

APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS

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”) for the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (“Nationwide Agreement”).² The Federal Communications Commission (“Commission” or “FCC”) sought written public comment on the proposals in the *Notice*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.³

A. Need for, and Objectives of, Adopted Rules

Under Commission rules implementing the National Environmental Policy Act of 1969, as amended (“NEPA”),⁴ licensees and other entities that build towers and other communications facilities (“Applicants”) are required to assess such proposed facilities to determine whether they may significantly affect the environment under Section 1.1307 of the Commission’s rules.⁵ For example, under Section 1.1307(a)(4) of the Commission’s rules, those Applicants currently are obliged to use the detailed procedures specified in the rules of the Advisory Council on Historic Preservation (“Council”) (36 C.F.R. § 800.1 *et seq.*) to determine whether their proposed facilities may affect districts, sites, buildings, structures, or objects significant in American history, architecture, archeology, engineering or culture that are listed or eligible for listing in the National Register of Historic Places (“historic properties”).

These Council procedures, when combined with the procedures employed by the various State Historic Preservation Officers (“SHPOs”) and Tribal Historic Preservation Officers (“THPOs”), and when multiplied by the number of facilities being constructed, created an unnecessarily inefficient review process for Applicants. For example, in the late 1990’s, coincident with the vast increase in tower constructions necessitated by the expanded deployment of wireless mobile services, unacceptable delays in completing traditional Section 106 reviews under the Council’s rules began to occur and continue to be experienced. The Commission therefore, began to explore alleviating such procedural inefficiencies by using the provision in the rules of the Council that allows for the creation of programmatic agreements between the Council and other agencies.⁶ Generally speaking, such programmatic agreements

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, WT Docket No. 03-128, *Notice of Proposed Rulemaking*, 18 FCC Rcd 11,664 (2003) (“Notice”); *Errata*, 18 FCC Rcd 12,854 (2003).

³ See 5 U.S.C. § 604.

⁴ 42 U.S.C. §§ 4321-4335.

⁵ 47 C.F.R. § 1.1307.

⁶ 36 C.F.R. § 800.14(b).

are intended to craft specific procedures that more closely reflect the needs and practices of specific federal agencies and the industries they regulate.

Under Section 800.14(b) of its rules, the Council, Federal agencies, such as the Commission, and the appropriate SHPO or National Conference of State Historic Preservation Officers (“NCSHPO”) may negotiate a programmatic agreement to govern the implementation of a particular program when, for example, the effects on historic properties are multi-state or when nonfederal parties are delegated major responsibilities. Accordingly, to streamline and tailor the pre-construction review of towers and other communications facilities under Section 106 of the National Historic Preservation Act (“NHPA”)⁷ and the related Commission and Council rules, the Council, the Commission, and NCSHPO negotiated a programmatic agreement under Section 800.14(b) of the Council’s rules. Some objectives of the Nationwide Agreement and the related rule revisions are to increase Applicants’ awareness of applicable laws and rules; to tailor and streamline the current procedures under the rules of the Council and the Commission; and to ensure compliance by Applicants with the Nationwide Agreement and related Commission and Council rules.

In this *Report and Order*, the Commission incorporates into its rules the recently agreed upon Nationwide Agreement, which, as discussed below, will streamline and tailor existing procedures under the Commission and Council rules for the review of certain Undertakings for communications facilities under Section 106 of the National Historic Preservation Act of 1966 (“NHPA”).⁸

The Nationwide Agreement clarifies and tailors the obligations⁹ of the Applicants to assist the Commission in meeting its responsibilities under NEPA and the NHPA. First, to reduce regulatory burdens (*e.g.*, identifying historic properties, preparing submission packets) on both large and small Applicants, the Nationwide Agreement, in Part III, excludes from routine review under Section 106 of the NHPA certain Undertakings that are unlikely to affect historic properties.¹⁰

Second, for those Undertakings that are not addressed by the Part III exclusions and that, therefore, remain subject to review, the Agreement specifies standards and procedures that Applicants must follow when completing the Section 106 review. For example, for undertakings that remain subject to review, the draft Agreement sets forth guidelines for tribal participation;¹¹ procedures for ensuring compliance with the NHPA’s public participation requirements;¹² methods for establishing the area of potential effects, identifying and evaluating historic sites,

⁷ 16 U.S.C. § 470f.

⁸ See 16 U.S.C. § 470 *et seq*

⁹ See 47 C.F.R. § 1.1307(a)(4) (directing that proposed undertakings be evaluated for their effects on historic properties).

¹⁰ Appendix B at B-8 through B-10 (Nationwide Agreement, Part III).

¹¹ Appendix B at B-10 through B-15 (Nationwide Agreement, Part IV).

¹² Appendix B at B-15 through B-16 (Nationwide Agreement, Part V).

and assessing effects;¹³ and procedures for submitting projects to, and for review by, the SHPO or THPO and the Commission.¹⁴ The Nationwide Agreement also includes procedures to be followed when historic properties (*e.g.*, archeological artifacts) are discovered during construction;¹⁵ processes to be followed when facilities are constructed prior to completion of the Section 106 process;¹⁶ and provisions for the submission of public comments and objections.¹⁷

In addition, the Nationwide Agreement includes forms which Applicants must use for Section 106 submissions to SHPOs, as well as to THPOs that have agreed to accept such forms for projects on tribal lands that are not subject to review by a SHPO.¹⁸

The Commission also amends its rules in order to make clear that the procedures in the Nationwide Agreement will be binding on regulates, who are subject to its terms, and that non-compliance with these procedures would subject a party to potential Commission enforcement action such as admonishment, forfeiture, or revocation of a license to operate, where appropriate. Specifically, the Commission amends Section 1.1307(a)(4) to specify that, in order to ascertain whether a proposed action may affect properties that are listed or eligible for listing in the National Register,¹⁹ an Applicant must follow the procedures set forth in the rules of the Council, as modified and supplemented by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas and the Nationwide Agreement. Both agreements will be included as appendices in the Code of Federal Regulations.

