

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

In the Matters of)
)
Federal-State Joint Board) CC Docket No. 96-45
On Universal Service)
)
Access Charge Reform) CC Docket No. 96-262

SIXTEENTH ORDER ON RECONSIDERATION IN CC DOCKET NO. 96-45
EIGHTH REPORT AND ORDER IN CC DOCKET 96-45
SIXTH REPORT AND ORDER IN CC DOCKET 96-262

Adopted: October 8, 1999

Released: October 8, 1999

By the Commission:

I. INTRODUCTION

1. On July 30, 1999, a three-judge panel of the United States Court of Appeals for the Fifth Circuit issued a decision¹ affirming in part, remanding in part, and reversing in part the Commission's May 8, 1997 *Universal Service Order*.² Several of the court's rulings in that decision affect the assessment and recovery of universal service contributions, as well as the Commission's Lifeline program for low-income consumers. The court's mandate from the decision is scheduled to take effect on November 1, 1999. Accordingly, in this Order, we adopt modifications to our rules consistent with those portions of the court's decision concerning the assessment and recovery of universal service contributions, and the Lifeline program. These rule changes shall become effective on November 1, 1999.

2. This Order reflects our effort to respond promptly to the court's forthcoming mandate. The actions we take are transitional in view of the limited time and data available to us in implementing the court's mandate that we change our rules and past practices by a specific date. In view of these constraints, our actions represent our best effort to take short-term action,

¹ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

² *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Erratum, FCC 97-157 (rel. June 4, 1997), *aff'd in part, rev'd in part, remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *motion for stay granted in part*, (Sept. 28, 1999), *petitions for rehearing and rehearing en banc denied*, (Sept. 28, 1999) (*Universal Service Order*).

subject to later refinement if necessary, in order to assure compliance with the court's mandate.

II.BACKGROUND

3. *The Universal Service Order.* On May 8, 1997, the Commission issued the *Universal Service Order*, implementing the universal service provisions in section 254 of the Communications Act of 1934, as amended (the Act), and setting forth a plan to fulfill the universal service goals established by Congress.³ In the *Universal Service Order*, the Commission announced its plan for establishing a system of universal service support for rural, insular, and high-cost areas that will replace the existing high-cost support mechanisms and implicit federal subsidies with explicit, competitively-neutral federal universal service support mechanisms.⁴ Pursuant to the Act, the Commission also adopted rules to help ensure that quality services are available to low-income consumers at affordable rates.⁵ In addition, the Commission adopted rules creating new support mechanisms to promote universal service for eligible schools and libraries, and rural health care providers, as mandated by Congress in the Act.⁶ Finally, the Commission modified its existing funding methods, so that funding for the support mechanisms is not generated exclusively through charges on long distance carriers. Instead, as the statute requires, the new universal service rules require equitable and nondiscriminatory contributions from all telecommunications carriers that provide interstate telecommunications services, as well as other providers of interstate telecommunications to the extent that the Commission determines that their contributions would serve the public interest.⁷

4. *Assessment Base for High-Cost and Low-Income Support Mechanisms.* In the *Universal Service Order*, the Commission concluded that contributions to the support mechanisms for high-cost areas and low-income consumers will be based on the interstate and

³ *Universal Service Order*, 12 FCC Rcd 8776.

⁴ *Universal Service Order*, 12 FCC Rcd at 8888-8951, paras. 199-325.

⁵ *Universal Service Order*, 12 FCC Rcd at 8952-8994, paras. 326-409.

⁶ *Universal Service Order*, 12 FCC Rcd at 9002-9161, paras. 424-749.

⁷ *Universal Service Order*, 12 FCC Rcd at 9171-9186, paras.772-800. Section 254(d) provides that

[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. . . . Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

47 U.S.C. § 254(d).

international revenues of providers of interstate telecommunications services.⁸ Regarding contributors' international revenues, the Commission adopted the recommendation of the Federal-State Joint Board on Universal Service (Joint Board) that interstate providers that also provide international telecommunications services should contribute to universal service based on revenues derived from both their interstate and international services.⁹ The Commission reasoned that contributors that provide international telecommunications services benefit from universal service because they must either terminate or originate telecommunications on the domestic public switched telephone network. The Commission did not include in the revenue base revenues derived from communications between two international points or foreign countries.¹⁰ Nor did the Commission require carriers that provide only international telecommunications services to contribute to universal service because such carriers are not "telecommunications carriers that provide interstate telecommunications," as required by section 254(d) of the Act.¹¹

5. By not requiring carriers that provide only international telecommunications services to contribute to universal service, the Commission recognized that some providers of international services would be treated differently than others.¹² The Commission concluded, however, that the effects of this disparate treatment would be minimal because most international revenues are earned by carriers that also provide interstate services and because the contribution rules would be exactly the same for both foreign-owned carriers providing service in the United States and domestically-owned carriers.¹³

6. *Assessment Base for Schools and Libraries, and Rural Health Care Support Mechanisms.* To fund the new schools and libraries, and rural health care support mechanisms required by section 254(h) of the Act, the Commission adopted the recommendation of the Joint Board to assess not only the interstate and international revenues of providers of interstate telecommunications and telecommunications services, but also the intrastate revenues of such providers.¹⁴ Because many states do not already have similar support mechanisms for schools and libraries, and rural health care providers, the Commission and Joint Board believed that including intrastate revenues in the assessment base for the section 254(h) support mechanisms

⁸ *Universal Service Order*, 12 FCC Rcd at 9200, para. 831; *see also* 47 C.F.R. § 54.706(c).

⁹ *Universal Service Order*, 12 FCC Rcd at 9173-75, para. 779.

¹⁰ *Universal Service Order*, 12 FCC Rcd at 9174, para. 779.

¹¹ *Universal Service Order*, 12 FCC Rcd at 9174, para. 779.

¹² *Universal Service Order*, 12 FCC Rcd at 9174, para. 779.

¹³ *Universal Service Order*, 12 FCC Rcd at 9175, para. 779.

¹⁴ *Universal Service Order*, 12 FCC Rcd at 9203-05, paras. 837-841.

would help to ensure adequate funding for those support mechanisms.¹⁵

7. *Commission's Current Rules Governing the Calculation of Universal Service Contributions.* Under the Commission's current rules, contributions to the universal service support mechanisms are based on contributors' end-user telecommunications revenues and two contribution factors that are determined quarterly by the Commission.¹⁶ The Commission's rules require universal service contributors to submit revenue data on a worksheet that is filed semi-annually with the universal service Administrator, the Universal Service Administrative Company (USAC).¹⁷ USAC compiles this revenue data, projects expenses and demand for each program, and submits this information to the Commission. Based on this information, the Commission establishes two quarterly contribution factors based on the ratio of total projected expenses of the universal service support mechanisms to total end-user telecommunications revenues.¹⁸ One factor is applied to contributors' intrastate, interstate and international end-user telecommunications revenues and is used to calculate contributions for the schools and libraries, and rural health care support mechanisms.¹⁹ The other factor is applied to contributors' interstate and international end-user telecommunications revenues and is used to calculate contributions for the high-cost and low-income support mechanisms.²⁰ Once the Commission has approved the quarterly contribution factors, USAC applies the factors to contributors' individual revenue bases and bills contributors accordingly.²¹

8. *Recovery of Universal Service Contributions.* The *Universal Service Order* generally permitted, but did not require, contributors to pass the cost of their universal service contributions on to their customers of interstate services.²² For contributors electing to recover their federal universal service contribution costs from their customers, the *Universal Service Order* did not generally specify a particular method for obtaining such recovery.²³ Rather, the

¹⁵ *Universal Service Order*, 12 FCC Rcd at 9203, para. 837.

¹⁶ 47 C.F.R. § 54.709(a).

¹⁷ 47 C.F.R. § 54.711.

¹⁸ 47 C.F.R. § 54.709(a)(2).

¹⁹ 47 C.F.R. § 54.709(a)(1)-(2).

²⁰ 47 C.F.R. § 54.709(a)(1)-(2).

²¹ 47 C.F.R. § 54.709(a)(3).

²² *Universal Service Order*, 12 FCC Rcd at 9209, para. 851 ("Although we do not mandate that carriers recover contributions in a particular manner, we note that carriers are permitted to pass through their contribution requirements to all of their customers of interstate services in an equitable and nondiscriminatory fashion.").

²³ *Universal Service Order*, 12 FCC Rcd at 9211, para. 853 ("We agree with state members [of the Joint Board] and CPI that we should allow carriers the flexibility to decide how they should recover their contributions.") (footnote omitted).

Commission required only that contributors obtain recovery of the cost of their universal service contributions "in an equitable and nondiscriminatory fashion"²⁴ and "through rates for interstate services."²⁵ As for incumbent local exchange carriers (LECs), however, the Commission determined that price cap LECs that elect to recover their universal service contributions may treat their universal service contributions as exogenous changes to their price cap indices.²⁶ For all other incumbent LECs, the Commission decided to permit recovery of universal service contributions by applying a factor to increase their carrier common line charge revenue requirement.²⁷

9. *Lifeline Program.* The Commission's Lifeline program predates the 1996 Act, and is designed to provide support to assist low-income consumers in participating jurisdictions pay for some state-specified level of local service.²⁸ In the *Universal Service Order*, the Commission made various adjustments to the Lifeline program in accordance with the 1996 Act.²⁹ Among other things, the Commission adopted a rule prohibiting carriers receiving universal service support from disconnecting Lifeline services from consumers who have failed to pay toll charges.³⁰

III. OPINION BY THE FIFTH CIRCUIT COURT OF APPEALS

10. Numerous parties filed petitions for review of the Commission's *Universal Service Order*. Those petitions were consolidated before the Fifth Circuit, which issued an opinion on July 30, 1999. In response to the arguments of Petitioner COMSAT Corporation (COMSAT), the court reversed and remanded to the Commission for further consideration the Commission's decision to assess contributions based on contributors' combined interstate and international revenues.³¹ COMSAT did not challenge the Commission's jurisdiction to include international

²⁴ *Universal Service Order* 12 FCC Rcd at 9199, para. 829 (carriers may not shift more than an equitable share of their contributions to any customer or group of customers).

