FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 6, 7, and 8

[CG Docket No. 10–213; WT Docket No. 96–198; CG Docket No. 10–145; FCC 11–37]

Implementing the Provisions of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission proposes to adopt rules that implement provisions in section 104 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), the most significant piece of accessibility legislation since the passage of the Americans with Disabilities Act in 1990. This proceeding would update and amend the Commission's rules to ensure that individuals with disabilities are able to fully utilize advanced communications services (ACS) and equipment and networks used for such services. Specifically, we seek comment on ways to implement the CVAA's requirements on providers of ACS and manufacturers of equipment used for ACS to make their services and products accessible to people with disabilities. The intended effect is to promote rapid deployment of and universal access to broadband services for all Americans across the country, because broadband technology can stimulate economic growth and provide opportunity for all Americans.

DATES: Submit comments on or before April 13, 2011. Submit reply comments on or before May 13, 2011.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. A copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to the Federal Communications Commission via e-mail to *PRA@fcc.gov.* You may submit comments, identified by FCC 11–37, or by CG Docket No. 10–213, WT Docket No. 96–198, CG Docket No. 10–145, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: (202) 418–0530 or TTY: (202) 418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, *see* the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: David Hu, Broadband Division, Wireless Telecommunications Bureau, FCC at (202) 418–7120 or via the Internet to *David.Hu@fcc.gov,* or Rosaline Crawford, Disability Rights Office, Consumer and Governmental Affairs Bureau, FCC at (202) 418–2075 or via the Internet to *Rosaline.Crawford@fcc.gov.* For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Judith B. Herman at (202) 418–0214, or submit your PRA comments via the Internet at *PRA@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rulemaking,* FCC 11–37, adopted on March 2, 2011, and released on March 3, 2011. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (202) 488–5300, facsimile (202) 488–5563, or via e-mail at *fcc@bcpiweb.com.* The complete text is also available on the Commission's Web site at *http://wireless.fcc.gov/edocs_public/attachment/FCC-11-37A1doc.* This full text may also be downloaded at: *http://wireless.fcc.gov/releases.html.* Alternative formats (computer diskette, large print, audio cassette, and Braille) are available by contacting Brian Millin at (202) 418–7426, TTY (202) 418–7365, or via e-mail to *bmillin@fcc.gov.*

Summary

I. Introduction and Overview

1. This Notice of Proposed Rulemaking ("NPRM") initiates a proceeding to update the Commission's rules to ensure that the 54 million individuals with disabilities are able to fully utilize advanced communications services and equipment and networks used for such services. Also, this NPRM proposes to adopt rules that implement provisions in section 104 of the "Twenty-First Century Communications and Video Accessibility Act of 2010" (hereinafter referred to as the "CVAA"), Public Law 111–260, 124 Stat. 2751 (2010), the most significant piece of accessibility legislation since the passage of the Americans with Disabilities Act in 1990 ("ADA"). (*See also* Public Law 111–265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA)).

2. In explaining the need for the CVAA, Congress noted that the communications marketplace has undergone a "fundamental transformation" since Congress acted to ensure access to telecommunications services and equipment by people with disabilities as part of the Telecommunications Act of 1996. See S. Rep. No. 111–386 (2010) and H.R. Rep. No. 111–563 (2010). Specifically, Congress stated that since it added section 255 to the Communications Act of 1934, as amended (hereinafter referred to as "the Communications Act" or "the Act"), "Internet-based and digital technologies * * * driven by growth in broadband * * * are now pervasive, offering innovative and exciting ways to communicate and share information." Congress found, however, that people with disabilities often have not shared in the benefits of this rapid technological advancement and that they face disproportionately higher rates of unemployment and poverty than those without disabilities. Recent surveys confirmed this finding, showing a gap of 38 percentage points in the rates of employment of working-age people with disabilities and those without disabilities (21% v. 59%) and a gap of 27 percentage points in the rates of Internet access (54% v. 81%).

3. These trends are even more troubling when one considers the pace at which the communications marketplace is changing and how we as a society are becoming more dependent on such technologies to succeed in the workplace and to manage our daily lives. Statistics show, for example, that more than ever, Americans rely on their mobile phones for much more than phone service. Increasingly, wireless handsets have evolved into multi-media devices capable of accessing the Internet, sending e-mails or text messages, downloading music, and viewing streaming video programming that can, for example, enable distance education and telemedicine. As described in the National Broadband Plan, one of the Commission's most important policy objectives is the rapid deployment of and universal access to

broadband services for all Americans across the country, because broadband technology can stimulate economic growth and provide opportunity for all Americans. To that end, the recommendations in the National Broadband Plan were consistent with the objectives set forth in the CVAA. This law will bring existing communication laws protecting people with disabilities in line with 21st Century technologies by ensuring that people with disabilities are not left behind and that they will be able to share fully in the economic, social, and civic benefits of broadband.

4. This NPRM seeks comment on the way in which we should implement the requirements of sections 716 and 717, which were added by section 104 of Title I of the CVAA. The statute requires the Commission to adopt rules within one year of enactment. section 716 requires that providers of "advanced communications services" (or "ACS") and manufacturers of equipment used for ACS make their services and products accessible to people with disabilities, unless it is not achievable to do so. The CVAA provides flexibility to the industry by allowing covered entities to comply with section 716 by either building access features into their equipment or services or relying on third party applications, peripheral devices, software, hardware, or customer premises equipment (or "CPE") that is available to individuals with disabilities at nominal cost. If such compliance is not achievable, covered entities must ensure that their equipment and services are compatible with "existing peripheral devices or specialized customer premises equipment" commonly used by persons with disabilities to achieve access, unless it is not achievable to do so. Section 717 requires that the Commission establish new recordkeeping and enforcement procedures for manufacturers and providers subject to section 255 and section 716. Appendix D contains the full text of the CVAA as enacted (Pub. L. 111–260 and Pub. L. 111–265).

5. While section 255 of the Act will be the starting point for our implementation of these sections, our proposed approach reflects several important differences between section 255 and section 716. First, section 716 covers a broader scope of services and related equipment than section 255. In addition, relative to section 255, section 716 requires a higher standard of achievement for covered entities but also allows for greater flexibility in how to accomplish these requirements. In the NPRM, we propose to adopt a new rule part to implement sections 716 and 717 of the Act and to amend the rules implementing section 255 of the Act to incorporate any relevant definitional changes in section 716 and establish the new recordkeeping and enforcement procedures set forth in section 717. The regulatory oversight we propose in this proceeding is not intended to prejudge the scope of the Commission's authority in other proceedings that derive from different statutory grants of authority.

6. The NPRM also seeks comment on section 718, which is effective three years after the date of enactment of the CVAA and requires manufacturers and service providers to make Internet browsers built into mobile phones accessible to people who are blind or have visual impairments. Specifically, the NPRM seeks input on what steps the Commission and stakeholders can take to ensure that manufacturers and service providers can meet their obligations when section 718 goes into effect in 2013.

II. Background

7. Section 255 of the Act, which was added by the Telecommunications Act of 1996, requires manufacturers of telecommunications equipment and providers of telecommunications services to ensure that their equipment and services are accessible to and usable by people with disabilities, if readily achievable. When the accessibility requirements of section 255 are not readily achievable, manufacturers and service providers must ensure compatibility with existing peripheral devices or specialized CPE commonly used by individuals with disabilities, if readily achievable. A related provision in section 251(a)(2) of the Act prohibits a telecommunications carrier from installing network features, functions or capabilities that do not comply with the guidelines and standards established pursuant to section 255.

8. Section 255 directed the United States Access Board ("Access Board") to work with the Commission to establish guidelines for the accessibility of telecommunications equipment and CPE within 18 months of enactment. In June 1996, the Access Board convened the Telecommunications Access Advisory Committee (TAAC), a federal advisory committee consisting of consumer, industry, and government stakeholders, for this purpose. The TAAC delivered its final report to the Access Board in January 1997, which the Access Board then used to develop its section 255 guidelines. In September 1999, the Commission adopted a Report and Order adding parts 6 and 7 to its rules to implement section 255, in large part incorporating the Access Board's guidelines for telecommunications equipment and customer premises equipment ("CPE"). In addition to drawing heavily on these guidelines for its rules implementing section 255 of the Act on telecommunications equipment and CPE (in part 6 of its rules), the Commission utilized the general principles contained in these guidelines to outline the general obligations of telecommunications service providers. In part 7 of these rules, the Commission also used its ancillary jurisdiction to adopt rules relating to voicemail and interactive voice response providers and equipment manufacturers. In 2007, the Commission extended its section 255 accessibility rules to interconnected Voice-over-Internet Protocol ("VoIP") service providers and equipment manufacturers.

9. The rules adopted to implement section 255 require that where readily achievable, manufacturers and service providers must evaluate the accessibility, usability, and compatibility features of covered services and equipment; incorporate such evaluation throughout product design, development, and fabrication, as early and consistently as possible; and identify barriers to accessibility and usability as part of the product design and development process. The rules also provide that where readily achievable, manufacturers and service providers must ensure that product and service information and documentation provided to customers is accessible to customers with disabilities. In addition, under the rules, equipment manufacturers must pass through cross-manufacturer, nonproprietary, industry-standard codes, translation protocols, formats or other information necessary to provide telecommunications in an accessible format, where readily achievable. The rules also contain an informal complaint procedure by which manufacturers and service providers must attempt to resolve the complainant's concerns and respond to the Commission within 30 days.

10. In 2006, the Access Board initiated a review of its accessibility guidelines for telecommunications equipment and CPE covered under section 255 of the Act and its standards for electronic and information technology covered under section 508 of the Rehabilitation Act. Under section 508, federal agencies must "develop, procure, maintain, and use" electronic and information technologies that are accessible to people with disabilities, unless doing so would cause an undue burden. The goal of this review was to

bring the section 255 and section 508 guidelines and standards up to date and to harmonize them with each other and international accessibility standards. Again, the Access Board established an advisory board of interested stakeholders for this purpose, and in April 2008, the Telecommunications and Electronic and Information Technology Advisory Committee ("TEITAC") issued its final report, containing a set of recommended updates to these guidelines and standards. In March 2010, the Access Board released for public comment draft information and communication technology ("ICT") guidelines and standards, which were based on these stakeholder recommendations.

11. During the spring of 2010, the Consumer and Governmental Affairs Bureau ("CGB") and the Wireless Telecommunications Bureau ("WTB") ("the Bureaus") held two workshops to explore the telecommunications access needs of people with disabilities, along with solutions to address these barriers. At the first of these, held on May 13, 2010, the Commission received feedback on expanding disability access to wireless telecommunications; at the second, held on June 15, 2010, young adults who are deaf-blind discussed the barriers they experience in accessing telecommunications and in obtaining information about accessible technologies.

12. Building on those workshops, on July 19, 2010, the Bureaus issued a public notice in DA 10–1324, in CG Docket No. 10–145 expressing the concerns "that people who are blind or have other vision disabilities have few accessible and affordable wireless phone options" and "that many wireless technologies may not be compatible with Braille displays needed by individuals who are deaf-blind." The July public notice sought comment on, among other things, the barriers faced by these populations, the cost and feasibility of technical solutions, and the actions that the agency should take to address the current lack of access. The Bureaus received over 200 submissions in the record from consumers, consumer groups, trade associations, and individual companies, many of whom provided details about the lack of access to basic and smart phones. While staff continues to consider the steps the agency should take to address those concerns, we have incorporated the record from the July public notice into the record of this proceeding because the record in CG Docket No. 10–145 is particularly relevant and may inform our understanding of the issues raised here, including the difficulties that people with disabilities face in finding accessible products and getting the technical and customer support that they need in today's marketplace.

13. On October 21, 2010, CGB and WTB issued a public notice in DA 10–2029, seeking input on key provisions in sections 716, 717, and 718 of the Communications Act, as amended by the CVAA. The Bureaus received 24 comments and 25 reply comments, which have helped to shape the development of this NPRM.