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

The Commission considered the potential impact of its actions on smaller entities throughout the process of negotiating and drafting the Nationwide Agreement. One of its goals has been to make the environmental review process more efficient and standardized so that smaller entities can learn and complete the process more quickly.

We received one comment in response to the IRFA. The Eastern Band of Cherokee Indians (“EBCI”) opposes any streamlining efforts, whether for large or small businesses, that could have the effect of reducing or eliminating government-to-government consultation

¹³ Appendix B at B-16 through B-21 (Nationwide Agreement, Part VI).

¹⁴ Appendix B at B-21 through B-24 (Nationwide Agreement, Part VII).

¹⁵ Appendix B at B-25 (Nationwide Agreement, Part IX).

¹⁶ Appendix B at B-25 through B-27 (Nationwide Agreement, Part X).

¹⁷ Appendix B at B-27 (Nationwide Agreement, Part XI).

¹⁸ Appendix B, Attachments 3 and 4.

¹⁹ “Listed” properties are those properties for which an application for inclusion in the National Register of Historic Places (“National Register”) has been approved. Under Section 800.16(l)(2) of the regulations of the Advisory Council on Historic Preservation, 36 C.F.R. § 800.16(l)(2), the term “eligible for inclusion in the National Register” includes both properties formally determined as such by the Keeper of the National Register in accordance with applicable regulations of the Secretary of the Interior and all other properties that meet the National Register criteria. Information on the characteristics of properties that meet these criteria is available at the National Register web site: www.cr.nps.gov/nr.

between federal agencies and tribes.²⁰ EBCI also believes that some language in the IRFA should have been stronger to make clear that an Applicant's obligations under the Nationwide Agreement (*e.g.*, notice, timely submission of necessary documents, and consultation) are mandatory.²¹

With respect to the impact of the Nationwide Agreement on government-to-government consultation, we address the concerns of EBCI most specifically in Section IV of the Nationwide Agreement.²² In particular, as explained in Section III.C.2. of the *Report and Order*²³ we have taken considerable care in the Nationwide Agreement to fulfill the Commission's duty of government-to-government consultation in all cases that cannot be consensually resolved without such consultation. With regard to the obligations of Applicants to comply with the terms of the Nationwide Agreement, we have revised Section 1.1307(a)(4) of our rules to ensure that regulatees understand that compliance with the Nationwide Agreement is mandated. However, the Commission notes that, wherever appropriate, any differential burdens favoring small entities have been preserved by the Nationwide Agreement. Furthermore, the Commission has made a concerted effort to reduce burdens on small entities. That being said, the Commission believes that all entities – large and small – will benefit from compliance with the Nationwide Agreement.

C. Description and Estimate of the Number of Small Entities To Which the Adopted Rules Will Apply

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 proposed rules.²⁴ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”²⁵ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²⁶ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (“SBA”).²⁷

²⁰ EBCI Comments at B-1 (comments inserted into Appendix B of the *Notice*).

²¹ EBCI Comments at B-2 (comments inserted into Appendix B of the *Notice*).

²² Nationwide Agreement at B-10 to B-14 (“Participation of Indian Tribes and Native Hawaiian Organizations in Undertakings off Tribal Lands”).

²³ *Nationwide Agreement Report and Order* at Section III.C.2.

²⁴ 5 U.S.C. § 604(a)(3).

²⁵ 5 U.S.C. § 601(6).

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

²⁷ 15 U.S.C. § 632.

The *Report and Order* and, accordingly, the Nationwide Agreement, will produce a rule change that will impose requirements on a large number of entities in determining whether facilities that they propose to construct may affect historic properties listed or eligible for listing on the National Register of Historic Places.²⁸ Due to the number and diversity of Applicants, including small entities that are Commission licensees as well as non-licensee tower companies, we now classify and quantify them in the remainder of this section.

Wireless Telecommunications

Cellular Licensees. The SBA has developed a small business size standard for small businesses in the category “Cellular and Other Wireless Telecommunications.”²⁹ Under that SBA category, a business is small if it has 1,500 or fewer employees.³⁰ According to the Bureau of the Census, only twelve firms from a total of 1238 cellular and other wireless telecommunications firms operating during 1997 had 1,000 or more employees.³¹ Therefore, even if all twelve of these firms were cellular telephone companies with more than 1,500 employees, nearly all cellular carriers were small businesses under the SBA’s definition.

220 MHz Radio Service – Phase I Licensees. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the definition under the SBA rules applicable to “Cellular and Other Wireless Telecommunication” companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.³² According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.³³ Of this total, 965 firms had 999 or fewer employees, and an additional 12 firms had 1,000 employees or more.³⁴ If this general ratio continues in 2004 in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA’s small business size standard.

²⁸ 47 C.F.R. § 1.1307(a)(4).

²⁹ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517212 (changed from 513322 in October 2002).

³⁰ *Id.*

³¹ U.S. Department of Commerce, U.S. Census Bureau, 1997 Economic Census, Information - Subject Series, Establishment and Firm Size, Table 5 – Employment Size of Firms Subject to Federal Income Tax at 64, NAICS code 517212 (October 2000).

³² 13 C.F.R. § 121.201.

³³ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Employment Size of Firms Subject to Federal Income Tax: 1997,” Table 5, NAICS code 513322 (issued Oct. 2000).

³⁴ *Id.* The census data do not provide a more precise estimate of the number of firms that have 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”

220 MHz Radio Service – Phase II Licensees. The Phase II 220 MHz service is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for defining “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.³⁵ This small business standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.³⁶ A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.³⁷ The SBA has approved these small size standards.³⁸ Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.³⁹ In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (“EAG”) Licenses, and 875 Economic Area (“EA”) Licenses. Of the 908 licenses auctioned, 683 were sold.⁴⁰ Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.⁴¹

700 MHz Guard Band Licenses. In the *700 MHz Guard Band Order*, we adopted size standards for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁴² A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.⁴³ Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.⁴⁴ An auction of 52 Major Economic Area (“MEA”) licenses commenced on September 6, 2000, and closed on September 21, 2000.⁴⁵ Of the 104 licenses auctioned, 96 licenses were sold to 9 bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700

³⁵ Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, *Third Report and Order*, 12 FCC Rcd 10943, 11068-70, ¶¶ 291-295 (1997) (*220 MHz Third Report and Order*).