²⁵ *Universal Service Order*, 12 FCC Rcd at 9190, para. 809.

²⁶ *Universal Service Order*, 12 FCC Rcd at 9200, para. 830. *See also Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, and 95-72, First Report and Order, 12 FCC Rcd 15982, 16147, para. 379 (1997) (*Access Charge Reform Order*).

²⁷ *Universal Service Order*, 12 FCC Rcd at 9200, para. 830.

²⁸ *Universal Service Order*, 12 FCC Rcd at 8957, para. 341.

²⁹ *Universal Service Order*, 12 FCC Rcd at 8957-94, paras. 341-409.

³⁰ *Universal Service Order*, 12 FCC Rcd at 8983-88, para. 390-97. *See also* 47 C.F.R. § 54.401(b). This rule is often referred to as the "no disconnect" rule.

³¹ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 434-35.

revenues in calculating carriers' contributions. COMSAT argued, however, that including the international revenues of interstate carriers in the revenue base was unreasonable for carriers such as COMSAT whose interstate revenues account for a small percentage of their total annual revenues and whose annual contribution to universal service would exceed their annual interstate revenues.³² COMSAT argued, and the court agreed, that this result is contrary to the statutory requirement in section 254(d) of the Act, that contributions be made on an "equitable and nondiscriminatory basis."³³ Specifically, the court found that the Commission failed to demonstrate how requiring COMSAT to pay more in universal service contributions than it derives in interstate revenues satisfies the "equitable" language of section 254(d).³⁴ Additionally, the court criticized the contribution requirement at issue as "discriminatory" under section 254(d), on the basis that the application of that requirement "damages some international carriers like COMSAT more than it harms others."³⁵ Accordingly, the court reversed and remanded for further consideration the Commission's decision to assess the international revenues of interstate carriers.³⁶

11. With respect to the Commission's methodology for assessing contributions for the universal service support mechanisms for schools and libraries, and rural health care providers, the court found that the Commission had exceeded its jurisdictional authority by assessing contributions for those programs based, in part, on the intrastate revenues of universal service contributors.³⁷ Accordingly, the court reversed the Commission's decision to include intrastate revenues in the contribution base for the schools and libraries, and rural health care support mechanisms.³⁸

12. The court also reversed the Commission's "decision to require [incumbent LECs] to recover universal service contributions from their interstate access charges."³⁹ Finding that the Commission had "required" incumbent LECs to recover their contributions from interstate access charges, the court held that this requirement maintained an implicit subsidy in violation of section 254(e) of the Act.⁴⁰

³² *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 434.

³³ 47 U.S.C. § 254(d).

³⁴ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 434-35.

³⁵ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 435.

³⁶ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 435.

³⁷ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 448.

³⁸ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 448.

³⁹ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 425.

⁴⁰ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 425.

13. Finally, the court reversed the Commission's decision to prohibit carriers eligible for universal service support from disconnecting Lifeline service to consumers who fail to pay toll charges.⁴¹ The court held that the Commission lacked jurisdiction under the Act to impose this "no disconnect" requirement on carriers.⁴²

IV. RESPONSE TO THE FIFTH CIRCUIT'S OPINION

A. Procedural Response

14. On September 9, 1999, the Commission filed a motion to stay the court's mandate, which had been scheduled to take effect on September 20, 1999.⁴³ On September 13, 1999, the Commission, GTE, and AT&T each filed petitions for rehearing with the court.⁴⁴ On September 28, 1999, the court denied all of the petitions for rehearing, and granted, in part, the Commission's motion for stay.⁴⁵ In its order granting, in part, the Commission's motion for stay, the court ordered its July 30, 1999 mandate to issue on November 1, 1999.⁴⁶ In light of the court's September 28, 1999 rulings, the rule changes discussed below shall become effective on November 1, 1999.

B. Changes to the Commission's Rules

1. Single Contribution Base for Universal Service Support Mechanisms

15. *Overview.* In light of the court's ruling, we amend sections 54.706 and 54.709 of our rules to provide for a single contribution base for purposes of funding all of the universal service support mechanisms.⁴⁷ Specifically, in response to the court's determination that the

⁴¹ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 421-24.

⁴² *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 424.

⁴³ See Commission's Motion for a Stay of the Mandate (filed Sept. 9, 1999).

⁴⁴ See FCC Petition for Panel Rehearing (filed Sept. 13, 1999); FCC Petition for Rehearing *En Banc* (filed Sept. 13, 1999); Petition for Rehearing of the GTE Entities (filed Sept. 13, 1999); Petition for Rehearing *En Banc* of the GTE Entities (filed Sept. 13, 1999); and Petition of Intervenor AT&T Corp. for Rehearing *En Banc* (filed Sept. 13, 1999).

⁴⁵ See *Texas Office of Public Utility Counsel v. FCC*, No. 97-60421 (Sept. 28, 1999) (order denying petitions for rehearing); *Texas Office of Public Utility Counsel v. FCC*, No. 97-60421 (Sept. 28, 1999) (order granting, in part, Commission's motion for stay).

⁴⁶ *Texas Office of Public Utility Counsel v. FCC*, No. 97-60421 (Sept. 28, 1999) (order granting, in part, Commission's motion for stay).

⁴⁷ 47 C.F.R. §§ 54.706, 54.709.

Commission lacks jurisdiction to assess providers' intrastate revenues, we have eliminated intrastate revenues from the contribution base. Consistent with the court's ruling, we also reconsider the basis for assessing the international revenues of interstate providers. No party has challenged the Commission's decision to include international revenues generally. The court, however, agreed with COMSAT's argument that our rules, as applied, are in some instances inequitable and discriminatory. As discussed more fully below, we modify sections 54.706 and 54.709 of our rules to exclude from the contribution base the international end-user telecommunications revenues of each interstate telecommunications provider whose interstate end-user telecommunications revenues constitute less than 8 percent of its combined interstate and international end-user telecommunications revenues. Except for revenues excluded pursuant to revised section 54.706(c), the new contribution base will consist of interstate providers' interstate and international end-user telecommunications revenues. The revised texts of sections 54.706 and 54.709 are set forth in Appendix A attached hereto.

16. Our rules provide that the Commission will determine contribution factors on a quarterly basis.⁴⁸ Because the court's mandate will issue on November 1, 1999, however, the Commission must establish contribution factors in the middle of the quarter, to comply with the court's decision.⁴⁹ The Commission's rules permit us, on our own motion, to waive our rules for good cause shown.⁵⁰ Because it is necessary to issue new contribution factors before the start of the next quarter in order to comply with the judicial mandate, we find that good cause exists to waive section 54.709(a) on this occasion to the extent that it provides that contribution factors will be adopted on a quarterly basis. In addition, because of the need to revise our rules so that they will be in compliance with the mandate as of November 1, 1999, we find good cause to dispense with notice and comment requirements that might otherwise apply, pursuant to the Administrative Procedure Act, because those requirements are impracticable and contrary to the public interest.⁵¹

17. *Revised Fourth Quarter Contribution Factor.* On September 10, 1999, the Commission released proposed fourth quarter 1999 contribution factors, which USAC is using to

⁴⁸ 47 C.F.R. § 54.709(a).

⁴⁹ In our motion to stay the court's mandate, the Commission sought to avoid implementing the court-mandated change to a single contribution base in the middle of a quarter so as not to disrupt universal service collection and disbursement functions during a quarter. Motion for Stay at 2. In the event that the upcoming quarter were to begin less than 60 days after the effective date of the court's mandate, the Commission asked that the mandate be stayed until the first day of the quarter subsequent to the quarter following the court's mandate. Motion for Stay at 2. The court did not grant this portion of the Commission's motion and, instead, ordered the mandate to take effect on November 1, 1999. See *Texas Office of Public Utility Counsel v. FCC*, No. 97-60421 (Sept. 28, 1999) (order granting, in part, Commission's motion for stay).

⁵⁰ 47 C.F.R. § 1.3.

⁵¹ 5 U.S.C. § 553(b)(3)(B).

bill contributors for their October 1999 contributions.⁵² Consistent with the Commission's rules in effect on that date, one of those contribution factors was calculated based on contributors' intrastate, interstate, and international end-user telecommunications revenues for the July 1998 through December 1998 period, as reported by contributors on the March 1999 Universal Service Worksheet (FCC Form 457). In order to comply with the Fifth Circuit's decision, we must eliminate intrastate revenues from the contribution base. Eliminating intrastate revenues from the new contribution base will eliminate the need for two contribution factors. Specifically, our revised rules provide for a single contribution factor that will be calculated based on contributors' interstate and, as discussed more fully below, international end-user telecommunications revenues. That factor will be applied to individual contributors' combined interstate and international end-user telecommunications revenues to calculate contributions for all of the universal service support mechanisms. The elimination of intrastate revenues from the contribution base will reduce the contributions of incumbent LECs. To the extent an incumbent LEC is recovering its universal service contributions in interstate access charges, it must file tariffs reducing its access charges correspondingly.