III. Statutory Definitions

A. Scope of Coverage

1. Background

14. Section 716 of the Act covers a broad array of manufacturers of equipment and providers of services that are not covered under section 255. As discussed in more detail *below,* the requirements of section 716 apply to the manufacturers of equipment used for non-interconnected VoIP services, electronic messaging services, and interoperable video conferencing services (all of which are "advanced communications services" as defined in section 3(1) of the Act) and the providers of those services. (Although interconnected VoIP service also constitutes an ACS, such service is subject to section 255 of the Act and thus need not comply with the requirements of section 716.) We agree with AT&T's statement that "section 716 reflects the reality that ACS is delivered in a complex Internet ecosystem" and that "[a]ccessibility obligations must be shared by all entities in that ecosystem for consumers to have an accessible experience." We discuss the evolution of the "complex Internet ecosystem" below and seek further comment on how we should interpret section 716 requirements, in light of this evolution and the statute's broader purposes of ensuring that ACS and equipment used for ACS is accessible to and usable by people with disabilities.

15. Since section 255 was first enacted, communication technology has changed significantly, both in terms of its usage of the Internet and packet-switched networks instead of circuit-switched networks and in its common architecture. In many cases, communication devices had a single function, and were created by a single manufacturer and often closely tied to a specific communication service or network. As the fixed and mobile Internet has evolved, mass-market communication devices are now often general-purpose computers or devices such as smart phones incorporating aspects of general-purpose computers, with an architecture reflecting the evolution of computer technology. This architecture has been common for personal computers since the 1980s, but has more recently also made its way into mobile devices such as smart phones and tablets, and into entertainment devices such as game consoles and set-top boxes. In all of these cases, systems can be divided into at least five components that can be pictured, roughly, as layers, with the hardware at the bottom and the application and services at the top:

- Hardware (commonly referred to as the "device"): Every advanced communications service relies on hardware with general-purpose computing functionality. It typically includes a computing component ("CPU"), several kinds of memory, one or more network interfaces (cellular, IEEE 802.11 "WiFi," Ethernet, Bluetooth, etc.), built-in peripherals such as keyboards and displays, and both generic and dedicated-purpose interfaces to external peripherals. A common example of a generic interface is a USB interface, as it can support just about any input or output technology, from audio to keyboards and cameras. A dedicated-purpose interface can only support one media type, such as audio.
- Operating system ("OS"): The OS manages the system resources enumerated above and provides common functionality, such as network protocols, to applications. Almost all devices with a CPU have an OS.
- User interface layer: Most modern devices have a separate user interface ("UI") layer upon which almost all applications rely to create their graphical user interface. Currently, the OS and user interface layer are typically provided as a package and are often referred to collectively as the OS, but this is not always the case. For example, at least one common OS allows users to replace the user interface layer. In many cases, web browsers are considered to be part of the UI layer although they themselves are also an application.
- Application (commonly referred to as an "app"): Software is used to implement the actual advanced communications functionality. The software may be embedded into the device and non-removable, installed by the system integrator or user, or reside in the cloud.
- Network services: Advanced communication applications, such as VoIP, rely on network services to interconnect users. These networks perform many functions, ranging from user authentication and authorization to call routing and media storage. In many

cases, such network services simply route the call signaling information and do not touch the actual media exchanged. In these cases, the service itself may not know or care what kind of media (audio, video, text) is exchanged between communicating end systems. In other cases, the network services may perform more than transport functions and offer video, voice, and other data capabilities.

While the particulars of the above components have evolved, the basic architecture has remained stable for several decades and there are no obvious successors under development in the research community. Thus, it appears reasonably safe to assume that this division will continue for the immediate future, although we note that the components listed above overlap with each other.

16. Because each of the above components may be created by a different manufacturer and sold separately, this division has three major consequences. First, a manufacturer or provider of one component may have limited ability to know which other components are being used to deliver an advanced communications service. For example, a PC- and web-based collaboration service can run on most personal computers, using an almost infinite set of combinations of hardware, operating systems and web browsers. Second, components of the service can change over time. Users can often upgrade their hardware, OS, or application, without consulting with the manufacturer or provider of the other components. Third, the accessibility features of each component are likely to evolve over time. Manufacturers of hardware, OS, and user interface layers may not know whether the components they produce will be used for advanced communications services in the future and for which ones.

17. In order to enable individuals with disabilities to use an advanced communications service, all of the components may have to support accessibility features and capabilities. Conversely, if one component does not offer a particular function, it is often impossible for another component to compensate for that omission. For example, only the hardware component can support an audio jack or a connection to an external Braille device, while only the OS and user interface layer can enable screen readers. In addition, it should be noted that while upper layers cannot make up for the lack of accessibility features at the lower layers, they can impede their use. For example, an application could render text in such a way that screen readers or Braille devices cannot function, *e.g.,* to protect content against extraction as part of digital rights management functionality. While this environment complicates the ability to implement capabilities that support people with disabilities, we also recognize that these challenges are inherent in the design of any mass market application or hardware device. At the same time, we recognize that this environment also has the potential to provide new solutions for people with disabilities which were not previously possible.

18. We seek comment on whether the above description accurately reflects the basic architecture and components involved in the delivery of ACS. Below, we seek comment on how we should interpret the statute's directives, in light of the architecture and components discussed above.

2. Manufacturers of Equipment Used for Advanced Communications Services

19. Section 716(a) of the Act provides that, with respect to equipment manufactured after the effective date of applicable regulations established by the Commission and subject to those regulations, the accessibility obligations apply to a "manufacturer of equipment used for advanced communications services, including end user equipment, network equipment, and software * * * that such manufacturer offers for sale or otherwise distributes in interstate commerce."

20. We first seek comment on the meaning of the term "manufacturer." We note that in our rules implementing section 255 of the Act we define "manufacturer" as "an entity that makes or produces a product." In the *Section 255 Report and Order,* we found that "[t]his definition puts responsibility on those who have direct control over the products produced, and provides a ready point of contact for consumers and the Commission in getting answers to accessibility questions and resolving complaints." We propose to adopt the same definition of "manufacturer" in our rules implementing section 716 and seek comment on this proposal.

21. We also seek comment on the meaning of "end user equipment," "network equipment" and "software," as those terms are used in section 716(a). We propose to define "end user equipment" as including hardware as described above; "software" includes the OS, the user interface layer, and applications, as described above, that are installed or embedded in the end user equipment by the manufacturer of the end user equipment or by the user; and "network equipment" includes equipment used for network services, as described above. We seek comment on whether upgrades to the software (OS, user interfaces, or applications) by manufacturers are encompassed in these definitions. We also seek comment on whether there are any circumstances in which a manufacturer of end user equipment would be responsible for the accessibility of software that is installed or downloaded by the user. In particular, we seek comment on commenters' assertions that the limitations on liability in section 2(a) of the CVAA generally preclude manufacturers from being liable for third party applications that are installed or downloaded by the consumer.

22. In addition, we seek comment on the meaning of the phrase "used for advanced communications services," in section 716(a), for the purposes of determining a manufacturer's obligations under this section. As a general matter, must equipment subject to section 716(a) be capable of offering ACS on a standalone basis or merely support ACS in some way? If the former, then how should this standard be applied, for example, to Internet-enabled ACS intended to run on separately distributed general computing platforms?

23. We also seek comment on the meaning of "offers for sale or otherwise distributes in interstate commerce" by "such manufacturer." Hardware, as described above, commonly meets this definition. We seek comment on whether other components that are used for advanced communications services are offered for sale or otherwise distributed in interstate commerce by the manufacturer when installed or embedded by the manufacturer. We propose to treat generally the act of a manufacturer's making software available for download as a form of distribution. We seek comment, however, for purposes of the CVAA, on what should constitute making software available for download.

24. We propose to hold manufacturers of end user equipment responsible for the accessibility of their products, including the software, such as the OS, the user interface layer, and the applications that they install. We also propose to find manufacturers of software used for advanced communications services that is offered for sale or otherwise distributed in interstate commerce by such manufacturers and that is downloaded or installed by the user as being covered by section 716(a).

3. Providers of Advanced Communications Services

25. Section 716(b)(1) of the Act provides that, with respect to service providers, after the effective date of applicable regulations established by the Commission and subject to those regulations, a "provider of advanced communications services shall ensure that such services offered by such provider in or affecting interstate commerce are accessible to and usable by individuals with disabilities," unless these requirements are "not achievable."

26. In the *Section 255 Report and Order,* the Commission found that providers of telecommunications services include resellers and aggregators. The Commission's decision was based on its interpretation of the statutory definition of "telecommunications carrier" as defined in section 3(51) of the Act. Specifically, the Commission noted that "[section 3(51)] states that a 'telecommunications carrier' means any 'provider of telecommunications services' with the exception of aggregators, thus indicating that a 'provider of telecommunications services' would otherwise include aggregators." While the CVAA does not provide similar guidance with respect to the definition of provider of ACS, we believe that the general principle that the Commission adopted in the *Section 255 Report and Order*—that "Congress intended to use the term "provider" broadly * * * to include all entities that make telecommunications services available"—has applicability here. Accordingly, we propose to find providers of ACS to include all entities that make ACS available in or affecting interstate commerce, including resellers and aggregators. We seek comment on this proposal.

27. We also seek comment on additional issues relating to the meaning of "providers of advanced communications services." We propose to find such providers to include entities that provide ACS over their own networks as well as providers of applications or services accessed (*i.e.,* downloaded and run) by users over other service providers' networks, as long as these providers make advanced communications services available in or affecting interstate commerce. We also seek comment on whether there are any circumstances in which a service provider would be responsible for the accessibility of third party services and applications or whether the liability provisions in section 2(a) of the CVAA would generally preclude such a result. We seek comment on these proposed approaches and on whether the fact that we are required under section 716(e)(1)(C) to "determine the obligations under this section of manufacturers, service providers, and providers of applications or services accessed over service provider networks" should have any bearing on how we interpret the meaning of providers of ACS. Specifically, we seek comment on the meaning of "providers of applications or services accessed over service provider networks" and how this term differs from "providers of advanced communications services." Finally, we also seek comment on the meaning of "in or affecting interstate commerce." Are there any circumstances in which advanced communications services that are downloaded or run by the user would not meet this definition?

4. Advanced Communications Services

28. Section 3(1) of the Act defines "advanced communications services" to mean (A) Interconnected VoIP service; (B) non-interconnected VoIP service; (C) electronic messaging service; and (D) interoperable video conferencing service. That provision sets forth definitions for each of these terms.

a. Interconnected VoIP Service

29. Section 3(25) of the Act, as added by the CVAA, provides that the term "interconnected VoIP service" has the meaning given in § 9.3 of the Commission's rules, as such section may be amended. § 9.3 of the Commission's rules, in turn, defines interconnected VoIP as a service that (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible CPE; and (4) permits users generally to receive calls that originate on the public switched telephone network ("PSTN") and to terminate calls to the PSTN. We propose to continue to define interconnected VoIP in accordance with § 9.3 of the Commission's rules. We seek comment on this proposal.

30. Section 716(f) of the Act provides that "the requirements of this section shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of section 255 on the day before the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010." In the *October Public Notice,* the Bureaus sought comment on how to address the accessibility obligations of equipment that is used to provide both telecommunications and advanced communications services and how to treat interconnected VoIP. In its comments, AT&T states that "the Commission should subject multi-purpose devices to section 255 to the extent that the device provides a service that is already subject to section 255 and apply section 716 solely to the extent that the device provides ACS that is not otherwise subject to section 255." We seek comment on AT&T's interpretation and also seek comment on alternative interpretations of section 716(f).

b. Non-interconnected VoIP Service

31. Section 3(36) of the Act, as added by the CVAA, states that the term "non-interconnected VoIP service" means a service that "(i) enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and (ii) requires Internet protocol compatible customer premises equipment" and that "does not include any service that is an interconnected VoIP service." We propose to define "non-interconnected VoIP service" in our rules in the same way and seek comment on this proposal.