³⁶ *Id.* at ¶ 291.

³⁷ *Id.*

³⁸ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

³⁹ See generally “220 MHz Service Auction Closes,” *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

⁴⁰ “FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses after Final Payment is Made,” *Public Notice*, 14 FCC Rcd 1085 (WTB 1999).

⁴¹ “Phase II 220 MHz Service Spectrum Auction Closes,” *Public Notice*, 14 FCC Rcd 11218 (WTB 1999).

⁴² See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 99-168, *Second Report and Order*, 15 FCC Rcd 5299-5344, ¶ 108 (2000).

⁴³ *Id.* at ¶¶ 106-108.

⁴⁴ *Id.* at ¶¶ 106-108.

⁴⁵ See generally, “220 MHz Service Auction Closes: Winning Bidders in the Auction of 908 Phase II 220 MHz Service Licenses,” *Public Notice*, DA 98-2143 (rel. October 23, 1998).

MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.⁴⁶

Lower 700 MHz Band Licenses. We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.⁴⁷ We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.⁴⁸ A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.⁴⁹ Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (“MSA/RSA”) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings) commenced on August 27, 2002, and closed on September 18, 2002.⁵⁰ Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.

Upper 700 MHz Band Licenses. The Commission released a Report and Order, authorizing service in the upper 700 MHz band.⁵¹ No auction has been held yet.

Private and Common Carrier Paging. In the Paging *Third Report and Order*, we developed a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁵² A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. The SBA has approved these size standards.⁵³ An auction of MEA

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

⁴⁷ See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), GN Docket No. 01-74, *Report and Order*, 17 FCC Rcd 1022 (2002).

⁴⁸ *Id.* at ¶ 172.

⁴⁹ *Id.* at ¶ 172.

⁵⁰ See “Lower 700 MHz Band Auction Closes,” 17 FCC Rcd 17272 (2002).

⁵¹ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 99-168, *Second Memorandum Opinion and Order*, 16 FCC Rcd 1239 (2001).

⁵² *220 MHz Third Report and Order*, 12 FCC Rcd at 11068-70, ¶¶ 291-295, 62 FR 16004 at ¶¶ 291-295 (1997).

⁵³ See Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas Sugrue, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (June 4, 1999).

licenses commenced on February 24, 2000, and closed on March 2, 2000.⁵⁴ Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won licenses. At present, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging site-specific licenses. According to the most recent *Trends in Telephone Service*, 471 carriers reported that they were engaged in the provision of either paging and messaging services or other mobile services.⁵⁵ Of those, the Commission estimates that 450 are small, under the SBA business size standard specifying that firms are small if they have 1,500 or fewer employees.⁵⁶

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.⁵⁷ 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.⁵⁸ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.⁵⁹ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 “small” and “very small” business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F.⁶⁰ On March 23, 1999, the Commission re-auctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders. Based on this information, we conclude that the number of small broadband PCS licensees includes the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks plus the 113 winning bidders in the re-auction, for a total of 296 small entity broadband PCS providers as defined by the SBA small business standards and the Commission’s auction rules.

Narrowband PCS. To date, two auctions of narrowband personal communications services licenses have been conducted. For purposes of the two auctions that have already been held, “small businesses” were entities with average gross revenues for the prior three calendar

⁵⁴ Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, PR Docket No. 93-253, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10085, ¶ 98 (1999).

⁵⁵ *Trends in Telephone Service* at Table 5.3 (rel. Aug. 2001).

⁵⁶ *Id.* The SBA size standard is that of Paging, 13 C.F.R. § 121.201, NAICS code 517211.

⁵⁷ See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824, ¶¶ 57-60 (1996); see also 47 C.F.R. § 24.720(b).

⁵⁸ 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, ¶ 60 (1996).

⁵⁹ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Small Business Administration, dated December 2, 1998.

⁶⁰ FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. January 14, 1997).

years of \$40 million or less.⁶¹ Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*. A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.⁶² A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.⁶³ The SBA has approved these small business size standards.⁶⁴ There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future auctions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined under the Commission’s Rules. The Commission assumes, for purposes of this analysis, that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission’s partitioning and disaggregation rules.

900 MHz Specialized Mobile Radio (“SMR”). In September of 1995, in a rulemaking adopting competitive bidding rules specifically for the 900 MHz SMR service, the Commission established a two-tiered bidding credit scheme for the 900 MHz SMR auction in which we defined two categories of small businesses: (1) an entity that, together with affiliates, has average gross revenues for the three preceding years of \$3 million or less; and (2) an entity that, together with affiliates, has average gross revenues for the three preceding years of \$15 million or less.⁶⁵ The SBA has approved these size standards.⁶⁶ In Auction Seven, which closed on April 15, 1996, sixty winning bidders for geographic area licenses in the 900 MHz SMR band qualified as small businesses under the \$15 million size standard.

800 MHz SMR. In the *800 MHz Second Report and Order*, we adopted a small business size standard for defining “small” and “very small” businesses for purposes of determining their

⁶¹ See Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 15 FCC Rcd 10456, 10476, ¶ 40 (May 18, 2000).

⁶² *Id.* at 15 FCC Rcd 10476, ¶ 40.

⁶³ *Id.* at 15 FCC Rcd 10476, ¶ 40.

⁶⁴ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Administrator, Small Business Administration (Dec. 2, 1998).

⁶⁵ Amendment of Parts 2 and 90 of the Commission’s Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2645-46 (1995) (*900 MHz SMR Rulemaking*); see also 47 C.F.R. § 90.814(b).