18. In order to implement this change by November 1, 1999, the effective date of the court's mandate, the Common Carrier Bureau (Bureau) is releasing today a revised proposed fourth quarter contribution factor that will be applicable to carrier contributions for November and December 1999.⁵³ We direct USAC to calculate all contributor bills for November and December 1999 based on this revised fourth quarter 1999 contribution factor. For the month of October 1999, USAC shall continue to bill contributors, and contributors shall continue making contributions to universal service, in accordance with the Commission's current contribution rules. Providers that fail to contribute to the universal service support mechanisms in accordance with the Commission's rules will be subject to enforcement action by the Commission.⁵⁴

19. *Limited International Revenues Exception.* Consistent with the court's ruling, we modify sections 54.706 and 54.709 of our rules.⁵⁵ A provider of interstate and international telecommunications shall not be required to contribute based on its international end-user telecommunications revenues if its interstate end-user telecommunications revenues constitute less than 8 percent of its combined interstate and international end-user telecommunications revenues. This modification is consistent with the court's ruling because it will exclude from the contribution base the international end-user telecommunications revenues of any telecommunications provider whose annual contribution to the federal universal service support

⁵² See *Proposed Fourth Quarter 1999 Universal Service Contribution Factors*, CC Docket No. 96-45, Public Notice, DA 99-1857 (rel. Sept. 10, 1999).

⁵³ *Proposed Fourth Quarter 1999 Universal Service Contribution Factor for November and December 1999*, CC Docket No. 96-45, Public Notice, DA 99-2109 (Com. Car. Bur., rel. Oct. 8, 1999).

⁵⁴ 47 C.F.R. § 54.713. See also 47 C.F.R. § 54.709(d).

⁵⁵ 47 C.F.R. §§ 54.706, 54.709.

mechanisms, based on the provider's interstate and international end-user telecommunications revenues, would exceed the amount of the provider's interstate end-user telecommunications revenues. We do not anticipate that the universal service contribution factor will exceed 8 percent in the near future.⁵⁶ Thus, this 8 percent rule ensures that a provider's universal service contribution will not exceed the amount of its interstate end-user telecommunications revenues.

20. The operation of this rule is demonstrated in the following example. Assume a hypothetical provider with \$100 of interstate and international end-user telecommunications revenues, consisting of \$5 of interstate revenues and \$95 of international revenues. Also assume a contribution factor of 0.06, or 6 percent. In the absence of the 8 percent rule, the provider's contribution (\$6) would exceed its interstate revenues (\$5) -- a result contrary to the court's ruling. Under our 8 percent rule, however, the provider's interstate revenues (\$5) are less than 8 percent of its combined interstate and international revenues and, therefore, the provider is not required to contribute on the basis of its international revenues -- a result consistent with the court's ruling. The provider must still contribute, however, on the basis of its \$5 of interstate revenues.⁵⁷

21. *Equitable Requirement of Section 254(d)*. We believe that the international revenues exception adopted here is responsive to the court's concerns regarding the fairness of our assessment methodology in that it will permit a contributor that derives the substantial majority of its revenues from the provision of international services to calculate its contribution to universal service based solely on its domestic interstate revenues. We conclude that this exception further addresses the court's concerns by ensuring that a provider is not assessed a contribution in an amount exceeding that provider's annual interstate end-user telecommunications revenues. Because providers will receive a financial benefit, overall, from providing interstate service, we conclude that our revised rule is equitable.

22. We decline to adopt a more expansive exception than the rule adopted here or to exclude international revenues from the contribution requirement altogether in light of section 254(d)'s mandate requiring all interstate telecommunications providers to contribute without

⁵⁶ Indeed, if only a single contribution factor had been calculated for the Fourth Quarter of 1999 based solely on interstate and international end-user telecommunications revenues, the factor would have been 0.05801, or 5.801 percent. Thus, the 8 percent rule provides a margin of safety to account for usual fluctuations in the contribution factor from quarter to quarter. In the event that the contribution factor were to increase or decrease significantly, the Commission could revise the 8 percent rule to a more appropriate level. Moreover, as discussed in paragraph 25, *infra*, by adopting a rule using a fixed percentage, we establish a specific and predictable test that allows carriers to know with certainty whether they qualify for the limited international exception. A rule using the contribution factor to determine eligibility for the limited international exception, on the other hand, would not be as specific and predictable as the 8 percent rule because of the usual quarterly fluctuations in the contribution factor.

⁵⁷ This hypothetical is only for purposes of illustration. Under existing rules, if such a provider's annual contribution to universal service would be less than \$10,000 in a given year, the provider would not be required to submit a contribution for that year. 47 C.F.R. § 54.708.

regard to whether those providers' revenues are interstate or international.⁵⁸ Moreover, nothing in the court's decision suggests that the Commission's decision to assess international revenues is inconsistent with the Act, outside of the impact it had on Comsat and similarly situated carriers.⁵⁹ In addition, we conclude that providers whose interstate revenues account for a greater amount of their combined interstate and international revenues than the threshold adopted here clearly receive a direct benefit from universal service insofar as their domestic interstate business benefits from the expanded network that is fostered by universal service.⁶⁰ For these providers, their interstate telecommunications services are not merely ancillary to their provision of international telecommunications services. Accordingly, as direct beneficiaries of an expanded domestic network, such carriers reasonably should be required to contribute to universal service based on their combined interstate and international revenues.

23. *Nondiscriminatory Requirement of Section 254(d)*. The international revenues exception that we adopt here also addresses the court's concerns regarding the potentially discriminatory impact of our previous assessment methodology. As stated by the court,

the FCC's interpretation is 'discriminatory,' because the agency concedes that its rule damages some international carriers like COMSAT more than it harms others.⁶¹

Any competitive disparity claimed by COMSAT or by similarly situated carriers should be minimized as a result of the exception that we adopt today. Specifically, such a provider of interstate and international telecommunications shall not be required to contribute based on its international revenues if its interstate end-user telecommunications revenues constitute less than 8 percent of its combined interstate and international end-user telecommunications revenues. Therefore, providers whose interstate telecommunications services are merely ancillary to their international operations will not be in a worse position than providers that, by virtue of their status as exclusively international providers, are not subject to the universal service contribution requirements.⁶²

24. *Specific, Predictable, and Sufficient Requirement of Section 254(d)*. The limited international revenues exception that we adopt today also meets the requirement in section

⁵⁸ See 47 U.S.C. § 254(d).

⁵⁹ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 434-35.

⁶⁰ Indeed, the Commission previously has stated its view that carriers providing solely international telecommunications services benefit from universal service because they must either terminate or originate telecommunications on the public switched telephone network. *Universal Service Order*, 12 FCC Rcd at 9174.

⁶¹ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 435.

⁶² *Universal Service Order*, 12 FCC Rcd at 9174.

254(d) of the Act that universal service support mechanisms be specific, predictable, and sufficient.⁶³ By setting the international exception at the predetermined level of 8 percent, we establish a bright-line rule for providers. As soon as providers prepare their worksheets, they will know with certainty whether their interstate end-user telecommunications revenues comprise 8 percent or more of their total interstate and international end-user telecommunications revenues and, thus, whether they must contribute on the basis of their international end-user telecommunications revenues during the upcoming quarters in which their reported revenues will be assessed. In sum, the 8 percent rule allows the provider to make decisions based on the specific and predictable operation of the support mechanism.

25. As an alternative, we considered creating an exception based not on a fixed percentage of a provider's interstate revenues, but instead on the relationship between a provider's actual contribution and the amount of its interstate revenues. Under this alternative, a carrier would not contribute in a given quarter if its contribution for the quarter exceeded its interstate end-user telecommunications revenues applicable to that quarter. While this approach would address the equitable and nondiscriminatory requirements of section 254(d), we conclude that it does not meet the specific and predictable requirements as well as the 8 percent rule. If we were to base the international revenues exception on the amount of a provider's contribution in relation to its interstate end-user telecommunications revenues, then the provider's eligibility for the exception would depend on the level of the quarterly contribution factor, which varies from quarter to quarter. Providers with a percentage of interstate end-user telecommunications revenues close to the contribution factor would not know with certainty whether they qualify for the exception until the contribution factor is announced shortly before the beginning of each quarter. Thus, this approach is not as specific and predictable as the 8 percent rule, and we decline to adopt it.

26. We also conclude that the 8 percent rule meets section 254(d)'s requirement that universal service support mechanisms be sufficient. In order to address the court's concerns, any approach that we adopt must necessarily exclude a certain amount of international revenue from the contribution base. The 8 percent rule excludes only slightly more international revenue from the contribution base than would an approach that is tied directly to the level of the quarterly contribution factor. Moreover, as discussed below, the relatively small amount of international revenue excluded from the contribution base by the 8 percent rule should not dramatically affect the level of the quarterly contribution factor or the ability of providers to meet their contribution obligations. Thus, we conclude that the 8 percent rule will allow us to maintain universal service support mechanisms that are sufficient.