32. We propose to treat any offering that meets the criteria of the statutory definition set forth above as a "non-interconnected VoIP service," and note that the statutory definition of non-interconnected VoIP does not exclude offerings with a purely incidental VoIP component. We seek comment on this proposal. We also note that, as discussed below, the statute allows the Commission to waive the requirements of section 716 for equipment or services "designed primarily for purposes other than using advanced communications service." In addition, as discussed below, section 716(i) provides that the requirements of this Section do not apply to "customized equipment or services that are not offered directly to the public."

c. Electronic Messaging Service

33. Section 3(19) of the Act, as added by the CVAA, states that the term "electronic messaging service" means a service that provides real-time or near real-time non-voice messages in text form between individuals over communications networks. In accordance with this definition, we propose to define this term in the Commission's rules as "a service that provides real-time or near real-time non-voice messages in text form between individuals over communications networks." Consistent with language of the Senate and House Reports, we also propose that electronic messaging service includes "more traditional, two-way interactive services such as text messaging, instant messaging, and

electronic mail, rather than * * * blog posts, online publishing, or messages posted on social networking websites." We seek comment on these proposed definitions. For reasons similar to those discussed below in the section on interoperable video conferencing services, we believe that Internet protocol relay ("IP Relay") services that otherwise fit the definition of "electronic messaging services" are services subject to the requirements of section 716.

34. We also seek comment on the assertion of several commenters that the phrase "between individuals" in the above definition precludes the application of the accessibility requirements to communications in which no human is involved, such as automatic software updates or other device-to-device or machine-to-machine communications. In addition, we seek comment on TIA's assertion that "services and applications that merely provide access to an electronic messaging service, such as a broadband platform that provides an end user access to an HTML-based e-mail service, are not covered."

d. Interoperable Video Conferencing Service

35. Section 3(1) of the Act, as added by the CVAA, defines the term "advanced communications services" to include "interoperable video conferencing service," which, in turn, is defined in section 3(27) as "a service that provides real-time video communications, including audio, to enable users to share information of the user's choosing." We note that while earlier versions of the legislation did not include the word "interoperable" in the definition of the term "advanced communications services," the definition of "interoperable video conferencing services" in the enacted legislation is identical to the definition of "video conferencing services" found in earlier versions. In addition, language in the Senate Report regarding "interoperable video conferencing services" is identical to language in the House Report regarding "video conferencing services." Both the Senate Report and the House Report state, for example, that "[t]he inclusion * * * of these services within the scope of the requirements of this act is to ensure, in part, that individuals with disabilities are able to access and control these services" and that "such services may, by themselves, be accessibility solutions." In light of the above symmetries between the earlier and later versions of this definition, as well as the reports prepared by each chamber of Congress, we will first seek comment on the meaning of "video conferencing service" and then on the meaning of "interoperable" in this context.

i. Video Conferencing Service

36. We first seek comment on what services meet the statutory definition of "providing * * * real-time video communications, including audio, to enable users to share information of the user's choosing" and what end user equipment, network equipment, and software are used for these services. We propose to classify a range of services and end user equipment under this statutory definition, including, but not limited to videophones and software applications used for conversation between and among users. Such end user equipment includes smart phones and computers with the capability of using interactive video, text and audio conferencing applications such as the Apple iPhone 4.0, Motorola Droid X and computers and videophones such as ASUS Skype, Grandstream, Ojo, and Polycom. Examples of video conferencing software applications include, for example, Google Voice & Video Chat, ooVoo, AOL Instant Message ("AIM") Chat, WebEx, and Skype. We seek comment on this proposal.

37. We also seek comment on whether video relay services ("VRS") meet the above definition. VRS is a form of TRS under section 225 of the Act that enables individuals who are deaf or hard of hearing and who use American Sign Language to communicate over distances with voice telephone users through a remotely located sign language interpreter called a CA. The person who is deaf or hard of hearing makes a VRS call using video equipment (a television or a computer with a video camera device) that connects such individual with the CA over a broadband connection. The CA then relays the conversation between the parties—in sign language with the VRS user (the "video leg"), and by voice with the telephone user (the "telephone leg"). Voice telephone users can also initiate VRS calls by simply dialing the telephone number of the person who uses sign language. The call is then automatically connected to a CA, who then relays the conversation.

38. Commenters disagree about whether the CVAA covers the video conferencing service and equipment used in the provision of VRS. Sorenson cites to the legislative history and submits that "Section 716 was intended to cover mass market services and equipment (such as personal computers and smart phones) that have not been designed for use by people with disabilities, not services and equipment (such as VRS and point-to-point) that have been designed specifically to be accessible to and usable by persons with disabilities." Consumer Groups disagree, stating that "VRS equipment and [video conferencing] services * * * should be made accessible in accordance with the Accessibility Act, if achievable." Sorenson also asserts that the phrase "including audio" in the definition suggests the exclusion of VRS "video conferencing service" or equipment. Consumer Groups reject Sorenson's assertion because widely distributed VRS equipment includes audio functions that "benefit users who engage in voice carryover ('VCO') and hearing carryover ('HCO')."

39. We agree with Consumer Groups and believe that the "video leg" of a VRS call meets the statutory definition of "provid[ing] * * * real-time video communications, including audio, to enable users to share information of the user's choosing." Just as a voice telephone user uses telecommunications services and equipment to communicate with the VRS CA (the "telephone leg" of a VRS call), we propose to find that a VRS consumer uses video conferencing services and equipment to communicate with the VRS CA (the "video leg" of a VRS call). We find nothing in the statute or the legislative history to suggest that providers of video conferencing services and manufacturers of equipment used for VRS who otherwise are covered under the CVAA should be excluded from its requirements simply because their services are a kind of TRS provided pursuant to section 225 of the Act. While VRS equipment and services are specifically designed for people who are deaf or hard of hearing and use sign language, they are not necessarily designed for those who have additional disabilities as well (*e.g.,* individuals who are deaf and have low vision, a mobility, or dexterity disability). We do not believe this interpretation will in any way diminish or change the obligations of VRS providers that are contained in part 64 of the Commission's rules. We seek further comment on this issue and on whether such an interpretation would create any difficulties or conflicts in our implementation of the VRS program.

40. We note that consumers who are deaf or hard of hearing also use video equipment distributed by VRS providers for point-to-point calls with other users of this equipment. We believe that such point-to-point calling also meets the CVAA's statutory definition of "providing * * * real-time video communications, including audio, to

enable users to share information of the user's choosing," and seek comment on this analysis.

41. We also seek further comment on whether webinars are a covered service. TIA states that "a service that enables users to share information necessarily implies a two-way service, not a broadcast-style webinar video." The IT and Telecom RERCs disagree, however, asserting that webinar systems should be subject to Section 716 because these systems are "not designed to broadcast information but rather to provide user interaction in the form of chat, voting, and hand-raising, etc."

42. Next, we seek comment on Consumer Groups' assertion that "the scope of the [CVAA] should not be limited by the type of communication conveyed by the video conferencing service (*i.e.,* uni-, bi-, or multi-directional), but by the fact that the service is capable of providing real-time communications that enable users to share information." Consumer Groups suggest, for example, that the fact that "video conferencing services may be used to leave a 'video mail' (similar to a 'voice mail') message," does not preclude the service's coverage under the CVAA. Consistent with our seeking comment on how to treat multi-purpose devices above we seek comment on Consumer Groups' suggestion. We also seek comment more generally on whether services that otherwise meet the definition of "provid[ing] * * * real-time video communications, including audio, to enable users to share information of the user's choosing" but that also provide non-real-time functions (such as video mail) are covered under the CVAA. If so, are the non-real-time functions or near-real-time functions of such a service (such as video mail) subject to the requirements of section 716? If such functions are not covered, should we, similar to what we did in the section 255 context, assert our ancillary jurisdiction to cover video mail? Specifically, the Commission employed its ancillary jurisdiction to extend the scope of section 255 to both voicemail and interactive menu services under part 7 of the Commission's rules because "the failure to ensure accessibility of voicemail and interactive menu services, and the related equipment that performs these functions, would [have] seriously undermined the accessibility and usability of telecommunications services required by sections 255 and 251(a)(2)." Similarly, we seek comment on whether the exclusion of video mail from our rules governing section 716 would hinder our ability to ensure the accessibility and usability of advanced communications services.

43. TIA also asserts, similar to the argument that it made with respect to the scope of VoIP services covered under the CVAA, that "products that offer a video connection that is incidental to the principal purpose and nature of the end user offering fall outside the definition as well," we believe the same analysis that we propose to apply to the scope of non-interconnected VoIP should apply here. We therefore propose to classify any offering that meets the criteria of the statutory definition set forth above as a "video conferencing service" and note that the statutory definition does not exclude "products that offer a video connection that is incidental to the principal purpose and nature of the end user offering." Again, we note that this issue may be relevant to our waiver authority set forth in section 716(h), or the exclusion of customized equipment or services pursuant to section 716(i). We seek comment on this proposed classification.

ii. Interoperable

44. We seek further comment on the meaning of "interoperable" in the term "interoperable video conferencing service," again noting the symmetries of the definition and interpretation of this term in the various drafts of the CVAA and the legislative history of this law. Commenters appear to be divided on the significance of this term. ITI asserts that the inclusion of the modifier "interoperable" after earlier versions of the legislation did not include the word "strongly suggests that Congress consciously decided to target only a subset of all video conferencing services." TIA urges an interpretation of the word "interoperable" to mean that a video conferencing service must operate "inter-platform, inter-network, and inter-provider" before it is subject to the accessibility provisions of the CVAA. Similarly, CEA concludes that "most nascent two-way video services and applications commercially available in the marketplace have not yet reached true interoperability and are not covered by the statute." However, Consumer Groups believe that "interoperable" should be interpreted to achieve a broad application of the requirements of the CVAA. Similarly, the RERC–IT urges that the inclusion of the word "interoperable" suggests a broad application of the CVAA so that "all video conferencing services are covered and that they should be made interoperable." Other commenters express concerns about the current lack of interoperability of video conferencing services, *i.e.,* that consumers are not able to make point-to-point calls using different video conferencing programs.

45. We are concerned that limiting coverage of this provision to only currently available video conferencing services that are "inter-platform, inter-network, and inter-provider" may undermine the statute's intent to the extent the definition results in little or no video conferencing service or equipment being "interoperable." We note that "video conferencing service" in the legislative history and "interoperable video conferencing service" in the statute have the exact same definitions.

46. We seek comment on how to define "interoperable" in a manner that is faithful to both the statutory language and the broader purposes of the CVAA. Specifically, we seek comment on how the Commission should define interoperable video conferencing services within the scope of covered services to ensure that "such services may, by themselves, be accessibility solutions" and "that individuals with disabilities are able to access and control these services" as Congress intended. For example, which characteristics of video conferencing services and equipment, including software, should determine "interoperability"?

47. The Commission requires VRS services and equipment to be "interoperable" for the provision of VRS under section 225 of the Act. The Commission also requires video conferencing services and equipment used for point-to-point calls between VRS equipment users to be "interoperable" under the authority of ancillary jurisdiction. These interoperability requirements pertain only to VRS providers and equipment used by registered VRS users for VRS and point-to-point communications and do not require interoperability among VRS and other platforms, networks, or providers. We seek comment on whether how we define interoperability in the context of VRS should have any bearing on how we define "interoperable" in the term "interoperable video conferencing service."

5. Customized Equipment or Services

48. Section 716(i) states that the provisions of this section "shall not apply to customized equipment or services that are not offered directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." While the Senate Report did not discuss this provision, the House Report explains that section 716(i) is a "narrow

exemption" that encompasses "equipment and services [that] are customized to the unique specifications requested by an enterprise customer." It goes on to state that this provision "permit[s] manufacturers and service providers to respond to requests from businesses that require specialized and sometimes innovative equipment to provide their services efficiently" and is "not intended to create an exemption for equipment and services designed for and used by members of the general public."

49. Several other commenters urge us to find that manufacturers and service providers are subject to Section 716 only to the extent that they are offering their equipment and services directly to the public. In contrast, the RERC–IT urges us to "carefully limit the exception for customized equipment and services" and to cover equipment and services that have been customized in "minor ways" and "that are made available to the public indirectly through employers, schools, or other institutions." The RERC–IT also urges that we define "public" in this context to "include public institutions, such as educational institutions and government agencies."

50. We believe that the guidance offered by the House Report evinces Congress's intent that section 716(i) be narrow in scope and applicable only to customized equipment and services offered to business or other enterprise customers, rather than to equipment and services "used by members of the general public." We seek comment on this analysis, as well as on the extent to which the equipment and services used by private institutions but made available to the public, such as communications equipment and services used by libraries and schools, should be covered by the CVAA. More specifically, we seek comment on what additional guidance by the Commission is needed to define equipment and services that are "used by members of the general public." Finally, we seek comment on the extent to which section 716 covers products and services that are offered to the general public, but which have been customized in minor ways to meet the needs of private entities.