⁶⁶ See Letter to Michele C. Farquhar, Acting Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Philip Lader, Administrator, Small Business Administration (July 24, 1996).

eligibility for special provisions such as bidding credits and installment payments.⁶⁷ This small business standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.⁶⁸ A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.⁶⁹ The SBA has approved these small size standards.⁷⁰

The auction of the 525 800 MHz SMR geographic area licenses for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Three (3) winning bidders for geographic area licenses for the upper 200 channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard, and seven (7) qualified as very small businesses. Next, 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 (11) out of a total of 14 winning bidders for geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. Finally, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold in an auction completed on December 5, 2000. Of the 22 winning bidders, 19 claimed “small business” status. Thus, 40 winning bidders for geographic licenses in the 800 MHz SMR band qualified as small businesses.

In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations on the 800 MHz bands. We do not know how many firms provide 800 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities as defined for the 800 MHz SMR service.

Private Land Mobile Radio. Private Land Mobile Radio (“PLMR”) systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. The SBA has not developed a definition of small entity specifically applicable to PLMR licensees due to the vast array of PLMR users. For purposes of this FRFA, we will use the SBA’s

⁶⁷ See Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Second Report and Order*, FCC 97-223, PR Docket No. 93-144, 12 FCC Rcd 19079, ¶ 141 (1997) (*800 MHz Second Report and Order*); see also 47 C.F.R. § 90.912(b).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Letter from Aida Alvarez, Administration, Small Business Administration to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (Oct. 27, 1997)(Upper 200 channels). See Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas Sugrue, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 10, 1999)(applying the size standards approved in SBA’s Oct. 27, 1997 letter to the 800 MHz SMR, Lower 80 and 150 General channels).

definition applicable to Cellular and Other Wireless Telecommunications -- that is, an entity with no more than 1,500 persons.⁷¹

The Commission is unable at this time to estimate the number of small businesses which could be impacted by the rules. The Commission's 1994 Annual Report on PLMRs⁷² indicates that at the end of fiscal year 1994 there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Because any entity engaged in a commercial activity is eligible to hold a PLMR license, the revised rules in this context could potentially impact every small business in the United States.

Fixed Microwave Services. Microwave services include common carrier,⁷³ private-operational fixed,⁷⁴ and broadcast auxiliary radio services.⁷⁵ At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. For purposes of this FRFA, we will use the SBA's definition applicable to Cellular and Other Wireless Telecommunications -- that is, an entity with no more than 1,500 persons.⁷⁶ We estimate that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone (wireless) companies.

Public Safety Radio Services. Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.⁷⁷

⁷¹ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517212 (changed from 513322 in October 2002).

⁷² Federal Communications Commission, 60th Annual Report, Fiscal Year 1994, at paragraph 116.

⁷³ 47 C.F.R. Part 101 (formerly, Part 21 of the Commission's Rules).

⁷⁴ Persons eligible under Parts 80 and 90 of the Commission's rules can use Private Operational-Fixed Microwave services. See 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

⁷⁵ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

⁷⁶ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517212 (changed from 513322 in October 2002).

⁷⁷ With the exception of the special emergency service, these services are governed by Subpart B of Part 90 of the Commission's Rules, 47 C.F.R. §§ 90.15 through 90.27. The police service includes approximately 27,000 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes approximately 23,000 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service is presently comprised of approximately 41,000 licensees that are state, county, or municipal entities that use the radio for official purposes not covered by other public safety services. There are approximately 7,000 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The approximately 9,000 state and local governments that are licensed to highway maintenance service provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The approximately 1,000 licensees in the Emergency Medical Radio Service (EMRS) use the 39 channels

There are a total of approximately 127,540 licensees within these services. Governmental entities⁷⁸ as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.⁷⁹

Offshore Radiotelephone Service. This service operates on several UHF TV broadcast channels that are not used for TV broadcasting in the coastal areas of states bordering the Gulf of Mexico.⁸⁰ There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for "Cellular and Other Wireless Telecommunications" services.⁸¹ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.⁸²

Wireless Communications Services. This service can be used for fixed, mobile, radiolocation and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services ("WCS") auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these definitions.⁸³ The FCC auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as very small business entities, and one that qualified as a small business entity. We conclude that the number of geographic area WCS licensees affected includes these eight entities.

39 GHz Service. The Commission defined "small entity" for 39 GHz licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.⁸⁴ An additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years. These regulations defining "small entity" in the context of 39 GHz auctions have been approved by the SBA.⁸⁵ The auction of the 2,173 39 GHz licenses

allocated to this service for emergency medical service communications related to the delivery of emergency medical treatment. 47 C.F.R. §§ 90.15 through 90.27. The approximately 20,000 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities. 47 C.F.R. §§ 90.33 through 90.55.

⁷⁸ 47 C.F.R. § 1.1162.

⁷⁹ 5 U.S.C. § 601(5).

⁸⁰ This service is governed by subpart I of Part 22 of the Commission's Rules. See 47 C.F.R. § 22.1001 through § 22.1037.

⁸¹ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

⁸² *Id.*

⁸³ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division from A. Alvarez, Administrator, SBA (December 2, 1998).

⁸⁴ See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Band, *Report and Order*, 12 FCC Rcd 18600 (1997).

⁸⁵ See Letter to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998).

began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and policies adopted herein.

Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service. Multichannel Multipoint Distribution Service (“MMDS”) systems, often referred to as “wireless cable,” transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (“MDS”) and Instructional Television Fixed Service (“ITFS”).⁸⁶ In connection with the 1996 MDS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.⁸⁷ The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (“BTA”). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in annual receipts.⁸⁸ According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.⁸⁹ Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard also appears applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.⁹⁰ Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

Local Multipoint Distribution Service. Local Multipoint Distribution Service (“LMDS”) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.⁹¹ The auction of the 1,030 Local Multipoint Distribution Service licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined “small entity” for LMDS licenses as an entity that has average gross revenues of less than \$40

⁸⁶ *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

⁸⁷ 47 C.F.R. § 21.961(b)(1).

⁸⁸ 13 C.F.R. § 121.201, NAICS code 517510 (changed from 513220 in October 2002).

⁸⁹ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 513220 (issued October 2000).

