors and some remote terminals are too small to support a battery); Verizon Wireless *Ex Parte* filed September 4, 2007 (stating that Verizon Wireless' internal design standard is for eight hours or more of backup power (generators, batteries or both) at every cell site where possible, that the majority of its cell sites have on-site generators or batteries capable of providing backup power for much longer than eight hours, that only a small percentage of sites have only batteries that will not last for eight hours, and that only a handful of sites have no on-site backup power at all). *See also* CTIA comments at 8 (observing that wireless carriers "must ensure network reliability and reliance" and that, to do so, they "provision their cell sites and switches with batteries to power them when electrical grids fail" and "maintain permanent generators at all of the switches and critical cell sites, as well as an inventory of backup power generators to recharge the batteries during extended commercial power failures).

plans that address the issue of backup power. Finally, the Commission clarified that on-site power sources satisfy the this rule if such sources were originally designed to provide the minimum backup power capacity level required by the rule and the provider has implemented reasonable methods and procedures to ensure that batteries are regularly checked and replaced when they deteriorate. This too should lessen the burden on providers.

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

24. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (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.[65]

25. *Backup Power Supply.* The Order on Reconsideration does not disturb the previously-adopted exemptions from the requirement for LECs (both ILECs and CLECs) that meet the definition of a Class B company as set forth in Section 32.11(b)(2) of the Commission's rules and non-nationwide CMRS providers with no more than 500,000 subscribers.[66] Thus, for example, paging carriers that are non-nationwide CMRS providers and have no more than 500,000 subscribers will be exempt from this rule. The Order on Reconsideration also provides relief to LECs and CMRS providers subject to the rule for assets where they cannot comply with the rule due to legal and other constraints as described above. Finally, the Order on Reconsideration provides that, for non-compliant assets designed with less than the required emergency backup power capacity that are not otherwise exempt, LECs and CMRS providers must comply with the backup power requirement or submit an emergency backup power compliance plan.

**Report to Congress:** The Commission will send a copy of the Order, including this Supplemental FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[67] In addition, the Commission will send a copy of the Order, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.[68]

[65] 5 U.S.C. § 603(c).

[66] Although this subscriber level is based on the Tier III CMRS definition, which is defined as non-nationwide CMRS providers with no more than 500,000 subscribers as of the end of 2001, we note that we are not exempting from this requirement those non-nationwide CMRS providers that have grown to exceed the 500,000 subscriber threshold since 2001 as we believe that such providers are at a size where they should be able to comply with the emergency backup power rule.

[67] *See* 5 U.S.C. § 801(a)(1)(A).

[68] *See* 5 U.S.C. § 604(b).