51. Consistent with Motorola's assertions, we propose to find section 716's definition of advanced communications services not to extend to public safety communications networks and devices and find that these networks and devices are "equipment and services that are not offered directly to the public." We agree that the Commission's recent proposal not to apply its hearing aid compatibility requirements to public safety equipment is instructive here. We note, however, that employers still have obligations under the ADA, and agree with CSD that "to the extent possible, public safety systems should be designed to accommodate the needs of deaf [and] hard-of-hearing employees and employees with other disabilities." We seek comment on this analysis.

6. Waivers for Services or Equipment Designed for Purposes Other Than Using ACS

52. Section 716(h)(1) of the Act states: The Commission shall have the authority, on its own motion or in response to a petition by a manufacturer or provider of [ACS] or any interested party, to waive the requirements of [section 716] for any feature or function of equipment used to provide or access [ACS], or for any class of such equipment, for any provider of [ACS], or for any class of such services that —(A) is capable of accessing an [ACS]; and (B) is designed for multiple purposes but is designed primarily for purposes other than using [ACS]. We note that, in making waiver decisions, the Commission generally considers whether special circumstances exist that warrant deviation from the general rule, and whether the waiver will serve the public interest. In the October public notice, the Bureaus asked what factors would be relevant to determining whether a product or service is eligible for a waiver and whether there are any specific classes of products or services that warrant the establishment of a categorical or blanket waiver.

53. Both the Senate and House Reports state that section 716(h) "provides the Commission with the flexibility to waive the accessibility requirements for any feature or function of a device that is capable of accessing advanced communications services but is, in the judgment of the Commission, designed primarily for purposes other than accessing advanced communications." Consistent with the statutory language and legislative history, we propose to focus our inquiry on determining whether the offering is designed primarily for purposes other than using ACS.

54. In making our waiver assessment, we agree with commenters that the "core" function of an offering is an issue relevant to our analysis, we also agree with the IT and Telecom RERCs's suggestion that the "primary feature of a multi-feature device or service [may] vary from person to person." Furthermore, we do not believe the fact that a "core" function of a device is to play games to be dispositive of the issue whether such device is entitled to waiver under section 716(h). As the IT and Telecom RERCs note, "[g]aming is used for education, rehabilitation, and social interaction [and] * * * should not be exempted simply because the basic feature is a game." We seek comment on this analysis. We also seek comment on AFB's contentions that "how [a product] is marketed" and "[how] most people think of the device" should not be relevant to our analysis; rather, "[t]he issue is whether the advanced communications features and functions can be operated apart from the device's [primary] functions."

55. ESA also suggests that why consumers access the gaming products is an important consideration: "Consumers do not play an online game, [for example], as a means of accessing chat—a consumer in search of a general purpose messaging service will find simpler, more direct alternatives than navigating through the various features of a gaming device or online game service." We seek comment on this assertion and on whether how consumers actually use the communications component of a multi-purpose device or service is relevant to our assessment of the primary purpose for which a device or service was designed. In addition, we seek comment on ESA's proposal that we consider as part of our waiver determination whether the offering is designed for a "specific class of users who are using the ACS features in support of another task."

56. We also seek comment on the process that we should adopt for determining whether to waive the requirements of section 716 and specifically on the extent to which we need to adopt any procedures to ensure that such process is efficient and effective. Alternatively, we seek comment on whether we should handle waivers as we have in the normal course pursuant to § 1.3 of the Commission's rules. We agree with commenters who state that we should "incorporate protections for confidential information" and propose that parties seeking waivers be able to request confidential treatment of information pursuant to § 0.459 of the Commission's rules. At the same time, we agree with AAPD that, to the extent possible, the process should be "transparent and public," and propose to seek comment on any waiver petition that we receive pursuant to section 716(h). We seek comment on these proposals.

57. We also recognize the need, after appropriate consideration, for making waiver determinations in an "expeditious manner," although we

propose not to "incorporate an automatic grant date for waiver requests" as TIA urges. We note that TIA requests that "if the Commission fails to timely act on a good faith waiver request, the company in question [should] be able to initiate the product or service without penalty, and incorporate accessibility features in a reasonable time frame prospectively." Given that such a "deemed granted" provision is not contemplated by the statute, we do not intend to propose the framework outlined by TIA. We seek comment on this analysis.

58. In addition, in light of the fact that, as the NFB observes, "[t]echnology is ever changing and the 'primary purpose' of multi-purpose products is always evolving," we seek comment on AAPD's assertion that "there should be no permanent waivers." Should waivers be temporary, and, if so, what should the duration of the waivers be? If we decide that waivers should only be temporary, should we establish a process for renewing waivers, and, if so, should the factors we consider for renewal vary from the factors we consider for the original waiver grant?

59. We also seek comment on whether we should consider waivers for a "class" of services or equipment under this section and what specific showing is needed to justify such waivers. Several commenters suggest that we should grant blanket waivers in order to support innovation and competition. For example, Microsoft states that "[g]ranting prospective categorical waivers is essential to encourage manufacturers and service providers to build communication features into services and equipment devices that do not have as their core purpose advanced communications * * * [f]ostering this innovation will enrich the communications choices and solutions available to all consumers, including those with disabilities." In contrast, many consumer commenters suggest that blanket waivers are never appropriate, given rapid technological advancement and the belief that "much accessibility and usability will be accomplished through software and related changes."

60. We seek further comment on the specific factors that we should consider in determining whether a particular "class" of services or equipment should be granted a waiver. How can we determine what services or equipment are similarly situated enough to be designated a "class"? Is it possible to structure a blanket waiver in such a way as to address consumers' concerns that any such waiver could quickly become outdated? Are there specific classes of services or equipment that we should consider waiving in our final rules on section 716? If we do decide to grant waivers for an entire class of services or equipment, should such waivers be permanent or temporary? As discussed above (for individual waivers), should we establish a renewal and/or revocation process for categorical waivers?

7. Exemptions for Small Entities

61. Section 716(h)(2) states that "the Commission may exempt small entities from the requirements of this section." While the Senate Report did not discuss this provision, the House Report notes that under this section, the Commission may "waive the accessibility requirements for certain small businesses and entrepreneurial organizations" because they "may not have the legal, financial, or technical capability to incorporate accessibility features." Otherwise, the Report notes, the "application of these requirements in this limited case may slow the pace of technological innovation." It also states that "the Commission is best suited to evaluate and determine which entities may qualify for this exemption," and that it expects we will consult with the Small Business Administration ("SBA") when defining the small entities to be exempted.

62. NTCA asks the Commission to exercise its authority under section 716(h)(2) to exempt small businesses from section 716 and to define "small businesses," as such term is defined in the Regulatory Flexibility Act, thereby enabling small, rural local exchange carriers ("RLECs") and their affiliates to deploy and offer ACS "without facing outsized or unachievable regulatory burdens." Similarly, Blooston Rural Carriers request that small RLECs, RLEC affiliates, and other similarly situated small entities be exempted under section 716(h)(2) from both section 716, and the related enforcement and recordkeeping requirements of section 717. In the alternative, they request that the Commission adopt "streamlined procedures and simplified criteria" that make "appropriate waivers reasonably available to qualifying entities in a timely, predictable, and economically reasonable manner."

63. Consumer Groups, however, urge that "[i]ndividuals with disabilities should not be denied accessible advanced communications equipment and services simply because they happen to live in underserved or rural areas," and assert that "RLECs can ensure their own compliance with the [CVAA] through contracts with larger providers and mass market vendors * * * who must also comply with the [CVAA]." ACB opposes small entity waivers "without such entities having done due diligence on whether or not product accessibility is 'achievable'* * * [contending] a case-by-case approach to granting waivers would better serve the needs of consumers." Moreover, ACB recommends that, if the Commission grants categorical waivers for small entities, any such waivers only be granted for a year or less, subject to renewal at the Commission's discretion. Similarly, AAPD urges the FCC Commission to utilize caution when reviewing circumstances that would allow small entities an exemption from these requirements. AAPD does not favor "permanent exemptions or waivers."

64. In considering the proper scope of possible exemptions from the provisions of section 716 for small entities, we note that other provisions of that section also recognize the need to consider the circumstances of such entities in applying the accessibility requirements. As discussed in section III.B.1 *infra,* section 716 provides that service providers and manufacturers must meet the accessibility requirements of section 716 "unless [those requirements] are not achievable." Section 716(g) defines "achievable" as "with reasonable effort or expense," and requires the Commission to consider four factors in determining whether meeting a requirement of section 716 is "achievable." Two of those four factors necessarily incorporate consideration of the size and capabilities of an entity: "[t]he technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies;" and "[t]he type of operations of the manufacturer or provider."

65. The discretionary authority to exempt one or more groups of small entities in section 716(h)(2) supplements the protections that are built into the section 716(g) achievability analysis with an additional tool to ensure that our rules do not unduly burden such entities. We acknowledge that certain small entities may lack the legal, financial, or technical capability to incorporate the accessibility features required by the CVAA, and that in certain instances this may warrant an exemption from our accessibility requirements for certain small entities that provide ACS as well as some of those small entities that manufacture equipment used for ACS.

We agree with consumers that any such exemptions should be carefully tailored to ensure that individuals with disabilities are not denied access to advanced communications equipment and services in rural and other underserved areas.

66. In light of these competing concerns, we seek comment on whether we should exercise our exemption authority, and if so, how we should structure the exemption. For example, should we base the exemption on the number of employees or the annual revenues of the entity or a combination of the two? Are there other criteria that we should consider? We also seek input on the impact of any exemption that commenters urge us to make. In particular, we request information on the percentage of manufacturers and service providers that would be exempted from our section 716 requirements for any specific criteria proposed. We also seek comment on the percentage of equipment (including software) and services in the ACS marketplace that would be exempted from the requirements of section 716 if we exempted entities based these proposed criteria. In addition, we seek comment on how use of any recommended criteria would affect the availability of ACS and equipment used for ACS, especially in rural and underserved areas. Finally, if we adopt criteria to exempt small entities, should we consider limiting the time period of any exemption that may be granted under these criteria? We also propose to review periodically any basis that we adopt for granting exemptions to small entities to ensure that they reflect the current state of the industry.

B. Nature of Statutory Requirements

1. Achievable Standard

a. General Approach

67. Service providers and manufacturers must meet the accessibility requirements of section 716 "unless [those requirements] are not achievable." Section 716(g) of the Act defines the term "achievable" to mean "with reasonable effort or expense, as determined by the Commission." As noted above, section 716 requires a higher standard of achievement than section 255. Under section 255, covered entities must ensure the accessibility of their products if it is "readily achievable" to do so, which the statute defines by cross reference to the ADA to mean "easily accomplishable and able to be carried out without much difficulty or expense."

68. Specifically, section 716(g) requires the Commission to consider the following factors in making determinations about what "constitutes reasonable effort or expense": (1) The nature and cost of the steps needed to meet the requirements of this [s]ection with respect to the specific equipment or service in question; (2) the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies; (3) the type of operations of the manufacturer or provider; and (4) the extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.

69. We seek comment on each of these factors. At the outset, we note that the Senate and House Reports state that we should "weigh each factor equally when making an achievability determination." The House Report also states that in implementing section 716, the Commission should "afford manufacturers and service providers as much flexibility as possible, so long as each does everything that is achievable in accordance with the achievability factors." Consistent with this legislative history, we generally agree with AT&T that an assessment of what is achievable should be "fact-based, flexible, and applied on a case-by-case basis," but also agree with NFB that flexibility should not be so paramount that "accessibility is never achieved." The House Report also states that "the Commission [should] interpret the accessibility requirements in this provision the same way as it did for [s]ection 255, such that if the inclusion of a feature in a product or service results in a fundamental alteration of that service that it is *per se* not achievable to include that function." Accordingly, we agree with commenters who urge us to interpret the achievability requirements consistent with this directive. We seek comment on this analysis.