⁹⁰ In addition, the term “small entity” within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

⁹¹ *See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, and to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Second Report and Order, 12 FCC Rcd 12545 (1997).

million in the three previous calendar years.⁹² An additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁹³ These regulations defining “small entity” in the context of LMDS auctions have been approved by the SBA.⁹⁴ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 small business winning bidders. Based on this information, we conclude that the number of small LMDS licenses includes the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission’s auction rules.

218-219 MHz Service. The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Areas (“MSA”). Of the 594 licenses, 557 were won by 170 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.⁹⁵ In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed \$15 million for the preceding three years.⁹⁶ A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed \$3 million for the preceding three years.⁹⁷ We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this FRFA that in future auctions, all of the licenses may be awarded to small businesses.

24 GHz – Incumbent Licensees. This rule change may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of

⁹² See Local Multipoint Distribution Service, *Second Report and Order*, 62 Fed. Reg. 23148 (April 29, 1997).

⁹³ *Id.*

⁹⁴ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

⁹⁵ Implementation of Section 309(j) of the Communications Act--Competitive Bidding, PP WT Docket No. 93-253, *Fourth Report and Order*, 59 Fed. Reg. 24947 (May 13, 1994); Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd. 1497, 1583 (Sept. 10, 1999).

⁹⁶ Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, *Report and Order and Memorandum Opinion and Order*, 64 Fed. Reg. 59656 (November 3, 1999).

⁹⁷ *Id.*

“Cellular and Other Wireless Telecommunications” companies. This category provides that such a company is small if it employs no more than 1,500 persons.⁹⁸ According to Census Bureau data for 1997, there were 977 firms in this category that operated for the entire year.⁹⁹ Of this total, 965 firms had 999 or fewer employees, and an additional 12 firms had 1,000 employees or more.¹⁰⁰ Thus, under this size standard, the great majority of firms can be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent¹⁰¹ and TRW, Inc. It is our understanding that Teligent and its related companies have fewer than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

24 GHz – Future Licensees. With respect to new applicants in the 24 GHz band, the small business size standard for “small business” is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of \$15 million.¹⁰² “Very small business” in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.¹⁰³ The SBA has approved these small business size standards.¹⁰⁴ These size standards will apply to the future auction, if held.

Location and Monitoring Service (“LMS”). Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined “small business” as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$15 million.¹⁰⁵ A “very small business” is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$3 million.¹⁰⁶ These definitions have been approved by the SBA.¹⁰⁷ An auction for LMS licenses commenced on February 23, 1999 and closed on

⁹⁸ 13 C.F.R. § 121.201, NAICS code 517212 (changed from 513322 in October 2002).

⁹⁹ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Employment Size of Firms Subject to Federal Income Tax: 1997,” Table 5, NAICS code 513322 (issued Oct. 2000).

¹⁰⁰ *Id.* The census data do not provide a more precise estimate of the number of firms that have 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”

¹⁰¹ Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 18 GHz band whose license has been modified to require relocation to the 24 GHz band.

¹⁰² *Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967 (2000); *see also* 47 C.F.R. § 101.538(a)(2).

¹⁰³ *Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd at 16967; *see also* 47 C.F.R. § 101.538(a)(1).

¹⁰⁴ *See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

¹⁰⁵ Amendment of Part 90 of the Commission’s Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order*, 13 FCC Rcd 15182 ¶ 20 (1998); *see also* 47 C.F.R. § 90.1103.

¹⁰⁶ *Id.*

¹⁰⁷ *See* Letter to Letter to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration (Feb. 22, 1999).

March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses. We conclude that the number of LMS licensees affected by this *Report and Order* includes these four entities. We cannot accurately predict the number of remaining licenses that could be awarded to small entities in future LMS auctions.

Media Services (Broadcast & Cable)

Commercial Television Services. The SBA defines a television broadcasting station that has no more than \$12.0 million in annual receipts as a small business.¹⁰⁸ Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.¹⁰⁹ Included in this industry are commercial, religious, educational, and other television stations.¹¹⁰ Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.¹¹¹

There were 1,695 full-service television stations operating in the United States as of December 2001.¹¹² According to Census Bureau data for 1997, there were 906 Television Broadcasting firms, total, that operated for the entire year.¹¹³ Of this total, 734 firms had annual receipts of \$9,999,999.00 or less and an additional 71 had receipts of \$10 million to \$24,999,999.00.¹¹⁴ Thus, under this standard, the majority of firms can be considered small.

Commercial Radio Services. The SBA defines a radio broadcasting station that has no more than \$6 million in annual receipts as a small business.¹¹⁵ A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.¹¹⁶ Included in this industry are commercial, religious, educational, and other radio stations.¹¹⁷ Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.¹¹⁸ According to Census Bureau data for 1997, there were 4,476 Radio Stations (firms), total, that operated for the entire year.¹¹⁹ Of this

¹⁰⁸ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 515120.

¹⁰⁹ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

¹¹⁰ *Id.*; see Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual*, at 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 515120.

¹¹¹ 1992 Census, Series UC92-S-1, at Appendix A-9.

¹¹² FCC News Release, Broadcast Station Totals as of December 31, 2001 (released May 21, 2002).

¹¹³ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 515120.

¹¹⁴ *Id.* The census data do not provide a more precise estimate.

¹¹⁵ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 515112.

¹¹⁶ 1992 Census, Series UC92-S-1, at Appendix A-9.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 515112.

total 4,265 had annual receipts of \$4,999,999.00 or less, and an additional 103 firms had receipts of \$5 million to \$9,999,999.00.¹²⁰ Thus, under this standard, the great majority of firms can be considered small.

Cable Systems. The Commission has developed, with SBA's approval, its own definition of small cable system operators. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.¹²¹ Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable companies at the end of 1995.¹²² Since then, some of those companies may have grown to serve more than 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the rules adopted herein.