27. *Implementation of Limited International Revenues Exception.* Because providers currently report their interstate and international end-user telecommunications revenues as a *combined* amount on the Telecommunications Reporting Worksheet (FCC Form 499), the Commission does not have revenue data for contributors that distinguish their interstate and

⁶³ 47 U.S.C. § 254(d).

international revenues.⁶⁴ Although the worksheet that carriers will submit in April 2000 will be revised to provide for separate reporting of contributors' interstate and international revenues, two potential implementation problems arise in the interim with respect to our adoption of the international revenues exception pending the issuance of a revised Worksheet. First, without revenue data reflecting the amount of international revenues that will be excluded from the contribution base pursuant to the international revenues exception, the Commission cannot accurately calculate the revised contribution factor for the fourth quarter of 1999. Second, without revenue data separately identifying each contributor's interstate and international revenues, USAC cannot determine which contributors qualify for the international revenues exception and, therefore, cannot accurately bill individual contributors. To remedy these problems, this Order: (1) estimates the amount of international revenues that we anticipate will be excluded from the contribution base by operation of the international revenues exception described above; and (2) requires each contributor that qualifies for the international revenues exception adopted in this Order to file an amendment to its March 1999 and September 1999 worksheets within 30 days of the effective date of this Order, identifying the amount and percentages of the contributor's interstate and international revenues.

28. As set forth more fully in Appendix B, the Common Carrier Bureau's Industry Analysis Division has estimated that, as a result of our adoption of the limited international revenues exception, approximately \$0.617 billion of international end-user telecommunications revenues will be excluded from the \$38.204 billion of interstate and international end-user telecommunications revenues previously reported for the second half of 1998.⁶⁵ Thus, we direct that the amount of interstate and international end-user telecommunications revenues reported for July to December 1998 (\$38.204 billion), as filed with the Commission by USAC,⁶⁶ should be reduced to \$37.587 billion when calculating a contribution base using revenue data from that period.⁶⁷ In the event that our estimate of the amount of international revenues excluded by

⁶⁴ The Telecommunications Reporting Worksheet (FCC Form 499) recently replaced the former Universal Service Worksheet (FCC Form 457). *See 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Report and Order, FCC 99-175, paras. 1, 26 (1999). *See also Common Carrier Bureau Announces Release of September Version of Telecommunications Reporting Worksheet (FCC Form 499-S) for Contributions to the Universal Service Support Mechanisms*, CC Docket No. 98-171, Public Notice, DA 99-1520 (rel. July 30, 1999). The Universal Service Worksheet was submitted semiannually, once in March and once in September. The Telecommunications Reporting Worksheet is also submitted semiannually, once in April (FCC Form 499-A) and once in September (FCC Form 499-S).

⁶⁵ Funding bases for the third and fourth quarters of 1999 are determined by subtracting the revenues reported for January through June 1998 (on the September 1998 Worksheet) from the revenues reported for January through December 1998 (on the March 1999 Worksheet).

⁶⁶ Federal Universal Service Programs Fund Size Projections & Contribution Base For the Fourth Quarter 1999 at 24-25 (filed Aug. 3, 1999).

⁶⁷ *See Proposed Fourth Quarter 1999 Universal Service Contribution Factor for November and December 1999*, CC Docket No. 96-45, Public Notice, DA 99-2109.

operation of the limited international revenues exception proves inaccurate once actual revenue data become available, we direct USAC to adjust future revenue estimates and future contributor bills to correct for any inaccuracy in our estimate.

29. To enable USAC to bill individual carriers, each contributor that qualifies for the international revenues exception adopted in this Order must file with USAC an amendment to its March 1999 Form 457 and September 1999 Form 499-S worksheets within 30 days of the effective date of this Order, identifying the amount and percentages of the contributor's interstate and international revenues. (See Amendment to FCC Form 457 and Amendment to FCC Form 499-S attached hereto as Appendix C and Appendix D, respectively).⁶⁸ Only a contributor whose interstate end-user telecommunications revenues constituted less than 8 percent of the contributor's combined interstate and international end-user telecommunications revenues in 1998 should submit these forms. Until the Telecommunications Reporting Worksheet (FCC Form 499-A, FCC Form 499-S) can be revised and approved by the Office of Management and Budget (OMB), we conclude that the interim procedure just described will provide a reasonable estimate of the contribution base and allow individual contributors to obtain the benefit of the limited international revenues exception with minimal disruption to USAC's billing, collection, and disbursement operations. A revised worksheet that separately lists contributors' interstate and international revenues will be made available in time for filing of the April 2000 Worksheet (FCC Form 499-A). A contributor that qualifies for the international revenues exception shall continue making its contributions to universal service in accordance with the Commission's current contribution rules regarding the assessment of international revenues until such time as: (1) the contributor files the Form 457 and Form 499-S amendments with USAC, and (2) the contributor has received a bill or reimbursement from USAC in which USAC has adjusted the contributor's payment obligation, effective November 1, 1999, to take into account changes resulting from our adoption of the 8 percent rule.

2.Recovery of Universal Service Contributions by Incumbent Local Exchange Carriers

30. In *Texas Office of Public Utility Counsel v. FCC*, the court reversed the Commission's decision that incumbent LECs could only recover their universal service contributions through access charges, stating that:

forcing GTE to recover its universal service contributions from its access charges . . . maintains an implicit subsidy. . . . [R]equiring carriers to recover their contributions from access charges on interstate calls shifts the costs of intrastate universal service to the interstate jurisdiction.

. . . Because the agency continues to require implicit subsidies for ILECs in violation of a plain, direct statutory command, we reverse its decision to require ILECs to

⁶⁸ The collections of information and forms required herein are contingent upon approval by the Office of Management and Budget.

recover universal service contributions from their interstate access charges.⁶⁹

31. The U.S. Court of Appeals for the Eighth Circuit held in *Southwestern Bell Telephone Co. v. FCC* that section 254(e) does not preclude the Commission from permitting incumbent LECs to recover universal service contributions through access charges.⁷⁰ That court noted that contribution costs are “real costs of doing business” that carriers may pass through to customers that use their services.⁷¹ Rather than requiring explicit universal service support, section 254(e) states that such support “should” be explicit.⁷² Moreover, section 254(e) does not address *contributions to* the universal service fund, but *support flowing from* the fund.⁷³ As the Eighth Circuit observed, “[t]he flow-through of LEC universal service costs to its IXC customers is akin to the flow-through of IXC universal service costs to its long-distance customers—neither can be categorized as an implicit subsidy in violation of § 254(e).”⁷⁴

32. The Fifth Circuit’s analysis of section 254(e) can be harmonized with the Eighth Circuit’s decision in *Southwestern Bell*. We believe that the Fifth Circuit intended to hold only that section 254(e) barred the FCC from *requiring* incumbent LECs to recover universal service contributions through access charges. The Eighth Circuit, on the other hand, simply held that section 254(e) does not preclude the FCC from *permitting* incumbent LECs to recover universal service contributions through access charges.⁷⁵ Thus, we read the Fifth Circuit decision, consistent with the Eighth Circuit’s decision, as permitting incumbent LECs to adopt this method of cost recovery.

33. To comply with the Fifth Circuit’s order, we will expand incumbent LECs’ options for recovering their universal service contributions to include an end-user charge. Because incumbent LECs are dominant in the provision of local exchange and exchange access services, we conclude that some regulation of the way in which these carriers may recover their universal service contributions from end-users remains necessary. Competition is not sufficient to constrain their rates and ensure that they remain just and reasonable.⁷⁶ We require any such

⁶⁹ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 425.

⁷⁰ *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 553-54 (8th Cir. 1998).

⁷¹ *Id.* at 554.

⁷² 47 U.S.C. § 254(e).

⁷³ *See id.*

⁷⁴ *See Southwestern Bell*, 153 F.3d at 554.

⁷⁵ *Id.* at 553-54.

⁷⁶ *See* 47 U.S.C. § 201(b).

recovery to be equitable and nondiscriminatory.⁷⁷ Incumbent LECs will thus be able to recover their contributions through access charges⁷⁸ or through end-user charges. To the extent they choose to implement an interstate end-user charge, however, incumbent LECs that are currently recovering their universal service contributions in interstate access charges must make corresponding reductions in their interstate access charges to avoid any double recovery.

3.Elimination of the "No Disconnect" Rule

34. Section 54.401(b) of the Commission's rules prohibits carriers eligible for universal service support from disconnecting Lifeline service to consumers that fail to pay toll charges.⁷⁹ In light of the court's ruling that the Commission does not have jurisdiction under the Act impose this "no disconnect" rule,⁸⁰ we amend Part 54 of our rules to eliminate that provision.⁸¹

C.Authority Delegated to the Bureau

35. Pursuant to section 54.711(c) of the Commission's rules, the Bureau has authority to waive, reduce, eliminate, or add to the Commission's universal service reporting requirements.⁸² To the extent that the reporting requirements described in this Order require subsequent modification, the Bureau has authority to make such modifications without further Commission action.

V. PROCEDURAL MATTERS

A. Supplemental Final Regulatory Flexibility Analysis

36. The Regulatory Flexibility Act (RFA)⁸³ requires that a Regulatory Flexibility Analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant impact on a substantial number

⁷⁷ *Universal Service Order*, 12 FCC Rcd at 9209, para. 851 (stating that carriers may not shift more than an equitable share of their contributions to any customer or group of customers).

⁷⁸ *See id.*, 12 FCC Rcd. at 9200, para. 830; *Access Charge Reform Order*, 12 FCC Rcd. at 16147-48, paras. 379-80.

⁷⁹ 47 C.F.R. § 54.401(b).

⁸⁰ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 421-24.

⁸¹ *See* Appendix A.

⁸² 47 C.F.R. § 54.711(c).