70. We also seek comment on whether or to what extent we have the discretion to weigh other factors not specified in the statute in making an achievability determination. ITI urges us to do so, and specifically asks us to consider "how the lack of economies of scale and scope can sometimes hinder the development and deployment of accessibility solutions." We note that Congress specifically set forth in section 716 the factors that we must consider in determining whether accessibility is achievable, and directed us to weigh these factors equally. In light of the statute and this legislative history, we propose to only consider the factors enumerated in the statute in making our achievability determinations. We would note, however, that we propose to construe the factors broadly and weigh any relevant considerations in determining their meaning. We believe, for example, that the "lack of economies of scale and scope" could be a relevant consideration in determining the meaning of the second factor, "the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies." We seek comment on this analysis.

b. Specific Factors

(i) Nature and Cost of Steps Needed With Respect to Specific Equipment or Service

71. Section 716(g)(1) of the Act states that in determining whether the statutory requirements are achievable, the Commission must consider "[t]he nature and cost of the steps needed to meet the requirements of [716(g)] with respect to the specific equipment or service in question." The Senate Report requires the Commission to consider "the nature and cost of the steps needed to make the specific equipment or service in question accessible" and states that "[t]he Committee intends for the Commission to consider how such steps, if required, would impact the specific equipment or service in question." The House Report reiterates the need for the Commission to focus on the "specific product or service in question" when conducting this analysis. We believe that it is appropriate for us to consider whether accessibility has been achieved by competing products, but agree with T–Mobile that, in doing so, we must also consider the unique circumstances of each covered entity. We seek comments on this analysis and also seek comment on whether we should define this standard with more specificity in order to make sure that our standards are fully enforceable. We further request input on ACB's suggestion that we consider the totality of the steps that a company needs to take in our achievability analysis, as well as the need to compare the cost of making a product accessible with the organization's entire budget.

(ii) Technical and Economic Impact on the Operation

72. The second factor in determining whether compliance with section 716 is

"achievable" requires the Commission to consider the "technical and economic impact of making a product or service accessible on the operations of the manufacturer or provider, and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies." We seek comment on how we should assess this factor and how our analysis should take into account the development and deployment of new communications technologies.

(iii) Type of Operations

73. The third factor in determining whether compliance with section 716 is "achievable" requires the Commission to consider "[t]he type of operations of the manufacturer or provider." The Senate and House Reports state that this factor permits "the Commission to consider whether the entity offering the product or service has a history of offering advanced communications services or equipment or whether the entity has just begun to do so." We seek comment on the extent to which we should consider an entity's status as a new entrant in the ACS market in conducting our achievability analysis. How should a manufacturer or service provider's recent entry into this market affect our analysis if such entity has significant resources or otherwise appears capable of achieving accessibility? What other criteria should we use in assessing this factor as part of our achievability analysis?

(iv) Extent to Which Offering Has Varied Functions, Features, and Prices

74. The fourth factor in determining whether compliance with section 716 is "achievable" requires the Commission to consider "[t]he extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points." The Senate and House Reports state that "the Commission [should] interpret this factor in a similar manner to the way that it has implemented its hearing aid compatibility rules." The Commission's rules governing hearing aid compatibility ("HAC") obligations for wireless devices require manufacturers and service providers to ensure that a range of phones comply with the HAC standards. Specifically, those rules direct such companies to ensure that hearing aid users are able to select "from a variety of compliant handset models with varying features and prices."

75. Several industry commenters read Congress's directive to incorporate this criteria into the achievability analysis, in conjunction with the legislative history and Section 716(j), as an outright rejection of the finding in the *Section 255 Report and Order* to require covered entities to consider the accessibility of every product. On the other hand, the RERC–IT states that "if every function of a particular device can achievably be made accessible to every disability, every function should be made accessible." We question whether any of these proposed interpretations appropriately take into account the more balanced approach contemplated by Congress, which gives equal weight to each of the four achievability factors and applies them on a flexible, case-by-case basis. We do, however, generally agree with TIA that this factor should be interpreted to "give individuals with disabilities meaningful choices in accessible products, and to reward those companies who provide such choices." While section 716's flexible approach is not amenable to the fixed number or percentage approach the Commission has employed in the HAC context, section 716(g)(4) seems to require that where a company has made a good faith effort to incorporate accessibility features in different products across multiple product lines, this should count favorably toward a determination that the company is in compliance with section 716 for the product in question. Where companies offer a range of accessible products that perform different functions at varied price points, consumers with disabilities will have a range of devices from which to make their purchases. In those instances, so long as other criteria under the achievability analysis are met, a company charged with having an inaccessible product might not have to make that specific product accessible. This approach would appropriately reward companies that make substantial investments in accessible products, while allowing flexibility to account for marketplace realities.

76. Accordingly, we seek comment on whether covered entities generally should not have to consider what is achievable with respect to every product, if the entity offers consumers with the full range of disabilities meaningful choices through a range of accessible products with varying degrees of functionality and features, at differing price points. At the same time, we also seek comment on whether there are some accessibility features that are so important or easy to include (like a "nib" on the 5 key) that they should be deployed on every product, unless it is not achievable to do so. If so, we seek comment on whether we should identify in our rules some of these specific accessibility features that are currently available, to provide clarity on what accessibility features should be universally deployed, if achievable. We further express our general belief that section 716(j), does not preclude our identifying "easy" accessibility features that must be included on every product, if achievable. While the Senate Report did not address this specific provision, our belief is confirmed by the House Report, which states that the Commission's approach to section 255 is consistent with section 716(j). Finally, we seek comment on whether we should define with more specificity the meaning of "varying degrees of functionality and features" and "differing price points." In particular, we seek comment on ACB's assertion that "[i]t is essential that manufacturers and service providers make available a range of devices that fit various price ranges along with corresponding accessible features * * * this may be accomplished by dividing devices into classes and making certain that each class has at least one option that is fully accessible."

2. Industry Flexibility

77. Sections 716(a)(2) and (b)(2) of the Act provide manufacturers and service providers, respectively, flexibility on how to ensure compliance with the accessibility requirements of the CVAA. Specifically, a manufacturer or service provider may comply with these requirements either by building accessibility features into the equipment or service or "by relying on third party applications, peripheral devices, software, hardware, or [CPE] that is available to consumers at nominal cost and that can be accessed by people with disabilities." While the Senate Report did not discuss these provisions, the House Report makes clear that the choice between these two options "rests solely with the provider or manufacturer." We believe that the statutory language and legislative history preclude us from preferring built-in accessibility over third party accessibility solutions, as some consumer commenters urge us to do. We acknowledge the integral role that universal design has played in ensuring that mainstream products and services are accessible to people with disabilities, and we believe that universal design will continue to play an important role in providing accessibility to people with disabilities. We believe, however, that the industry flexibility provisions of the CVAA reflect the fact that there are new ways

to meet the needs of people with disabilities that were not envisioned when Congress passed section 255, which relied primarily on universal design principles. With new and innovative technologies, in some cases, personalized services and products may now be able to more efficiently and effectively meet individual needs than products built to perform in the same way for every person. Sometimes called "auto-personalization," where available, this allows devices to adapt to individual needs based on the user's preferences, according to the device's capabilities. In a growing and increasingly mobile computing environment, for example, consumers may be able to set their preferences so that the interfaces on a device or the content produced by that device automatically become accessible for that individual's disability needs.

78. We do, however, seek comment on what actions we should take to ensure that third party accessibility solutions meet the needs of consumers in a manner comparable to solutions that are built into the equipment. First, we seek comment on the meaning of the requirement that the third party accessibility solutions "must be available to the consumer at nominal cost." Some commenters assert that "nominal cost" cannot be a static definition or constitute a set amount or percentage of total cost, but rather should be determined on a case-by-case basis. In contrast, the RERC–IT, noting that people with disabilities are "poor at alarming rates," urges the Commission to limit "nominal cost" at to one percent (1%) of the total cost of the device or service, or the total cost of the device plus service, as applicable. AFB notes further that ongoing costs to keep third party software and hardware up to date and in good working order should be included, such that the total cost to the consumer cannot be more than nominal. While Congress did not prescribe a percentage or amount, it did intend that any fee for third-party software or hardware accessibility solutions be "small enough so as to generally not be a factor in the consumer's decision to acquire a product or service that the consumer otherwise desires." We propose to adopt this definition of "nominal cost" and seek comment on this proposed definition. We are concerned, however, that this definition, by itself, might not ensure that the cost of accessibility for the consumer is truly nominal, and we seek comment on whether we need to provide further guidance on the issue.

79. We believe that manufacturers and service providers can rely on a range of third party solutions, subject to the requirements that we discuss further below, including the use of third party applications, peripheral devices, software, hardware, and CPE. We propose to adopt the following definitions of these potential third party accessibility solutions:

(a) "Applications" means "computer software designed to perform or to help the user perform a specific task or specific tasks, such as communicating by voice, electronic text messaging, or video conferencing";

(b) "Peripheral devices" means "devices employed in connection with equipment covered by this [proceeding] to translate, enhance, or otherwise transfer advanced communications services into a form accessible to individuals with disabilities";

(c) "Software" means "computer programs, procedures, rules, and related data and documentation that direct the use and operation of a computer or a related device and instruct it to perform a given task or function";

(d) "Hardware" means "a tangible communications device, equipment, or physical component of communications technology, including peripheral devices, such as a smart phone, a laptop computer, a desk top computer, a screen, a keyboard, a speaker, or an amplifier"; and

(e) "Customer premises equipment" means "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications."

We seek comment on these definitions and whether they are sufficiently inclusive of third party solutions available to manufacturers and service providers.

80. Second, we seek comment on the requirement that individuals with disabilities must be able to "access" the third-party solutions. Specifically, we seek comment on ACB's assertions that the third party solutions (i) "cannot be an after-market sale for which the user must perform additional steps to obtain;" (ii) "must be fully operable by a person with a disability without having to turn to people without disabilities in order to perform setup or maintenance;" and (iii) "must be fully documented and supported." We believe that for covered entities to meet the "access" requirement of this provision, they must ensure that the third party solution not be more burdensome to a consumer than a built-in solution. In that vein, should a service provider or manufacturer relying on third party solutions be responsible for finding and installing the solution, and supporting the solution over the life of the product? We seek comment on this analysis, on what a company must do to achieve such parity with built-in solutions, and on whether it is necessary to require that covered entities bundle the third party solutions with its products in order to meet the requirements of the statute.

3. Accessible to and Usable by

81. Under sections 716(a) and (b) of the Act, covered service providers and equipment manufacturers must make their products "accessible to and usable by" people with disabilities, unless it is not achievable. In this section, we seek comment on the extent to which we should continue to define "accessible to and usable by" as we have for our implementation of section 255, which requires telecommunications service providers and equipment manufacturers to make their products "accessible to and usable by" people with disabilities, if readily achievable.

82. In the *Section 255 Report and Order,* the Commission adopted a definition of "accessible" in § 6.3(a) of the Commission's rules which incorporated the functional definition of this term from the Access Board guidelines and includes various input, control, and mechanical functions, output, display, and control functions. The *Section 255 Report and Order* also adopted a definition of "usable" in § 6.3 that incorporated the Access Board's definition of this term. Specifically, § 6.3(l) provides that usable "mean[s] that individuals with disabilities have access to the full functionality and documentation for the product, including instructions, product information (including accessible feature information), documentation, and technical support functionally equivalent to that provided to individuals without disabilities."

83. We seek comment on whether we should adopt these definitions for purposes of section 716 or whether we should take this opportunity to make changes to these definitions that would apply to both our section 255 of the Communications Act and our section 716 of the CVAA based on the Access Board Draft Guidelines that were released for public comment in March 2010. While we note that there is a great deal of overlap between section 255's definition of "accessible" and the Access Board's proposed updated functional criteria for ICT, there are some differences. To the extent that there are differences between these definitions and criteria, should we work to reconcile those differences? For example, the rules implementing section 255 of the Act address cognitive disabilities whereas the draft ICT guidelines do not; and the draft ICT guidelines address photosensitive seizures, whereas the rules implementing section 255 of the Act do not. In addition, we note that the Access

Board Draft Guidelines on "usability" are broader and more detailed than the rules implementing section 255 of the Act. The Access Board Draft Guidelines, for example, cover training and alternate methods of communication.