The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate less than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenue in the aggregate exceeds \$250,000,000."¹²³ The Commission has determined that there are 67,700,000 subscribers in the United States.¹²⁴ Therefore, we found 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 of its affiliates, do not exceed \$250 million in the aggregate.¹²⁵ Based on available data, we find that the number of cable operators serving 677,000 subscribers or less totals approximately 1,450.¹²⁶ Since we do not request nor collect information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

Auxiliary, Special Broadcast and Other Program Distribution Services. This service involves a variety of transmitters, generally used to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the station). The Commission has not developed a definition of small entities applicable to broadcast auxiliary licensees. The applicable definitions of small

¹²⁰ *Id.* The census data do not provide a more precise estimate.

¹²¹ 47 C.F.R. § 67.901(3). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 6393 (1995). 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 515210.

¹²² Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

¹²³ 47 U.S.C. § 543(m)(2).

¹²⁴ FCC Announces New Subscriber Count for the Definition of Small Cable Operator, *Public Notice*, DA 01-158 (January 24, 2001).

¹²⁵ 47 C.F.R. § 76.1403(b).

¹²⁶ Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

entities are those, noted previously, under the SBA rules applicable to radio broadcasting stations and television broadcasting stations. The SBA defines a television broadcasting station that has no more than \$12.0 million in annual receipts as a small business,¹²⁷ and it defines a radio broadcasting station that has no more than \$6 million in annual receipts as a small business.¹²⁸

The Commission estimates that there are approximately 3,600 translators and boosters. The Commission does not collect financial information on any broadcast facility, and the Department of Commerce does not collect financial information on these auxiliary broadcast facilities. We believe that most, if not all, of these auxiliary facilities could be classified as small businesses by themselves. We also recognize that most commercial translators and boosters are owned by a parent station which, in some cases, would be covered by the revenue definition of small business entity discussed above. These stations would likely have annual revenues that exceed the SBA maximum to be designated as a small business (either \$6 million for a radio station or \$12 million for a TV station). Furthermore, they do not meet the Small Business Act's definition of a "small business concern" because they are not independently owned and operated.

Satellite Services. The Commission has not developed a small business size standard applicable to licensees in the international services. However, the SBA has developed a small business size standard for Satellite Telecommunications, which consists of all such firms having \$12.5 million or less in annual receipts.¹²⁹ According to Census Bureau data for 1997, in this category there was a total of 324 firms that operated for the entire year.¹³⁰ Of this total, 273 firms had annual receipts of under \$10 million, and an additional twenty-four firms had receipts of \$10 million to \$24,999,999.¹³¹ Thus, under this size standard, the majority of firms can be considered small.

International Broadcast Stations. Commission records show that there are approximately 19 international high frequency broadcast station authorizations. We do not request nor collect annual revenue information, and are unable to estimate the number of international high frequency broadcast stations that would constitute small businesses under the SBA definition.

Fixed Satellite Transmit/Receive Earth Stations. There are approximately 4,303 earth station authorizations, a portion of which are Fixed Satellite Transmit/Receive Earth Stations. We do not request nor collect annual revenue information, and are unable to estimate the number of the earth stations that would constitute small businesses under the SBA definition.

Fixed Satellite Very Small Aperture Terminal ("VSAT") Systems. These stations operate on a primary basis, and frequency coordination with terrestrial microwave systems is not

¹²⁷ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 515120.

¹²⁸ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 515112.

¹²⁹ 13 C.F.R. § 121.201, NAICS code 517410 (changed from 513340 in October 2002).

¹³⁰ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513340 (issued October 2000).

¹³¹ *Id.*

required. Thus, a single “blanket” application may be filed for a specified number of small antennas and one or more hub stations. There are 485 current VSAT System authorizations. We do not request nor collect annual revenue information, and are unable to estimate the number of VSAT systems that would constitute small businesses under the SBA definition.

Mobile Satellite Stations. There are 21 licensees. On February 10, 2003, the Commission released a *Report and Order and Notice of Proposed Rulemaking* allowing licensees in the Mobile Satellite Services to use their spectrum for Ancillary Terrestrial Communications (“ATC”).¹³² Licensees may construct towers to provide ATC service. We do not request nor collect annual revenue information, and are unable to estimate the number of mobile satellite earth stations that would constitute small businesses under the SBA definition.

Radio Determination Satellite Earth Stations. There are four licensees. We do not request nor collect annual revenue information, and are unable to estimate the number of radio determination satellite earth stations that would constitute small businesses under the SBA definition.

Digital Audio Radio Services (“DARS”). Commission records show that there are 2 Digital Audio Radio Services authorizations. We do not request nor collect annual revenue information, and, therefore, we cannot estimate the number of small businesses under the SBA definition.

Non-Licensee Tower Owners

The Commission’s rules require that any entity proposing to construct an antenna structure over 200 feet or within the glide slope of an airport must register the antenna structure with the Commission on FCC Form 854.¹³³ For this and other reasons, non-licensee tower owners may be subject to the requirements adopted in the *Report and Order* and the Nationwide Agreement. As of August 2004, approximately 96,778 towers were included in the Antenna Structure Registration database. This includes both towers registered to licensees and towers registered to non-licensee tower owners. The Commission does not keep information from which we can easily determine how many of these towers are registered to non-licensees or how many non-licensees have registered towers.¹³⁴ Moreover, the SBA has not developed a size standard for small businesses in the category “Tower Owners.” Therefore, we are unable to estimate the number of non-licensee tower owners that are small entities. We assume, however, that nearly all non-licensee tower companies are small businesses under the SBA’s definition for cellular and other wireless telecommunications services.¹³⁵

¹³² In the Matter of Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd. 11,030 (2003).

¹³³ 47 C.F.R. §§ 17.4(a), 17.7(a).

¹³⁴ We note, however, that approximately 13,000 towers are registered to 10 cellular carriers with 1,000 or more employees.

¹³⁵ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517212. Under this category, a business is small if it has 1,500 or fewer employees.

D. Description of Reporting, Recordkeeping, and Other Compliance Requirements.

The Nationwide Agreement includes several compliance requirements, including recordkeeping and reporting requirements, applicable to regulatees. Under the Commission's rules, as they existed before the adoption of the *Report and Order*, applicants were required to determine whether their construction of "facilities may affect districts, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or eligible for listing, in the National Register of Historic Places," consistent with the rules of the Council.¹³⁶ The Nationwide Agreement modifies and more clearly specifies the means by which applicants should make that determination.