⁸³ The Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.*, was amended by the Small Business Regulatory Enforcement Act of 1996 (SBREFA), Title II of the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA).

of small entities."⁸⁴ The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁸⁵ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."⁸⁶ This Supplemental Final Regulatory Flexibility Analysis supplements the Final Regulatory Flexibility Analysis (FRFA) included in the *Universal Service Order*,⁸⁷ only to the extent that changes to that order adopted here require changes in the conclusions reached in the FRFA. As required by section 603 of the Regulatory Flexibility Act,⁸⁸ the FRFA was preceded by an Initial Regulatory Flexibility Analysis (IRFA) incorporated in the Notice of Proposed Rulemaking and Order Establishing the Joint Board (NPRM), and an IRFA, prepared in connection with the Recommended Decision, which sought written public comment on the proposals in the NPRM and the Recommended Decision.⁸⁹ The Commission has prepared this Supplemental Final Regulatory Flexibility Analysis of the possible significant economic impact this Order might have on small entities, in conformance with the RFA.⁹⁰

1. Need for and Objectives of Rules

37. In its July 30, 1999 decision, the court held that the Commission had exceeded its jurisdictional authority by assessing contributions for those programs based, in part, on the intrastate revenues of universal service contributors. In light of this ruling, the Commission has modified its rules to exclude intrastate revenues from the contribution base. The court also reversed the decision of the Commission requiring incumbent LECs to recover the costs of their universal service contributions through interstate access charges. This Order implements that ruling and provides incumbent LECs with a choice of recovery methods. Finally, the court reversed and remanded to the Commission for further consideration the Commission's decision to assess contributions based on contributors' international revenues. In response to this ruling, the Commission has modified its rules to provide some relief from the contribution requirements for certain providers, many of which may be small entities, whose contribution obligation would exceed the amount of such providers' interstate end-user telecommunications revenues.

38. The decisions and rules adopted in this Order are designed to implement as quickly

⁸⁴ 5 U.S.C. § 605(b).

⁸⁵ *Id.* § 601(6).

⁸⁶ *Id.* § 601(4).

⁸⁷ *Universal Service Order* 12 FCC Rcd at 9219, paras. 870-982

⁸⁸ 5 U.S.C. § 603.

⁸⁹ 61 Fed. Reg. 63,778, 63,796 (1996).

⁹⁰ *See* 5 U.S.C. § 604.

and effectively as possible the court's July 30, 1999 decision. In formulating these rules, we have been mindful of the impact of our rules on small business entities, particularly regarding their impact on (1) small international providers whose interstate operations represent a modest amount of their combined interstate and international revenues, and (2) small incumbent local exchange carriers that wish to recover their universal service contributions from their end-user customers through an explicit interstate end-user charge.

2. Summary of Significant Issues Raised by the Public Comments to the IRFA

39. The Commission performed an IRFA in connection with both the *NPRM* and *Recommended Decision* in this proceeding, which sought written public comment on the proposals in the *NPRM* and *Recommended Decision*.⁹¹ In the IRFAs, the Commission sought comment on possible exemptions from the proposed rules for small telecommunications companies and measures to avoid significant economic impact on small entities, as defined by the RFA. No comments in response to the IRFAs, other than those summarized in the *Universal Service Order*,⁹² were filed. In response to the FRFA contained in the *Universal Service Order*, RTC argued that the Commission did not satisfy the requirements of the RFA by considering alternatives to the cap on recovery of corporate operations expenses.⁹³ Those comments were fully addressed in the *Fourth Order on Reconsideration*.⁹⁴

40. No comments or petitions for reconsideration in response to the IRFAs or FRFA, other than those described above, were filed and none of the comments filed pertain to the issues raised in the present Order. We have nonetheless addressed small business concerns by giving incumbent LECs greater flexibility in structuring their recovery of universal service contributions and by creating an exception from the contribution requirements for certain providers of international telecommunications services, as described *infra* in "Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered."

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

41. 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 new rules.⁹⁵ The RFA generally

⁹¹ *NPRM*, 11 FCC Rcd at 18,152-53; 61 Fed. Reg. 63,778, 63,796 (1996).

⁹² *Universal Service Order*, 12 FCC Rcd at 9220-24.

⁹³ RTC petition to *July 10 Order* at 8, n.11, *citing* 5 U.S.C. § 603.

⁹⁴ *Federal State Joint Board on Universal Service*, CC Docket Nos. 96-45, 96-262, 94-1, 95-72, 13 FCC Rcd 5318, paras. 317-18 (1997).

⁹⁵ 5 U.S.C. § 603(b)(3).

defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁹⁶ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁹⁷ A small business concern is one that: (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).⁹⁸ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."⁹⁹ Nationwide, as of 1992, there were approximately 275,801 small organizations.¹⁰⁰ And finally, "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."¹⁰¹ As of 1992, there were approximately 85,006 such jurisdictions in the United States.¹⁰² This number includes

⁹⁶ *Id.* § 601(6).

⁹⁷ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, 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." 5 U.S.C. § 601(3).

⁹⁸ Small Business Act, 15 U.S.C. § 632.

⁹⁹ 5 U.S.C. § 601(4).

¹⁰⁰ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

¹⁰¹ 5 U.S.C. § 601(5).

¹⁰² U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.¹⁰³ The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities. In this Order, the Commission stated that the new rules will affect all providers of interstate telecommunications and interstate telecommunications services. Below, we further describe and estimate the number of small business concerns that may be affected by the rules adopted in this Order.

¹⁰³ *Id.*

42. As noted, under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).¹⁰⁴ The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1,500 employees.¹⁰⁵ We first discuss the number of small telephone companies falling within these SIC categories, then attempt to refine further those estimates to correspond with the categories of telecommunications companies that are commonly used under our rules.

43. The most reliable source of information regarding the total numbers of common carrier and related providers nationwide, including the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its *Carrier Locator* report, derived from filings made in connection with the Telecommunications Relay Service (TRS).¹⁰⁶ According to data in the most recent report, there are 3,604 interstate carriers.¹⁰⁷ These carriers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone toll service, providers of telephone exchange service, and resellers.

44. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."¹⁰⁸ 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.¹⁰⁹ We have therefore included

¹⁰⁴ 15 U.S.C. § 632. *See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc.*, 176 B.R. 82 (N.D. Ga. 1994).

¹⁰⁵ 13 C.F.R. § 121.201.

¹⁰⁶ FCC, *Carrier Locator: Interstate Service Providers*, Figure 1 (Jan. 1999) (*Carrier Locator*). *See also* 47 C.F.R. § 64.601 *et seq.* (TRS).

¹⁰⁷ *Carrier Locator* at Fig. 1.

¹⁰⁸ 5 U.S.C. § 601(3).

¹⁰⁹ 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. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. *See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45 (1996).

small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other non-RFA contexts.

45. *Total Number of Telephone Companies Affected.* The United States Bureau of the Census ("the Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.¹¹⁰ This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."¹¹¹ For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by the decisions and rules in this Order.

46. *Wireline Carriers and Service Providers.* SBA has developed a definition of small entities for telephone communications companies other than radiotelephone companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.¹¹² According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.¹¹³ All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions and rules in this Order.

47. *Local Exchange Carriers, Interexchange Carriers, Competitive Access Providers, Operator Service Providers, and Resellers.* Neither the Commission nor SBA has developed a definition of small local exchange carriers (LECs), interexchange carriers (IXCs), competitive

¹¹⁰ United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) ("1992 Census").

¹¹¹ 15 U.S.C. § 632(a)(1).

¹¹² 1992 Census, *supra*, at Firm Size 1-123.

¹¹³ 13 C.F.R. § 121.201, SIC Code 4813.

access providers (CAPs), operator service providers (OSPs), or resellers. The closest applicable definition for these carrier-types under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.¹¹⁴ The most reliable source of information regarding the number of these carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).¹¹⁵ According to our most recent data, there are 1,410 LECs, 151 IXC, 129 CAPs, 32 OSPs, and 351 resellers.¹¹⁶ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of these carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,410 small entity LECs or small incumbent LECs, 151 IXC, 129 CAPs, 32 OSPs, and 351 resellers that may be affected by the decisions and rules in the order and order on reconsideration.

48. *Wireless (Radiotelephone) Carriers.* SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.¹¹⁷ According to SBA's definition, a small business radiotelephone company is one employing no more than 1,500 persons.¹¹⁸ The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the decisions and rules in this Order.

¹¹⁴ 13 C.F.R. § 121.210, SIC Code 4813.

¹¹⁵ See 47 C.F.R. § 64.601 *et seq.*; *Carrier Locator* at Fig. 1.

¹¹⁶ *Carrier Locator* at Fig. 1. The total for resellers includes both toll resellers and local resellers. The TRS category for CAPs also includes competitive local exchange carriers (CLECs) (total of 129 for both).

¹¹⁷ United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) ("1992 Census").

¹¹⁸ 13 C.F.R. § 121.201, SIC Code 4812.

49. *Cellular, PCS, SMR and Other Mobile Service Providers.* In an effort to further refine our calculation of the number of radiotelephone companies that may be affected by the rules adopted herein, we consider the data that we collect annually in connection with the TRS for the subcategories Wireless Telephony (which includes Cellular, PCS, and SMR) and Other Mobile Service Providers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to these broad subcategories, so we will utilize the closest applicable definition under SBA rules -- which, for both categories, is for telephone companies other than radiotelephone (wireless) companies.¹¹⁹ To the extent that the Commission has adopted definitions for small entities providing PCS and SMR services, we discuss those definitions below. According to our most recent TRS data, 732 companies reported that they are engaged in the provision of Wireless Telephony services and 23 companies reported that they are engaged in the provision of Other Mobile Services.¹²⁰ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of Wireless Telephony Providers and Other Mobile Service Providers, except as described below, that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 732 small entity Wireless Telephony Providers and fewer than 23 small entity Other Mobile Service Providers that might be affected by the decisions and rules in this Order.