4. Disability

84. Section 3(18) of the Act states that the term "disability" has the meaning given such term under section 3 of the ADA. The ADA defines "disability" as with respect to an individual: "(A) A physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment * * *." Our current rules incorporate this definition of disability, and we propose to use that definition in our section 716 rules.

5. Compatibility

85. Under section 716(c) of the Act, whenever accessibility is not achievable either by building in access features or using third party accessibility solutions as set forth in sections 716(a) and (b), a manufacturer or service provider must "ensure that its equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access," unless that is not achievable. Section 255 of the Act contains a similar compatibility requirement for telecommunications service providers and manufacturers if it is readily achievable to do so, in cases where built-in accessibility is not readily achievable.

86. Our rules implementing section 255 of the Act define peripheral devices to mean "devices employed in connection with equipment covered by this part to translate, enhance or otherwise transform telecommunications into a form accessible to individuals with disabilities." We stated in the *Section 255 Report and Order* that these might include "audio amplifiers, ring signal lights, some TTYs, refreshable Braille translators, [and] text-to-speech synthesizers." Our rules implementing section 255 of the Act define specialized CPE as customer premises equipment that is commonly used by individuals with disabilities to achieve access.

87. For purposes of section 716, we propose to define peripheral devices to mean "devices employed in connection with equipment, including software, covered under this part to translate, enhance, or otherwise transform advanced communications services into a form accessible to individuals with disabilities." This definition is based on our section 255 definition, with some refinements to reflect the statutory language in section 716. We also propose to define specialized CPE, as we do in our rules implementing section 255 of the Act, as "customer premises equipment which is commonly used by individuals with disabilities to achieve access." We agree with the vast majority of commenters that peripheral devices can include mainstream devices and software, as long as they can be used to "translate, enhance, or otherwise transform advanced communications services into a form accessible to individuals with disabilities" and the devices and software are "commonly used by individuals with disabilities to achieve access." As we found in the *Section 255 Report and Order,* we do not believe that it would be feasible for the Commission to maintain a list of peripheral devices and specialized CPE commonly used by individuals with disabilities, given how quickly technology is evolving. For the same reason, we also believe that covered entities do not have a duty to maintain a list of all peripheral devices and specialized CPE used by people with disabilities. We do believe, however, that covered entities have an ongoing duty to consider how to make their products compatible with the software and hardware components and devices that people with disabilities use to achieve access and to include this information in their records required under section 717(a)(5). We seek comment on these proposed definitions.

88. We also seek additional comment on what should be required to ensure compatibility in the context of advanced communications services. Under our rules implementing section 255 of the Act, we use four criteria for determining compatibility: (i) External access to all information and control mechanisms; (ii) existence of a connection point for external audio processing devices; (iii) TTY connectability; and (iv) TTY signal compatibility. We seek comment on whether the four criteria listed above remain relevant in the context of advanced communications services. For example, we understand that a sizeable majority of consumers who previously relied on TTYs for communication are transitioning to more mainstream forms of text and video communications. If we want to encourage an efficient transition, should we phase out the third and fourth criteria as compatibility components in our section 716 rules? Should we phase out the criteria from our rules implementing section 255 of the Act as well? If so, should we ensure that these requirements are phased out only after alternative forms of communication, such as real-time text, are in place?

89. While the Access Board Draft Guidelines address compatibility primarily with content providers in mind, they may still be helpful in defining what "compatible" should mean as we update our accessibility rules. The Access Board Draft Guidelines define compatibility to be the "interaction between assistive technology, other applications, content, and the platform," as well as the preservation of accessibility in alternate formats. We seek further comment on whether and how we should use the Access Board Draft Guidelines to help us define compatibility for purposes of section 716.

90. We also seek comment on whether we should adopt additional criteria for determining compatibility under section 716 and section 255. The Access Board Draft Guidelines note that accessibility programming interfaces ("APIs") enable interoperability with assistive technology. Code Factory explains, for example, that it is better able to develop a screen reader application if "manufacturers and operating system developers develop an Accessibility API, which is essentially a layer between the device user interface and the screen reader that can be used to pull information that must be spoken to the user." The Access Board Draft Guidelines direct platforms, applications, and interactive content to comply with World Wide Web Consortium's Web Content Accessibility Guidelines (WCAG) 2.0 Level AA Success Criteria and Conformance Requirements or to comply with specific accessibility criteria in Chapter 4 of the Access Board Draft Guidelines. Are there aspects of the WCAG guidelines or Access Board criteria that we should incorporate into our definition of compatibility? We also seek comment on the status of industry development of APIs and whether incorporating criteria related to APIs into our definition of compatibility could promote the development of APIs.

6. Network Features

91. Under section 716(d) of the Act, "[e]ach provider of advanced communications services has the duty not to install network features, functions, or capabilities that impede accessibility or usability." In the October public notice, the Bureaus sought comment on how this provision compares to a similar provision in section 251(a)(2) of the Act (relating to section 255) and whether the

requirement has a different meaning in the context of advanced communications services networks.

92. We agree with commenters who generally believe that this duty not to impede accessibility is comparable to the duty set forth in section 251(a)(2) of the Act. We propose that our rules should include the requirements set forth in section 716(d), just as our rules implementing section 255 of the Act reflect the language in section 251(a)(2). We also agree with Verizon and AAPD, who stress that section 716(d) applies to a much broader range of providers, and seek comment on how we can best reach out to newly covered entities and ensure that they are aware of their new responsibilities.

93. We note that both the Senate and House Reports state that the obligations imposed by section 716(d) "apply where the accessibility or usability of advanced communications services were incorporated in accordance with recognized industry standards." CTIA states that until the Commission identifies and requires the use of industry-recognized standards, it should "refrain from enforcing these obligations on network providers." We seek comment on CTIA's assertion and on what industry standards currently exist that can be used to incorporate accessibility or usability in advanced communications services. We also seek comment on what, if any, industry standards should be developed to incorporate accessibility or usability in advanced communications services and how these standards should be developed.

94. In addition, we seek comment on assertions by the RERC–IT that our rules should prohibit "passive inaction or setting of options * * * that impede access." We also seek comment on AFB's statement that under this provision "digital rights management or network security features or functions must * * * be installed so as not to impede accessibility." Finally, we seek comment on CTIA's assertion that "any rules seeking to limit the incorporation of any network features or functions recognize the need for covered entities to manage all network traffic, including advanced communications services."

7. Accessibility of Information Content

95. Section 716(e)(1)(B) of the Act states that the Commission's regulations shall "provide that advanced communications services, the equipment used for advanced communications services, and networks used to provide [such services] may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through [such services, equipment or networks]." In the October public notice, the Bureaus sought comment on how this provision should be implemented and the types and nature of information content that should be addressed. We note that the legislative history of the CVAA makes clear that the requirements apply "where the accessibility of such content has been incorporated in accordance with recognized industry standards."

96. We seek further comment on what these standards should be and how they should be developed and reflected in the Commission's rules, subject to the limitation on mandating technical standards in section 716(1)(D). In particular, we seek comment on the RERC–IT proposal that our regulations need to ensure that (i) "the accessibility information (*e.g.,* captions or descriptions) are not stripped off when information is transitioned from one medium to another;" (ii) "parallel and associated media channels are not disconnected or blocked;" and (iii) "consumers * * * have the ability to combine text, video, and audio streaming from different origins." We also seek comment on how we can best ensure that encryption and other security measures do not thwart accessibility, while at the same time ensuring that we "promot[e] network security, reliability, and survivability in broadband networks."

97. We also note that the Access Board Draft Guidelines require content, which includes "information and sensory experience communicated to the user and encoding that defines the structure, presentation, and interactions associated with those elements" to be accessible. The Draft Guidelines provide text, images, sounds, videos, controls, and animations as examples of content and encourage, as a best practice, the maximization of compatibility of content with existing and future technologies, including assistive technology. The Draft Guidelines also require user interfaces and their functions to be accessible. For example, under these Draft Guidelines, advanced communications services, equipment, and networks cannot strip captions that make content accessible to people who are deaf or hard of hearing from content that provides closed captioning. We seek comment on whether all or some of these Draft Guidelines would be appropriate for industry-recognized standards or inclusion in the Commission's rules.

98. Finally, we agree with CEA that, consistent with the legislation's liability limitations, that manufacturers and service providers are not liable for content or embedded accessibility content (such as captioning or video description) that they do not create or control. We seek comment on this assessment.

IV. Implementation Requirements

A. Obligations

99. Section 716(e)(1)(C) of the Act requires the Commission to "determine the obligations * * * of manufacturers, service providers, and providers of applications or services accessed over service provider networks." Below, we seek comment and make proposals relating to the obligations of manufacturers and service providers and ask further questions about the obligations of providers of applications or services accessed over service provider networks.

1. Manufacturers and Service Providers

100. With respect to equipment manufacturers and service providers of ACS, we propose to adopt general obligations that mirror the language of the statute, similar to the approach taken in §§ 6.5 and 7.5 of our rules and section 255 of the Communications Act. Specifically, we propose that the Commission's rules set forth the following "General Obligations":

- With respect to equipment manufactured after the effective date of the regulations, a manufacturer of equipment used for advanced communications services, including end user equipment, network equipment, and software, must ensure that the equipment and software that such manufacturer offers for sale or otherwise distributes in interstate commerce shall be accessible to and usable by individuals with disabilities, unless such requirements are not achievable.
- With respect to services provided after the effective date of the regulations, a provider of advanced communications services must ensure that services offered by such provider in or affecting interstate commerce are accessible to and usable by individuals with disabilities, unless such requirements are not achievable.
- If accessibility is not achievable either by building it in or using third party accessibility solutions, then a manufacturer or service provider shall ensure that its equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access unless such compatibility is not achievable.
- Providers of advanced communications services shall not

install network features, functions, or capabilities that impede accessibility or usability.

○ Advanced communications services and the equipment and networks used to provide such services may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through such services, equipment or networks.

101. In addition, we propose to adopt requirements similar to those in our rules implementing section 255 of the Act regarding product design, development, and evaluation (§§ 6.7 and 7.7); information pass through (§§ 6.9 and 7.9); and information, documentation and training (§§ 6.11 and 7.11), modified to reflect the statutory requirements of section 716. Consistent with the *Section 255 Report and Order,* we find that adoption of the functional approach reflected in such requirements will provide clear guidance to covered entities regarding their obligation to ensure accessibility and usability. Some key requirements of these proposed rules include the following:

○ Manufacturers and service providers must consider performance objectives at the design stage as early and as consistently as possible and must implement such evaluation to the extent that it is achievable.

○ Manufacturers and service providers must identify barriers to accessibility and usability as part of such evaluation.

○ Equipment used for advanced communications services, including end user equipment, network equipment, and software must pass through cross-manufacturer, nonproprietary, industry-standard codes, translation protocols, formats or other information necessary to provide advanced communications services in an accessible format, if achievable. Signal compression technologies shall not remove information needed for access or shall restore it upon decompression.

○ Such information and documentation includes user guides, bills, installation guides for end user devices, and product support communications, in alternate formats, as needed. The requirement to provide access to information also includes ensuring that individuals with disabilities can access, at no extra cost, call centers and customer support regarding both the product generally and the accessibility features of the product.

102. We seek comment on these proposed obligations for equipment manufacturers and service providers of ACS. In particular, we seek comment on whether we should adopt additional obligations or make modifications to our proposals.

2. Providers of Applications or Services Accessed Over Service Provider Networks

103. We also seek comment on what, if any, obligations we should impose on "providers of applications or services accessed over service provider networks." Are there any requirements that we should impose on these providers in order to ensure that the statutory mandates of section 716 are carried out? We also seek comment on the meaning of "accessed over service provider networks." How does this apply to applications and services that are downloaded and then run as either native or web applications on the device? How does this apply to applications and services accessed through cloud computing?

B. Performance Objectives

104. Section 716(e)(1)(A) of the Act provides that in prescribing regulations for this section, the Commission shall "include performance objectives to ensure the accessibility, usability, and compatibility of advanced communications services and the equipment used for advanced communications services by individuals with disabilities." In the October public notice, the Bureaus sought comment on how to interpret this provision, including the extent to which these objectives should be specific or general. The October public notice also sought comment on the usefulness of the Access Board's March 2010 draft standards and guidelines on section 508 of the Rehabilitation Act.