Specific requirements that the Nationwide Agreement imposes on Applicants include making them determine whether an exclusion applies to their proposed construction project, thereby obviating the need to submit Section 106 materials to the SHPO/THPO.¹³⁷ Accordingly, applicants should maintain records to verify the applicability of any exclusion should questions arise about the project after construction has started or has been completed.¹³⁸

The Nationwide Agreement also requires that applicants follow specific steps to identify and initiate contact with Indian tribes and Native Hawaiian Organizations that may attach religious and cultural significance to potentially affected historic properties. These steps ensure that tribes and NHOs will be contacted in a respectful manner that conforms to their reasonable preferences and that offers them a full opportunity to participate in the process. These steps also ensure that Indian tribes' requests for government-to-government consultation, as well as cases of tribal or NHO disagreement or non-response, will be referred to the Commission. They also provide for confidentiality of private or sensitive information.¹³⁹

The Nationwide Agreement establishes required procedures for seeking local government and public participation; for considering public comments before forwarding them to the SHPO/THPO; and for identifying consulting parties.¹⁴⁰ In addition, the Nationwide Agreement establishes standards for applicants to apply in defining the area of potential effects ("APE") for both direct and visual effects; in identifying and evaluating the significance of Historic Properties within the APE; and in assessing the effects of the Undertaking on Historic Properties.¹⁴¹ Once identification, evaluation, and assessment are complete, the Nationwide Agreement requires Applicants to provide the SHPO/THPO and consulting parties with a

¹³⁶ See 47 C.F.R. § 1.1307(a)(4) and Note.

¹³⁷ Nationwide Agreement, § III. As will be discussed below, the addition of exclusions, on balance, greatly reduces the overall burdens on the Applicant.

¹³⁸ *Id.*

¹³⁹ *Id.*, Part IV.

¹⁴⁰ *Id.*, Part V.

¹⁴¹ *Id.*, Part VI.

Submission Packet that conforms to a standardized set of instructions, which require specific information about the Applicant, the project, and its review.¹⁴²

The Nationwide Agreement also establishes procedures for Applicants to follow after receiving certain responses from the SHPO/THPO. For example, if the SHPO/THPO disagrees with the Applicant's finding of "no Historic Properties affected," the Applicant is to engage in further discussions with the SHPO/THPO to resolve any disagreement, and, if that effort fails, the Applicant may submit the matter to the Commission for its effect determination. Additionally, the Nationwide Agreement provides procedures for developing Memoranda of Agreement to mitigate adverse effects (e.g., painting a facility a specific color to reduce its visibility).¹⁴³ Finally, the Nationwide Agreement prescribes procedures for Applicants to follow in the event of inadvertent or post-review discoveries (e.g., buried properties of archeological significance),¹⁴⁴ and delineates potential measures that the Commission may require Applicants to take in response to a complaint alleging construction prior to compliance with Section 106 (e.g., providing the Applicant with a copy of the complaint and requesting a written response within a reasonable time).¹⁴⁵

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

The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹⁴⁶

As noted in Section D, *supra*, under the Commission's rules, as they existed before the adoption of the *Report and Order*, applicants were required to perform historic preservation review in accordance with the rules of the Commission and the Council.¹⁴⁷ The Commission considered the potential impact of its rules on smaller entities throughout the process of negotiating and drafting the Nationwide Agreement. One of the Commission's goals has been to make its environmental review process more efficient and standardized so that entities with smaller staffs can learn and complete the process more quickly. The *Notice* sought comment on the draft Nationwide Agreement, generally, including issues related to its potential economic impact on small entities, but we received no comments on this topic. Despite having received no

¹⁴² *Id.*, § VII.A.1. and Attachments 3 (FCC Form 620) and 4 (FCC Form 621).

¹⁴³ *Id.*, §§ VII.B.3, VII.C.2, VII.C.3, VII.C.6, and VII.D.

¹⁴⁴ *Id.*, Part IX.

¹⁴⁵ *Id.*, § X.C.

¹⁴⁶ 5 U.S.C. § 603(c)(1)-(4).

¹⁴⁷ *See* 47 C.F.R. § 1.1307(a)(4) and Note.

comments with reference to issues that might affect small entities, the Commission continues to assess various options to relieve potential burdens on small entities.

The alternative of exempting small entities from the requirements proposed in the *Notice* and draft Nationwide Agreement was not possible. The NHPA requires that *all* Federal Undertakings be evaluated for their potential effects on districts, sites, buildings, structures or objects, which are significant in American history, architecture, archeology, engineering or culture, and which are listed, or are eligible for listing, in the National Register of Historic Places. Neither the NHPA nor the Council's rules contemplates any exemption from review depending on the size or resources of the non-federal entity which initiates the undertaking. The direct impact of the requirements proposed in the draft Nationwide Agreement will be the same on all entities. Therefore, no special or extra burden will be placed on small entities.

Under the Nationwide Agreement burdens on small entities will be reduced in significant ways. First, the exclusions listed in Part III provide regulatory relief for those who intend to construct facilities that fall within the criteria listed therein (*e.g.*, certain types of facilities to be located within 50 feet of the outer boundary of certain types of rights-of-way).¹⁴⁸ The availability of exclusions for certain categories of projects, whereby those that qualify are exempted from Section 106 review, offers a great reduction in burdens for some Applicants including many smaller entities. While a determination must be made as to whether the exclusion applies, in those instances in which the project is excluded from Section 106 review, only record-keeping is required, thereby relieving the Applicant of any responsibility for identifying and assessing possible adverse effects on listed or eligible properties.