50. *Broadband PCS Licensees.* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.¹²¹ For Block F, an additional classification for "very small business" was added, and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹²² These regulations defining "small entity" in the context of broadband PCS auctions have been approved by SBA.¹²³ No small businesses within the SBA-approved definition 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.

¹¹⁹ *Id.*

¹²⁰ *Carrier Locator* at Fig. 1.

¹²¹ *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, FCC 96-278, WT Docket No. 96-59, ¶¶ 57-60 (June 24, 1996), 61 FR 33859 (July 1, 1996); *see also* 47 C.F.R. § 24.720(b).

¹²² *Id.*, at ¶ 60.

¹²³ *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

However, licenses for Blocks C through F have not been awarded fully, therefore there are few, if any, small businesses currently providing PCS services. Based on this information, we estimate that the number of small broadband PCS licenses will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small PCS providers as defined by SBA and the Commissioner's auction rules.

51. *SMR Licensees.* Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than \$15 million in the three previous calendar years. The definition of a "small entity" in the context of 800 MHz SMR has been approved by the SBA,¹²⁴ and approval for the 900 MHz SMR definition has been sought. The rules may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than \$15 million. Consequently, we estimate, for purposes of this IRFA, that all of the extended implementation authorizations may be held by small entities, some of which may be affected by the decisions and rules in this Order.

52. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we estimate that the number of geographic area SMR licensees that may be affected by the decisions and rules in the order and order on reconsideration includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. The Commission, however, has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we estimate, for purposes of this IRFA, that all of the licenses may be awarded to small entities, some of which may be affected by the decisions and rules in this Order.

53. *220 MHz Radio Service -- Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. There are approximately 1,515 such non-nationwide licensees and four

¹²⁴ See *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. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

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 Radiotelephone Communications companies.¹²⁵

According to the Bureau of the Census, only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.¹²⁶ Therefore, if this general ratio continues to 1999 in the context of Phase I 220 MHz licensees, we estimate that nearly all such licensees are small businesses under the SBA's definition.

54. *220 MHz Radio Service -- Phase II Licensees.* The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the 220 MHz *Third Report and Order* we adopted criteria for defining small businesses and very small businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.¹²⁷ We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a very small business is 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.¹²⁸ An auction of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.¹²⁹ 908 licenses were auctioned in 3 different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Companies claiming small business status won: one of the Nationwide licenses, 67% of the Regional licenses, and 54% of the EA licenses. As of January 22, 1999, the Commission announced that it was prepared to grant 654 of the Phase II licenses won at auction.¹³⁰ A reauction of the remaining, unsold licenses was completed on June 30, 1999, with 16 bidders winning 222 of the

¹²⁵ 13 C.F.R. § 121.201, SIC Code 4812. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.

¹²⁶ U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms; 1992, SIC code 4812 (issued May 1995).

¹²⁷ 220 MHz Third Report and Order, 12 FCC Rcd 10943, 11068-70, at paras. 291- 295 (1997). The SBA has approved these definitions. See Letter from A. Alvarez, Administrator, SBA, to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC (Jan. 6, 1998).

¹²⁸ 220 MHz Third Report and Order, 12 FCC Rcd at 11068-69, para. 291.

¹²⁹ See generally Public Notice, "220 MHz Service Auction Closes," Report No. WT 98-36 (Wireless Telecom. Bur. Oct. 23, 1998).

¹³⁰ Public Notice, "FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After final Payment is Made," Report No. AUC-18-H, DA No. 99-229 (Wireless Telecom. Bur. Jan. 22, 1999).

Phase II licenses.¹³¹ As a result, we estimate that 16 or fewer of these final winning bidders are small or very small businesses.

55. *Paging*. On June 7, 1999, the Wireless Telecommunications Bureau announced the first in a series of auctions of paging licenses, the first to commence on December 7, 1999.¹³² The Bureau has proposed that the first auction be composed of 2,499 licenses.¹³³ The Commission utilizes a two-tiered definition of small businesses in the context of auctioning licenses in the Common Carrier Paging and exclusive Private Carrier Paging services.¹³⁴ A small business is defined as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million, or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than \$15 million. The SBA has approved this definition.¹³⁵ At present, there are approximately 24,000 Private Paging licenses and 74,000 Common Carrier Paging licenses. In addition, according to the most recent *Carrier Locator* data, 137 carriers reported that they were engaged in the provision of either paging or messaging services, which are placed together in the data.¹³⁶ Because the auction has yet to occur, we do not have data specifying the number of winning bidders that will meet the above small business definition. Also, we will assume that there currently are 137 or fewer small business paging carriers.

56. *Narrowband PCS*. The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. At present, there have been no auctions held for the major trading area (MTA) and basic trading area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licenses and 2,958 BTA licenses will be awarded by auction. Such auctions have not yet been scheduled, however. Given that nearly all radiotelephone companies have no more than 1,500 employees and that no reliable estimate of the number of prospective MTA and BTA

¹³¹ Public Notice, "Phase II 220 MHz Service Spectrum Auction Closes," Report No. AUC-99-24-E, DA No. 99-1287 (Wireless Telecom. Bur. July 1, 1999).

¹³² Public Notice, "First Paging Service Spectrum Auction Scheduled for December 7, 1999," Report No. AUC-99-26-A, DA No. 99-1103 (Wireless Telecom. Bur. June 7, 1999).

¹³³ *Id.*

¹³⁴ See 47 C.F.R. § 20.9(a)(1) (noting that private paging services may be treated as common carriage services).

¹³⁵ See Letter from A. Alvarez, Administrator, SBA, to A.J. Zoslov, Chief, Auctions Division, Wireless Telecommunications Bureau, FCC (Dec. 2, 1998).

¹³⁶ *Carrier Locator* at Fig. 1.

narrowband licensees can be made, we assume, for purposes of this IRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

57. *Rural Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.¹³⁷ A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).¹³⁸ We will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.¹³⁹ There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

58. *Air-Ground Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Air-Ground Radiotelephone Service.¹⁴⁰ Accordingly, we will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.¹⁴¹ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA definition.

¹³⁷ The service is defined in section 22.99 of the Commission's rules, 47 C.F.R. § 22.99.

¹³⁸ BETRS is defined in sections 22.757 and 22.759 of the Commission's rules, 47 C.F.R. §§ 22.757, 22.759.

¹³⁹ 13 C.F.R. § 121.201, SIC Code 4812.

¹⁴⁰ The service is defined in section 22.99 of the Commission's rules, 47 C.F.R. § 22.99.

¹⁴¹ 13 C.F.R. § 121.201, SIC Code 4812.

59. *Private Land Mobile Radio (PLMR)*. PLMR systems, also known as Private Mobile Radio Service (PMRS) systems, serve an essential role in a range of industrial, business, land transportation, and public safety activities.¹⁴² These radios are used by companies of all sizes operating in all U.S. business categories. The Commission has not developed a definition of small entity specifically applicable to PLMR licensees due to the vast array of PLMR users. For the purpose of determining whether a licensee is a small business as defined by the SBA, each licensee would need to be evaluated within its own business area. The Commission is unable at this time to estimate the number of, if any, small businesses that could be impacted by the new rules. However, the Commission's 1994 Annual Report on PLMRs¹⁴³ 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 rules in this context could potentially impact any small U.S. business that chooses to become licensed in this service. On July 21, 1999, the Wireless Telecommunications Bureau requested public comment on whether the licensing of PMRS frequencies in the 800 MHz band for commercial SMR use would serve the public interest.¹⁴⁴

60. *Fixed Microwave Services*. Microwave services include common carrier,¹⁴⁵ private-operational fixed,¹⁴⁶ and broadcast auxiliary radio services.¹⁴⁷ At present, there are approximately 22,015 common carrier fixed licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, we will utilize the SBA's definition applicable to radiotelephone companies -- *i.e.*, an entity with no more than 1,500 persons.¹⁴⁸ We estimate, for this purpose,

¹⁴² See 47 C.F.R. § 20.9(a)(2) (noting that certain Industrial/Business Pool service may be treated as common carriage service).

¹⁴³ Federal Communications Commission, *60th Annual Report, Fiscal Year 1994*, at 116.

¹⁴⁴ Public Notice, "Wireless Telecommunications Bureau Incorporates Nextel Communications, Inc. Waiver Record into WT Docket No. 99-87: Seeks Comment on Licensing of PMRS Channels in the 800 MHz Band for Use in Commercial SMR Systems," DA 99-1431 (Wireless Telecom. Bureau July 21, 1999).

¹⁴⁵ 47 C.F.R. § 101 *et seq.* (formerly, Part 21 of the Commission's rules).

¹⁴⁶ 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.

¹⁴⁷ Auxiliary Microwave Service is governed by Part 74 of the Commission's Rules. See 47 C.F.R. § 74 *et seq.* 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.

¹⁴⁸ 13 C.F.R. § 121.201, SIC Code 4812.

that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone companies.

61. *Offshore Radiotelephone Service.* This service operates on several UHF TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico.¹⁴⁹ At present, there are approximately 55 licensees in this service. We are unable at this time to estimate the number of licensees that would qualify as small entities under the SBA's definition for radiotelephone communications.

62. *Wireless Communications Services.* This service can be used for fixed, mobile, radio location 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 Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as very small business entities, and one that qualified as a small business entity. We conclude that the number of geographic area WCS licensees that may be affected by the decisions and rules in this Order includes these eight entities.