105. We agree with the broad range of commenters who stress the importance of having performance objectives that would clearly define the outcome needed to be achieved without specifying how these ends should be accomplished. More specifically, we agree with those commenters who suggest that we incorporate into the performance objectives the outcome-oriented definitions of "accessible," "compatibility," and "usable" from §§ 6.3 and 7.3 of the Commission's rules. We propose to adopt these definitions as performance objectives subject to any changes that we make to these definitions as part of this proceeding. We also agree with the IT and Telecom RERCs that "performance standards must * * * be testable, concrete, and enforceable" and seek further comment about how we can accomplish these objectives. We disagree with ITI's suggestion that performance objectives be merely "aspirational."

106. We seek additional comment on whether to adopt more specific performance objectives, and on the procedures and timelines that we should use to develop these objectives. While as a general matter it may be desirable to harmonize the Commission's rules with the Access Board Guidelines after the Access Board finalizes its Guidelines, we seek comment on what parts of the Access Board Draft Guidelines may be useful to us if we develop specific performance objectives in the interim. We also seek comment on AT&T's assertion that "the specific functionalities and standards mandated by section 508 [for government purchases of technology] * * * may not be appropriate in all circumstances for industry wide, mass market application contemplated by section 716." In which instances would the Access Board standards not be appropriate for mass market application? In which areas might they be particularly instructive?

107. We also propose to update our performance objectives, as appropriate, after the Emergency Access Advisory Committee ("EAAC"), which was established pursuant to section 106 of the CVAA, provides its recommendations to the Commission in December 2011. The EAAC, among other things, is considering "what actions are necessary as part of the migration to a national Internet protocol-enabled network to achieve reliable, interoperable communication transmitted over such network that will ensure access to emergency services by individuals with disabilities." We express our general belief that achieving reliable, interoperable communication over IP-enabled networks will have applicability outside the emergency access context and may be relevant to developing performance objectives under section 716 for advanced communications services and equipment used for these services. We note as well that the Access Board Draft Guidelines contain a proposal for real time text requirements for hardware and software whenever real-time voice is supported, further supporting the need to move forward with the recommendation in our National Broadband Plan to consider a standard for reliable and interoperable real-time text any time that VoIP is available and supported.

108. With respect to interoperable video conferencing services, we seek input on what performance objectives or rules need to be established to ensure that, where achievable, interoperable

video conferencing services and equipment are accessible to and usable by, individuals with disabilities, such as individuals who are blind, have a visual impairment, have limited manual dexterity, or who are deaf, hard of hearing, or deaf-blind. We also seek comment on whether and to what extent we have the authority to adopt industry-wide performance objectives that would set objectives for covered entities collectively. We recognize, for example, that no single entity working alone, can ensure that video conferencing services (or other advanced communications services) are interoperable. If we were to interpret section 716 to require interoperability among all video conferencing services, what industry-wide performance objectives are needed to achieve and ensure such interoperability so that consumers are able to make point-to-point calls using different video conferencing services and equipment? We also seek comments on what performance objectives are needed to address concerns expressed by consumers about the general inability of current video conferencing services to connect to VRS in a manner that achieves functional equivalency with conventional voice telephone services. In this regard, Consumer Groups urge that mainstream video conferencing equipment and services be required to "comply with standards, such as requisite resolution and frame-rate, to support real-time video conferencing used for VRS, remote video interpreting, and point-to-point communication." We note that the Access Board Draft Guidelines on section 508 propose that products used to transmit video conversations provide sufficient quality and fluidity for real-time video conversation in which at least one party is using a visual method of communication, such as sign language.

109. It appears that video conferencing equipment now available off-the-shelf to the general public does not match the capabilities of proprietary equipment offered by VRS providers in other ways as well. First, although our VRS rules require ten-digit numbering capability on VRS-provided video equipment—to enable the owners of such equipment to make point-to-point calls to one another—this capability does not presently exist in video conferencing equipment such as off-the-shelf videophones. Consumer Groups urge that the North American Numbering Plan ("NANP") 10-digit telephone number system be "adopted and/or adapted by [mainstream] video conferencing equipment and service providers to make their systems interoperable with other systems and users, including VRS users." Finally, we note, that while not yet universal, Consumer Groups envision multipoint control unit (MCU) capability in video conferencing services when VRS is provided so that all parties to the call can see the VRS communications assistant and each other simultaneously. We therefore seek comment on performance objectives for mainstream interoperable video conferencing services and equipment to address multiple video conferencing needs by people with disabilities, including the need for point-to-point calls where at least one party is using a visual method of communication, such as sign language; for functionally equivalent VRS; for multi-party conferencing via MCUs; for ten-digit numbering (or an alternative means of identifying and contacting one another); for effective emergency access; and for the delivery of video remote interpreting services.

110. We also seek comment on whether industry or the Commission should establish a working group of diverse stakeholders to address the interoperability issues relating to video conferencing services and equipment. If so, should the goals be focused on ensuring interoperability among the largest service providers and equipment manufacturers? How can we ensure that new entrants and software application developers would be fully represented in such a process? We ask commenters to set forth in detail the goals of such a group, which stakeholders should be included, the specific issues that such a working group should consider, and a timeline for completion of its work. We further ask whether such group should be part of the Commission's Consumer Advisory Committee, or be a stand-alone entity. Finally, we seek comment on what industry efforts are ongoing to address interoperability challenges and the degree to which such efforts have been effective.

111. Finally, we note that the comments to the October public notice contain relatively little discussion of "electronic messaging services" and "non-interconnected VoIP services." We seek further comment about the specific accessibility concerns relating to these services and whether we should adopt specific performance objectives to address these concerns. We also seek comment on whether it would be appropriate to establish a working group of diverse stakeholders to provide recommendations related to such performance objectives.

V. Industry Guidance

A. Safe Harbors

112. Section 716(e)(1)(D) of the Act provides that the Commission "shall * * * not mandate technical standards, except that the Commission may adopt technical standards as a safe harbor for such compliance if necessary to facilitate the manufacturers' and service providers' compliance" with the accessibility and compatibility requirements in section 716. In the October public notice, we sought comment on whether we should adopt safe harbor technical standards.

113. The vast majority of commenters oppose establishing technical standards as safe harbors. CTIA and AT&T assert that safe harbors will result in *de facto* standards being imposed that will limit the flexibility of covered entities seeking to provide accessibility. The IT and Telecom RERCs state that the Commission's rules should not include safe harbors because "technology, including accessibility technology, will develop faster than law can keep up." AFB asserts that it is too early in the CVAA's implementation "to make informed judgments * * * about whether and which safe harbors should be available." While ITI supports safe harbors, noting they provide clarity and predictability, it warns against using safe harbors "to establish implicit mandates [that] * * * lock in particular solutions." In light of the concerns raised in the record, we agree with AFB that it is too early in the implementation of the CVAA to make informed judgments about whether safe harbor technical standards should be established. Therefore, we propose not to adopt any technical standards as safe harbors at this time. We seek comment on this proposal.

B. Prospective Guidelines

114. Section 716(e)(2) of the Act requires the Commission to issue prospective guidelines concerning the new accessibility requirements. While the Senate Report did not discuss this provision, the House Report notes that such guidance "makes it easier for industry to gauge what is necessary to fulfill the requirements" by providing industry with "as much certainty as possible regarding how the Commission will determine compliance with any new obligations."

115. We agree with CTIA that the prospective guidelines that we adopt must be clear and understandable and provide service providers and manufacturers as much flexibility as possible, so long as achievable accessibility requirements are satisfied.

We seek comment on a proposal by the RERC–IT, endorsed by ACB, that we use "an approach to the guidelines similar to that used by the World Wide Web Consortium's Web Content Accessibility Guidelines (WCAG), which provide mandatory performance-based standards and non-mandatory technology-specific techniques for meeting them." We also seek comment on whether any parts of the Access Board's Draft Guidelines on section 508 of the Rehabilitation Act should be adopted as prospective guidelines. In addition, we seek comment on the process that should be used to develop prospective guidelines and to ensure that a diverse and broadly-based group of stakeholders participate in such an effort. Should the Commission, for example, establish a consumer-industry advisory group to prepare these?

VI. Section 717 Recordkeeping and Enforcement

A. Overview

116. Section 717(a) of the Act requires the Commission to establish new recordkeeping and enforcement procedures for "manufacturers and providers subject to [sections 255, 716, and 718.]" In the October public notice, the Bureaus sought comment on these requirements, including the types of records that should be maintained and the possible enforcement procedures that should be imposed. We will discuss the recordkeeping and enforcement requirements in further detail below, including a proposal to amend the existing rules implementing section 255 of the Act and to add a new rule subpart to implement the requirements of section 717. For purposes of our discussion below, we propose to apply the section 717 requirements to manufacturers of equipment used for telecommunications services, interconnected VoIP, voicemail and interactive menu services subject to section 255 of the Act; manufacturers of equipment used for ACS subject to section 716; and manufacturers of telephones used with public mobile services which include an Internet browser, subject to section 718. We also propose to apply the section 717 requirements to providers of telecommunications services, interconnected VoIP services, voicemail or interactive menu services subject to section 255 of the Act; providers of ACS subject to section 716; and providers of mobile services who arrange for the inclusion of a browser in telephones, subject to section 718. Finally, we reiterate our proposal to subject providers of applications and services that can be used for ACS and that can be accessed (*i.e.,* downloaded or run) by users over other service provider networks to the requirements of section 716 and thus by extension cover them under section 717. We seek comment on these proposals.

B. Recordkeeping

117. Beginning one year after the effective date of regulations promulgated pursuant to section 716(e), each manufacturer and provider subject to sections 255, 716, and 718 must maintain, in the ordinary course of business and for a reasonable period, records of the efforts taken by such manufacturer or provider to implement sections 255, 716, and 718, including: (1) Information about the manufacturer's or provider's efforts to consult with individuals with disabilities; (2) descriptions of the accessibility features of its products and services; and (3) information about the compatibility of such products and services with peripheral devices or specialized customer premise equipment commonly used by individuals with disabilities to achieve access. Section 717 also requires an officer of a manufacturer or provider to submit to the Commission an annual certification that records are being kept in accordance with this provision. Section 717 also states that "[a]fter the filing of a formal or informal complaint against a manufacturer or provider, the Commission may request, and shall keep confidential, a copy of the records maintained by such manufacturer or provider pursuant to [this section] that are directly relevant to the equipment or service that is the subject of such complaint." We seek comment on how to implement these statutory requirements and solicit specific input below.

118. Some commenter urge the Commission to refrain from making the recordkeeping requirements overly burdensome, unnecessarily expensive, or repetitive of the information required by existing reports. Motorola notes that it and some covered entities already publicly provide some of the information required by Section 717, including information regarding accessibility features, consultations with individuals with disabilities, and compatibility with third party peripherals submitted in existing Commission reports, such as those required for compliance with our HAC rules. CEA also states that "outreach to individuals with disabilities either directly or indirectly through standards development organizations" should be sufficient to demonstrate a company's compliance with Section 717's requirement to document efforts to consult with individuals with disabilities. Additionally, CEA points out that some of the required information may be reflected in information provided to the clearinghouse that will be established under the CVAA.

119. We note, however, that section 717 requires the Commission to establish uniform recordkeeping and enforcement procedures for entities subject to sections 255, 716, and 718. While some of these records that section 717 requires to be kept and, potentially, produced may be available publicly, in other reports or submissions made to the Commission or Bureau, or in information submitted to a clearinghouse, most of the information required by this section is not required in existing Commission reports and it is not clear to what extent this will be available in public information.

120. While we agree that we should avoid imposing excessive burdens or requiring the same information multiple times, we also seek to ensure that specific and relevant records required by the statute are appropriately maintained by manufacturers and providers. In light of the range of potential complaints that may be filed against covered entities under the CVAA and section 255, we seek comment on how the Commission should effectively implement section 717's recordkeeping requirements without imposing excessive burden or expense on covered entities or requiring multiple submissions of the same records to the Commission.