Additionally, the Commission recognizes that smaller entities do not have the economies of scale needed to sustain large environmental compliance staffs. Consequently, smaller entities will be unlikely to maintain in-house expertise on all facets of the review process needed for compliance with the rules of the Commission and the Council. Therefore, such firms will benefit more, relative to large entities, from the Part III exclusions. The exclusions allow smaller entities to forgo the costs associated with conducting the Section 106 analysis of properties within the relevant Area of Potential Effects. Even though many entities contract out much Section 106 work to historic preservation specialists, there are per project costs associated with the process of hiring a contractor, overseeing its work, and submitting the materials produced by the contractor to the SHPO that decrease as an entity is able to do this routinely and move up its learning curve by building more facilities. Similarly, the per unit cost for large entities declines as the cost of an in-house environmental compliance staff is spread over a greater number of units constructed. Furthermore, the cost charged by a historic preservation specialist to prepare a Section 106 report will be determined by the complexity of the project, not by the size of the entity contracting for the historic preservation analysis. Consequently, in some instances, smaller entities will pay more for such work as a proportion of revenues than will the large firms. Smaller entities may also be injured proportionally more by delays in the Section 106 process since more of their cash flow is tied up in each telecommunications facility being built. Thus, in assessing the general impact of Section 106 exclusions the Commission believes that the

¹⁴⁸ Nationwide Agreement, Part III at B-8 to B-10 ("Undertakings Excluded from Section 106 Review").

Nationwide Agreement's Part III exclusions will reduce costs for small entities to a proportionally greater extent than they will for large entities.

Furthermore, the availability of the Part III exclusions will likely encourage the wireless infrastructure industry to direct its projects so that the projects fall within the scope of the Part III exclusions. Consequently, smaller entities may reap a competitive advantage precisely because they may be able to avoid having large in-house compliance staffs and will be able to price their services more cheaply.

Burdens on small entities will also be reduced because the Commission and Council have clarified the steps that need to be taken to perform the requisite Section 106 review. For example, in those instances in which a Part III exclusion does not apply, Applicants will now submit a standardized submission packet to the SHPO/THPO that initiates the Section 106 review. Previously, the absence of a standardized submission packet made it difficult for small entities that were unfamiliar with the process to quickly learn what was required for a proper submission. However, the submission packet's standardized instructions, either for new towers or collocations, will facilitate preparation of high-quality submissions on the first effort by firms that may not be large enough to employ an environmental or historic preservation staff. The standards set forth in Part VI will add predictability to the process,¹⁴⁹ and the procedures and the time frames for review in Part VII will reduce the likelihood of either uncertainty or suspension of projects.¹⁵⁰ Thus, the new submission packets will prevent the need for costly and time-consuming delays and resubmissions which may be especially burdensome for small entities who, with fewer ongoing projects generating revenue, cannot afford long delays in the review process.

We note that Applicants, whether large or small entities, routinely retain consultants to perform many of the steps associated with Section 106 reviews. Consistent with the objectives of the NHPA, the Nationwide Agreement requires the use of professionals who meet the Secretary of the Interior's standards for tasks that implicate professional expertise.¹⁵¹ We anticipate that the use of consultants to provide this expertise will continue to be prevalent under the Nationwide Agreement. Applicants will typically comply with the professional qualification requirements in the Nationwide Agreement by using consultants to perform specialized tasks due to their relative cost effectiveness and efficiency in completing Section 106 reviews. We believe that the rules adopted herein will not impose any requirements on small entities that would make the use of consultants more burdensome than is currently the case. Indeed, by clarifying that certain tasks in the Section 106 process do not require professional expertise, the Nationwide Agreement may, as described above, relieve burdens in this area to a relatively greater extent for small entities than for large.

¹⁴⁹ Nationwide Agreement, Part VI at B-16 to B-22 ("Identification, Evaluation, and Assessment of Effects").

¹⁵⁰ Nationwide Agreement, Part VII at B-22 to B-25 ("Procedures").

¹⁵¹ Nationwide Agreement, §§ VI.D.1.e, VI.D.2.b, VI.E.5; *compare id.*, Part III (no professional expertise required to invoke exclusions), § VI.D.1.d (no professional expertise required to identify historic properties within the APE for visual effects).

In some instances, the Nationwide Agreement may impose specific burdens on all Applicants, including small entities. For example, standardized submission packets will now be submitted to the SHPO or THPO. However, we believe these burdens are the minimum necessary to accomplish the Nationwide Agreement's purpose. Thus, the Commission, after discussion with the members of the Telecommunications Working Group and after reviewing the record, believes that the forms include the minimum information necessary for appropriate review by a SHPO, THPO, or the Commission. Similarly, the provisions for tribal and public participation (Parts IV and V) are intended to embody the least burdensome procedures that will afford these parties a complete and legally sufficient opportunity to participate in the process.¹⁵²

The new document submission and historic preservation review processes which constitute a core feature in the Nationwide Agreement are set forth in Part VII. These procedures have also been developed with the goal of reducing the burden of procedural uncertainty by delineating straightforward, repeatable processes for assessing the potential effects of proposed facilities on historic properties.

Any burdens imposed by the Nationwide Agreement will be more than outweighed by the benefits that will accrue to small entities from its provisions. The Commission has drafted the Nationwide Agreement with a commitment to reducing burdens on small entities. In closing, the Commission believes that the Nationwide Agreement conscientiously alleviates burdens on small entities in the ways discussed above.

F. Federal Rules that may Duplicate, Overlap, or Conflict with the Proposed Rules.

None. The Nationwide Agreement will modify and supplement the procedures set forth in the rules of the Council,¹⁵³ as expressly contemplated in those rules.¹⁵⁴

G. Report to Congress

The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.¹⁵⁵ In addition, the Commission will send a copy of the *Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the Federal Register. See 5 U.S.C. § 604(b).

¹⁵² Nationwide Agreement, Part IV at B-11 to B-15 (“Participation of Indian Tribes and Native Hawaiian Organizations in Undertakings Off Tribal Lands”); Nationwide Agreement, Part V at B-15 to B-16 (“Public Participation and Consulting Parties”).

¹⁵³ 36 C.F.R. Part 800.

¹⁵⁴ 36 C.F.R. § 800.14(b).

¹⁵⁵ See 5 U.S.C. § 801(a)(1)(A)