63. *Multipoint Distribution Systems (MDS):* The Commission has defined "small entity" for the auction of MDS as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.¹⁵⁰ This definition of a small entity in the context of MDS auctions has been approved by the SBA.¹⁵¹ The Commission completed its MDS auction in March 1996 for authorizations in 493 basic trading areas (BTAs). Of 67 winning bidders, 61 qualified as small entities.¹⁵²

64. MDS is also heavily encumbered with licensees of stations authorized prior to the auction. The SBA has developed a definition of small entities for pay television services, which includes all such companies generating \$11 million or less in annual receipts.¹⁵³ This definition includes multipoint distribution systems, and thus applies to MDS licensees and wireless cable

¹⁴⁹ This service is governed by Subpart I of Part 22 of the Commission's Rules. See 47 C.F.R. §§ 22.1001 - 22.1037.

¹⁵⁰ 47 C.F.R. § 21.961(b)(1).

¹⁵¹ See *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. 94-31 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

¹⁵² One of these small entities, O'ahu Wireless Cable, Inc., was subsequently acquired by GTE Media Ventures, Inc., which did not qualify as a small entity for purposes of the MDS auction.

¹⁵³ 13 C.F.R. § 121.201.

operators which did not participate in the MDS auction. Information available to us indicates that there are 832 of these licensees and operators that do not generate revenue in excess of \$11 million annually. Therefore, for purposes of this IRFA, we find there are approximately 892 small MDS providers as defined by the SBA and the Commission's auction rules, some which may be affected by the decisions and rules in this Order.

65. *International Service Providers.* The Commission has not developed a definition of small entities applicable to licensees in the international services. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to Communications Services, Not Elsewhere Classified (NEC). This definition provides that a small entity is expressed as one with \$11 million or less in annual receipts.¹⁵⁴ According to the Census Bureau, there were a total of 848 communications services, NEC in operation in 1992, and a total of 775 had annual receipts of less than \$9.999 million.¹⁵⁵ We note that those entities providing only international service will not be affected by our revised rules. We do not, however, have sufficient data to estimate with greater detail those providing both international and interstate services. Consequently, we estimate that there are fewer than 775 small international service entities potentially impacted by our rules.

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

66. In this Order, we adopt revisions to Part 54 that are responsive to the court's July 30, 1999 ruling. In response to the court's concern that our assessment rules were unduly burdensome as applied to small providers whose interstate operations represent a modest amount of their combined interstate and international revenues, we modify our rules to create an exception from the contribution requirements for certain providers of international telecommunications services.¹⁵⁶ In doing so, we have asked providers claiming entitlement to this exception to prepare and submit to USAC two short forms amending their two most recently filed Worksheets. Those forms ask contributors claiming entitlement to the exception to separately list their interstate and international revenues. Those forms are attached as Appendix C and Appendix D. To the extent that this reporting obligation is not unduly burdensome and is adopted in order to establish certain providers' entitlement to an exception from the contribution requirements, we project that this Order will impose no significant new reporting requirements on small carriers.¹⁵⁷

¹⁵⁴ 13 C.F.R. § 120.121, SIC 4899.

¹⁵⁵ United States Dept. of Commerce, Bureau of Census, 1992 Economic Census Industry and Enterprise Receipts Size Report, at Table 2D.

¹⁵⁶ See Section IV.B.1, paras. 19-29.

¹⁵⁷ See Section IV.B.1, paras. 19-29, *supra*.

67. In light of the court's determination that the Commission may not require incumbent LECs to recover the cost of their universal service contributions through interstate access charges, we give incumbent LECs flexibility in the manner in which they recover their universal service contributions.¹⁵⁸ For those that elect to continue recovering their contributions through interstate access charges, no additional requirements are imposed by this Order. For those that elect to recover their contributions through an explicit end-user charge, this Order requires such carriers to take steps to make corresponding reductions in their interstate access charges to avoid double recovery.¹⁵⁹

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

68. In this Order, we have taken several steps to minimize the economic impact of our Part 54 rule changes on all carriers, including small carriers. For example, in response to the court's concern that our contribution requirement, as applied to certain small providers, was unduly burdensome, we have sought to reduce the contribution obligation of providers, many of which are small entities, whose interstate operations represent a modest amount of their combined interstate and international revenues.¹⁶⁰ We take this action in response to the court's concerns and to help primarily international providers with a small portion of interstate business to compete on a more equal footing with international providers that, by virtue of their status as exclusively international carriers, are not subject to the universal service contribution requirements.¹⁶¹

69. In light of the court's determination that the Commission may not require incumbent LECs to recover the cost of their universal service contributions through interstate access charges, we give incumbent LECs flexibility in the manner in which they recover their universal service contributions.¹⁶² For those that elect to continue recovering their contributions through interstate access charges, no additional requirements are imposed by this Order. For those that elect to recover their contributions through an explicit end-user charge, this Order requires such carriers to take steps to make corresponding reductions in their interstate access charges to avoid double recovery. Given that the compliance obligations associated with transitioning to an end-user method of recovery for incumbent LECs are in large measure voluntary, and insofar as

¹⁵⁸ See Section IV.B.2, paras. 30-33.

¹⁵⁹ See Section IV.B.2, paras. 30-33.

¹⁶⁰ See Section IV.B.1, paras. 19-29, *supra*.

¹⁶¹ See Section IV.B.1, paras. 19-29, *supra*.

¹⁶² See Section IV.B.2, paras. 30-33, *supra*.

carriers, including small carriers, are given no deadlines for implementing such changes, we conclude the compliance requirements adopted in this Order will not be unduly burdensome on small carriers.¹⁶³

6. Report to Congress

70. The Commission will send a copy of this Order, including the Supplemental Final Regulatory Flexibility Analysis, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. A summary of the rules adopted in this Order and this Supplemental Final Regulatory Flexibility Analysis will also be published in the Federal Register, and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

B. Effective Date of Final Rules

71. In this Order, the Commission amends its rules to implement the court's July 30, 1999 mandate with respect to the assessment and recovery of universal service contributions. Consistent with the court's September 28, 1999 rulings, we make this Order and the rule changes adopted herein effective on November 1, 1999.¹⁶⁴ The court's directive that its July 30, 1999 mandate will issue on November 1, 1999 provides good cause to depart in the manner described above from the general requirement of 5 U.S.C. § 553(d) that final rules take effect not less than thirty (30) days after their publication in the Federal Register. The information collections contained in this Order will become effective following OMB approval. The Commission will publish, at a later date, a notice in the Federal Register establishing the effective date of those collections.

VI. ORDERING CLAUSES

72. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 201-205, 218-220, 254, 303(r), 403, and 410 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 218-220, 254, 303(r), 403, 410, the SIXTEENTH ORDER ON RECONSIDERATION IN CC DOCKET NO. 96-45 IS ADOPTED. Any collections of information contained herein are contingent upon approval by the Office of Management and Budget.

73. IT IS FURTHER ORDERED that the EIGHTH REPORT AND ORDER IN CC

¹⁶³ See Section IV.B.2, paras. 30-33, *supra*.

¹⁶⁴ See *Texas Office of Public Utility Counsel v. FCC*, No. 97-60421 (Sept. 28, 1999) (order denying petitions for rehearing); *Texas Office of Public Utility Counsel v. FCC*, No. 97-60421 (Sept. 28, 1999) (order granting, in part, Commission's motion for stay).

DOCKET NO. 96-45 IS ADOPTED. Any collections of information contained herein are contingent upon approval by the Office of Management and Budget.

74. IT IS FURTHER ORDERED that the SIXTH REPORT AND ORDER IN CC DOCKET NO. 96-262 IS ADOPTED. Any collections of information contained herein are contingent upon approval by the Office of Management and Budget.

75. IT IS FURTHER ORDERED that Part 54 of the Commission's Rules, 47 C.F.R. Part 54, IS AMENDED as set forth in the Appendix hereto, effective November 1, 1999.

76. IT IS FURTHER ORDERED that AUTHORITY IS DELEGATED to the CHIEF OF THE COMMON CARRIER BUREAU pursuant to 47 C.F.R. §§ 0.291 and 54.711(c) to modify, or require the filing of, any forms that are necessary to implement the decisions and rules adopted in this Order and that are required to ensure the sound and efficient functioning of the universal service support mechanisms.

77. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Order, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

**APPENDIX A
FINAL RULES**

Part 54 of Title 47 of the Code of Federal Regulations is amended to read as follows:

Part 54 -- UNIVERSAL SERVICE

§ 54.401 Lifeline defined.

1. Amend § 54.401 by revising paragraph (b) to read as follows:

(b) [Deleted].

§ 54.706 Contributions.

2. Amend § 54.706 by revising paragraphs (b) and (c) and adding paragraph (d) to read as follows:

(b) Except as provided in subsection (c) of this rule, every telecommunications carrier that provides interstate telecommunications services, every provider of interstate telecommunications that offers telecommunications for a fee on a non-common carrier basis, and every payphone provider that is an aggregator shall contribute to the federal universal service support mechanisms on the basis of its interstate and international end-user telecommunications revenues.

(c) Any entity required to contribute to the federal universal service support mechanisms whose interstate end-user telecommunications revenues comprise less than 8 percent of its combined interstate and international end-user telecommunications revenues shall contribute to the federal universal service support mechanisms for high cost areas, low-income consumers, schools and libraries, and rural health care providers based only on such entity's interstate end-user telecommunications revenues. For purposes of this subsection, an "entity" shall refer to the entity that is subject to the universal service reporting requirements in 47 C.F.R. § 54.711 and shall include all of that entity's affiliated providers of telecommunications services.

(d) Entities providing open video systems (OVS), cable leased access, or direct broadcast satellite (DBS) services are not required to contribute on the basis of revenues derived

from those services. The following entities will not be required to contribute to universal service: non-profit health care providers; broadcasters; systems integrators that derive less than five percent of their systems integration revenues from the resale of telecommunications.

§ 54.709 Computations of required contributions to universal service support mechanisms.

3. Revise § 54.709 to read as follows:

(a) Contributions to the universal service support mechanisms shall be based on contributors' end-user telecommunications revenues and a contribution factor determined quarterly by the Commission.

(1) For funding the federal universal service support mechanisms, the subject revenues will be contributors' interstate and international revenues derived from domestic end users for telecommunications or telecommunications services.

(2) The quarterly universal service contribution factor shall be determined by the Commission based on the ratio of total projected quarterly expenses of the universal service support mechanisms to total end-user interstate and international telecommunications revenues. The Commission shall approve the Administrator's quarterly projected costs of the universal service support mechanisms, taking into account demand for support and administrative expenses. The total subject revenues shall be compiled by the Administrator based on information contained in the Telecommunications Reporting Worksheets described in § 54.711(a).

(3) Total projected expenses for the federal universal service support mechanisms for each quarter must be approved by the Commission before they are used to calculate the quarterly contribution factor and individual contributions. For each quarter, the Administrator must submit its projections of demand for the federal universal service support mechanisms for high-cost areas, low-income consumers, schools and libraries, and rural health care providers, respectively, and the basis for those projections, to the Commission and the Common Carrier Bureau at least sixty (60) calendar days prior to the start of that quarter. For each quarter, the Administrator must submit its projections of administrative expenses for the high-cost mechanism, the low-income mechanism, the schools and libraries mechanism and the rural health care mechanism and the basis for those projections to the Commission and the Common Carrier Bureau at least sixty (60) calendar days prior to the start of that quarter. Based on data submitted to the Administrator on the Telecommunications Reporting Worksheets, the Administrator must submit the total contribution base to the Common Carrier Bureau at least sixty (60) days before the start of each quarter. The projections of demand and administrative expenses and the contribution factor shall be announced by the Commission in a public notice and shall be made available on the Commission's website. The Commission reserves the right to set projections of demand and administrative expenses at amounts that the Commission determines will serve the public interest at any time within the fourteen-day period following

release of the Commission's public notice. If the Commission takes no action within fourteen (14) days of the date of release of the public notice announcing the projections of demand and administrative expenses, the projections of demand and administrative expenses, and the contribution factor shall be deemed approved by the Commission. Except as provided in § 54.706(c), the Administrator shall apply the quarterly contribution factor, once approved by the Commission, to contributors' interstate and international end-user telecommunications revenues to calculate the amount of individual contributions.

§ 69.4 Charges to be filed

4. Amend § 69.4(d), as follows:

(d) Recovery of Contributions to the Universal Service Support Mechanisms by Incumbent Local Exchange Carriers.

(1) Incumbent local exchange carriers may recover their contributions to the universal service support mechanisms through carriers' carrier charges.

(i) Price cap incumbent local exchange carriers may do so by exogenously adjusting the price cap indices of each basket on the basis of relative end-user revenues.

(ii) Non-price cap incumbent local exchange carriers may do so by applying a factor to their carrier common line charge revenue requirements.

(2)(i) In lieu of the carriers' carrier charges described in paragraph (d)(1), incumbent local exchange carriers may recover their contributions to the universal service support mechanisms through explicit, interstate, end-user charges that are equitable and nondiscriminatory.

(ii) To the extent that incumbent local exchange carriers choose to implement explicit, interstate, end-user charges to recover their contributions to the universal service support mechanisms, they must make corresponding reductions in their access charges to avoid any double recovery.

§ 69.5 Persons to be Assessed

5. Remove and reserve § 69.5(d).

APPENDIX B***Effect of the Limited International Revenues Exception on the Contribution Base*
Report of the Industry Analysis Division of the Common Carrier Bureau
October 5, 1999**

Sections 54.706 and 54.709 of the Commission's rules, as amended, exclude from the contribution base the international end-user telecommunications revenues of a universal service contributor, if the contributor's interstate end-user telecommunications revenues are less than 8 percent of its combined interstate and international end-user telecommunications revenues. This report conservatively estimates that as much as \$1.233 billion of international end-user telecommunications revenues that were reported in 1998 may be excluded from the contribution base by operation of the limited international revenues exception. This report estimates that one-half of that amount, or \$0.617 billion, would have been earned in the second-half of 1998. Thus, this report recommends that the amount of interstate and international revenues attributable to the period from July through December 1998 (\$38.204 billion), as filed with the Commission by the Universal Service Administrative Company (USAC),¹⁶⁵ should be reduced to \$37.587 billion when calculating a contribution base using revenue data from that period.

According to the universal service worksheets (FCC Form 457) filed with the USAC, 2,148 interstate service providers reported a total of \$197.452 billion in end-user telecommunications revenues for 1998.¹⁶⁶ Of this total amount, providers reported \$122.538 billion in intrastate revenues, and \$74.914 billion of interstate and international revenues.¹⁶⁷ Form 457 does not require providers to separate their interstate and international revenues. Until carriers separate their interstate and international revenues on revised worksheets, we cannot directly compare providers' interstate and international revenues to determine which providers have interstate end-user telecommunications revenues that account for less than 8 percent of their combined interstate and international end-user telecommunications revenues. As a surrogate for this direct comparison, however, we have devised a four-part test to determine the probable characteristics of those providers that will qualify for the limited international exemption. By applying this test to the data reported in the universal service worksheets, we are able to estimate the amount of revenues excluded from the contribution base as a result of the exception.

First, we observe that providers qualifying for the limited international exception must necessarily have a small amount of interstate end-user telecommunications revenues compared to

¹⁶⁵ Federal Universal Service Programs Fund Size Projections & Contribution Base For the Fourth Quarter 1999 at 24-25 (filed Aug. 3, 1999).

¹⁶⁶ *Telecommunications Industry Revenue: 1998*, Report at table 1 (Industry Analysis Div., Sept. 1999).

¹⁶⁷ *Telecommunications Industry Revenue: 1998*, Report at table 2.

their international end-user telecommunications revenues (i.e., less than 8 percent). We believe that such carriers also are likely to have a small amount of intrastate revenues compared to their international revenues. Indeed, we do not believe that there are many providers with a large percentage of international revenues, a small percentage of interstate revenues, and a large percentage of intrastate revenues. We believe that only providers reporting interstate and international end-user telecommunications revenues that account for 90 percent or more of their combined intrastate, interstate, and international end-user telecommunications revenues, are likely to qualify for the limited international exemption. Such providers reported interstate and international end-user telecommunications revenues of \$1.847 billion.

Second, we believe that providers passing the first part of our test are likely to qualify for the limited international exemption only if they reported a significant amount of interstate and international "toll service" end-user telecommunications revenues in comparison to their interstate and international "fixed local service" and/or interstate and international "mobile service" end-user telecommunications revenues.¹⁶⁸ We believe providers with a large amount of international end-user telecommunications revenues compared to their interstate end-user telecommunications revenues (i.e., 92 percent or more) are unlikely to have derived significant international end-user telecommunications revenues from "fixed local service" or "mobile service" rather than from "toll service." We believe that only providers reporting "toll service" greater than 90 percent of their combined "toll service," "fixed local service," and "mobile service" interstate and international end-user telecommunications revenues are likely to qualify for the limited international exemption. Providers meeting the first and second parts of our test reported interstate and international end-user telecommunications revenues of \$1.596 billion.

Third, several providers meeting the first and second parts of our test do not qualify for the limited international exemption because they are affiliates of other providers that do not qualify for the exemption. After eliminating those affiliated providers, the remaining providers reported interstate and international end-user telecommunications revenues of \$1.258 billion. We believe that these providers may qualify for the limited international exemption.

Fourth, providers qualifying for the limited international exemption must still contribute on the basis of their interstate end-user telecommunications revenues. Therefore, a portion of the \$1.258 billion interstate and international end-user telecommunications revenues reported by

¹⁶⁸ On the universal service worksheet, "toll service" includes assessable revenue from the following categories: (41) pre-paid cards; (43) operator and toll calls with alternative billing arrangements; (44) other switched toll service (including MTS, 800/888 services); (45) long distance private line services; (46) satellite services; and (47) all other long distance services. "Fixed local service" includes revenues from the following: (34) monthly service, local calling, connection charges, vertical features, and other local exchange service charges except for federally tariffed subscriber line charges; (35) tariffed subscriber line charges and PICCs levied on end-users; (36) local private line and special access; (37) pay telephone coin revenues; and (38) other local telecommunications service revenues. "Mobile service" includes revenue from the following categories: (39) monthly activation charges; (40) message charges including roaming but excluding toll charges.

providers likely to qualify for the exception will be subject to assessment. The portion of revenues will be somewhere in the range between 0 and 8 percent, depending upon the weighted average ratio of interstate to international end-user telecommunications revenues reported by carriers qualifying for the exception. We estimate that 2 percent of the \$1.258 billion interstate and international end-user telecommunications revenues are likely to be interstate revenues, and therefore subject to assessment. Accordingly, we estimate that \$1.233 billion ($\$1.258 \text{ billion} \times 0.98$) is likely to be excluded from the contribution base as a result of the limited international exception.

APPENDIX C

AMENDMENT

To March 1999 Universal Service Worksheet (FCC Form 457)

APPENDIX D

AMENDMENT

To September 1999 Telecommunications Reporting Worksheet (FCC Form 499-S)