121. Section 717 appears to give the Commission the discretion to expand the recordkeeping requirements beyond the three categories specifically set forth in subsection (a)(5)(A) to "records of the efforts taken by such manufacturer or provider to implement" these Sections. We seek comment on whether the Commission should require covered entities to maintain and, potentially, produce records to demonstrate their compliance with the provisions of section 255 and similarly structured requirements in section 716. We also seek comment on what constitutes a "reasonable time period" during which covered entities will be required to maintain these records. Should we require covered entities to create and maintain records showing their compliance with the general obligation requirements as well as the requirements of product design, development, and evaluation, information pass through, and information, documentation, and training? For example, should we

require covered entities to create and maintain records demonstrating the process they have used to assess whether it is achievable to make particular products and services accessible and usable by persons with disabilities? What kinds of records would be sufficient to demonstrate such compliance? We also seek comment on whether the Commission should require these or any other types of records to demonstrate covered entities' compliance with section 255.

122. Many comments on the recordkeeping requirement request that the Commission adopt a flexible approach to section 717's recordkeeping requirement that recognizes the differences in size and scope of covered entities and their communications services or manufacturing operations, instead of requiring a specific form of documentation. Verizon recommends that the Alliance for Telecommunications Industry Solutions (ATIS) or a similar organization develop a standard recordkeeping form that could be used to satisfy this requirement. While ATIS, on behalf of AISP.4–HAC, expresses a preference for flexible recordkeeping requirements, ATIS also supports Verizon's suggestion that industry and consumers should work together to develop a mutually agreeable form in the event the Commission decides to adopt a standardized approach. CTIA specifically requests that the Commission allow records to be kept electronically. TIA suggests that the Commission should "provide some non-exclusive guidance concerning the type of information that would be responsive to the statutory recordkeeping criteria" without precluding flexibility in the form in which those records may be kept. We seek comment on these recommendations.

123. We recognize that section 717 applies to a broad range of entities that have widely ranging business models and modes of operation. Therefore, consistent with some commenters' suggestions, we propose that we should not mandate any one form in which records must be kept in order to comply with section 717. We also propose that if a record (that the Commission requires be produced after receipt of a complaint) is not readily available, the covered entity must provide it no later than the date of its response to the complaint. We seek comment on these proposals and on whether there is any reason for the Commission to mandate a standard form of recordkeeping to comply with section 717(a)(5) or to require covered entities to submit publicly available records or those the Commission already has in another report or submission. While we cannot predict what the nature of consumers' complaints will be or provide specific guidance as to what information will be responsive to those complaints, we propose, as discussed more fully below, to require each response to a filed complaint to sufficiently describe how each record submitted is relevant to the complaint and the alleged violation, and how the provided record establishes the covered entity's compliance with the Act. Finally, given that the statute provides that recordkeeping requirements do not take effect until one year after the effective date of regulations promulgated pursuant to section 716(e), we seek comment regarding whether, and if so, in what fashion, the Commission should address this transition period, particularly for the purposes of enforcement.

C. Enforcement

1. Background

124. Section 717 requires the Commission to adopt rules that facilitate the filing of formal and informal complaints that allege a violation of section 255, 716, or 718 and to establish procedures for enforcement actions by the Commission with respect to such violations, within one year of enactment of the law. In this section, we seek comment on specific procedures to implement these requirements and propose rules to consolidate the existing enforcement provisions for section 255 with the newly proposed enforcement rules for alleged violations of sections 716 and 718.

a. Enforcement of Section 255

125. In the rules adopted in the *Section 255 Report and Order,* the Commission provided form and content requirements for informal and formal complaints alleging a violation of section 255, as well as review and disposition procedures. In particular, the Commission established specific elements to be included in any informal complaint alleging a violation of section 255 of the Act as well as the form and content for answers to such complaints. These rules provide that if the Commission determines that an informal complaint has been satisfied based on the defendant's answer, or from other communications with the parties, the Commission may, at its discretion, consider the informal complaint closed, without providing a response to the complainant or defendant. Additionally, the Commission may close the informal complaint if it determines that no further action is necessary based on the complaint and answer, and will then duly inform the complainant and the defendant of the reasons stated above. If, however, the Commission, based on the pleadings, determines that a material and substantial question remains as to a defendant's compliance with the section 255 requirements and the Commission's implementing rules, the Commission may conduct further investigation or proceedings as necessary to determine whether the defendant has violated any legal requirements, as well as whether any remedial actions and/or sanctions are warranted. If the Commission determines that a defendant has failed to comply with section 255 and its implementing rules, the Commission can order such remedial action or sanctions as are authorized by the Act and the rules as it deems appropriate. Aside from its complaint procedures, the Commission may, on its own motion, conduct inquiries and initiate proceedings as necessary to enforce the relevant requirements.

b. Section 717 Enforcement Requirements

126. As discussed above, section 717 requires the Commission within one year after the date of enactment of the CVAA to establish regulations that facilitate the filing of formal and informal complaints that allege a violation of section 255, 716, or 718, and to establish procedures for enforcement actions.

127. Specifically, the CVAA requires the Commission to establish separate and identifiable electronic, telephonic, and physical receptacles for the receipt of complaints filed under section 255, 716 or 718 as well as establish a process for filing and receiving formal or informal complaints. Further, the CVAA requires the Commission to investigate the allegations in an informal complaint and, within 180 days after the date on which such complaint was filed with the Commission, issue an order concluding the investigation and provide an explanation for its conclusion, unless such complaint is resolved before such time. If the Commission determines that a violation has occurred, the Commission may, in the order or in a subsequent order, direct the manufacturer or service provider to bring the service, or in the case of a manufacturer, the next generation of the equipment or device, into compliance with requirements of those sections within a reasonable time established by the Commission in its order. If a determination is made that a violation has not occurred, the Commission must provide the basis for

such determination. The statute also provides that before the Commission makes a determination, the party that is the subject of the complaint shall have a reasonable opportunity to respond to such complaint, and may include in its response any factors that are relevant to such determination. Before issuing a final order, the Commission is required to provide the responding party a reasonable opportunity to comment on any proposed remedial action.

2. General Requirements

128. *Pre-Filing Notice.* We seek comment on whether the Commission should require potential complainants to first notify the defendant manufacturer or provider that it intends to file a complaint based on an alleged violation of one or more provisions of section 255, 716, or 718. We note that some parties have suggested that such a pre-filing notice can potentially foster greater communication among parties. While we agree that such a requirement could lead to a more efficient resolution in advance of a complaint in some instances, we are also concerned that in other cases, such a requirement could prove burdensome to consumers and delay resolution of complaints. In the *Section 255 Report and Order,* consistent with an Access Board recommendation, we encouraged consumers to express their concerns informally to the manufacturer or service provider before filing a complaint with the Commission. We declined, however, to adopt a rule requiring consumers to contact manufacturers and service providers before they could file a complaint with the Commission, finding that our informal complaint process is "geared toward cooperative efforts." We seek comment on whether such an approach is sufficient or whether a specific requirement is necessary. To the extent that commenters advocate that we require that consumers notify manufacturers or providers before they file a complaint, we seek comment on specific safeguards that we should adopt to ensure that this requirement does not prove onerous to the consumers.

129. *Receipt and Filing of Complaints.* We seek comment on how the Commission should establish separate and identifiable electronic, telephonic, and physical receptacles for the receipt of complaints, both formal and informal. We note that the Commission's Disability Rights Office has already established a new phone number (202–418–2517(V); (202–418–2922 (TTY) and e-mail address (*dro@fcc.gov*) for this purpose. We also note that currently, informal complaints alleging a violation of section 255 may be transmitted to the Commission via any reasonable means, *e.g.,* letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette recording, and Braille. We propose to retain these vehicles as means for transmission and receipt of informal complaints by the Commission under sections 255, 716 and 718 and ask commenters to consider whether additional methods are necessary to meet this statutory requirement. Similarly, as discussed more fully below, we seek comment on the extent to which we should retain or revise our current requirements under section 255 governing formal complaints that are filed for alleged violations by manufacturers and providers under sections 255, as well as sections 716 and 718, in the future. At present, these procedures are consistent with §§ 1.720–1.736 of the Commission's rules. If we make changes to facilitate the filing of informal complaints, but continue to apply our procedures for formal complaints largely in their current form to the new ACS sections (as well as maintain these procedures for section 255), will this be enough to fulfill Congress's intent to facilitate the filing of complaints under these sections? We note that since our rules implementing section 255 of the Act went into effect in 1999, the Commission has received only three formal complaints alleging violations of that section.

130. *Standing to File.* We received comments requesting that the Commission establish "reasonable" standing requirements. We note that the CVAA allows "any person alleging a violation" of the CVAA or the implementing rules to file a formal or informal complaint under section 255, 716, or 718. Given that there is no standing requirement under these sections, and there is no standing requirement under either section 208 of the Act and our existing complaint rules, we decline to propose a standing requirement and believe the minimum content requirements we propose *infra* in sections VI.C.3 and VI.C.4 will effectively deter frivolous complaint filings.

131. *Sua sponte actions by the Commission.* As noted above, the Commission's implementing rules for section 255 explicitly state that the agency may, on its own motion, conduct inquiries and proceedings as necessary to enforce the requirements of its implementing rules and that section of the Act. We intend for the Commission and its staff to continue to investigate and take action on our own motion when compliance issues or problems involving sections 255, 716 and 718 come to our attention through an accessibility-related complaint or otherwise. Rather than establishing specific guidelines for initiating investigations and other enforcement actions on the Commission's own motion, we propose to continue to follow existing protocols, and use procedures that in the opinion of the Commission best serve the purposes of Commission- and staff-initiated inquiries and proceedings. We seek comment on this approach.

132. *Remedies and Sanctions.* We seek comment on what remedies and other sanctions the Commission should consider for violations found to have occurred under section 255, 716 or 718. As a preliminary matter, as noted above, we observe that section 717(a)(3)(B) specifically authorizes the Commission to impose as a remedy for any violation an order directing a manufacturer to bring the next generation of its equipment or device, and a service provider to bring its service, into compliance within a reasonable period of time. We also observe that section 718(c) envisions that we will continue to use our existing enforcement authority under section 503 of the Act, but specifically adds that (subject to section 503(b)(5)) manufacturers and service providers subject to the requirements of sections 255, 716, and 718 are liable for forfeitures of up to $100,000 per violation or each day of a continuing violation, with the maximum amount for a continuing violation set at $1 million. We intend to use these statutorily directed remedies and sanctions as well as other remedies and sanctions authorized in the Act. We propose a change to section 1.80 of the Commission's rules to reflect the modifications of section 718(c) to the Act.

133. We seek comment on whether there are additional remedies that the Commission should consider when a violation is determined to have occurred. The Senate and House Reports make clear that we should not consider remedies that require retrofitting of equipment, and accordingly, we agree with CEA that we should not employ those remedies for violations of these provisions. We also note that AFB suggests that when a complaint is filed and a given product is not accessible, but the company nevertheless offers an array of accessible options, "the Commission should require the company to demonstrate that it can offer the complainant at least one other of its products that satisfies the [CVAA's] requirements and that would provide the complainant at least the same

features and level of functionality as the product that is the subject of the complaint" and at a comparable cost to the inaccessible product. While we agree that this may be a potential defense, we clarify that the issue of whether a subject entity satisfies its accessibility obligations is a fact-specific determination that will be decided in the context of a complaint proceeding based on the record. More specifically, we believe our determination about what is achievable must take into account all four factors enumerated under section 716(g), not just the fourth factor that considers "the extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points."

3. Informal Complaints

134. As described above, within one year after the date of enactment of the CVAA, the Commission is required to establish regulations that facilitate the filing of an informal complaint that alleges a violation of section 255, 716 or 718, as well as establish procedures for enforcement actions by the Commission for any violations.

135. We note that commenters suggest that any enforcement procedures should provide clarity regarding culpability, given that a product or service may potentially involve several different entities such as a device manufacturer, a broadband provider, or an application developer. We acknowledge that it may be difficult for a consumer to determine where the responsibility of one covered entity ends and another begins. We seek comment on what additional procedures the Commission might adopt to clarify which entity is "culpable" for noncompliance and further ask to what extent the Commission should be available to assist consumers in determining which entities are appropriately targeted by specific complaints? We also seek comment on what additional elements should be included in complaints that are filed under these sections, beyond what is proposed below.

136. We propose the following minimum requirements that complainants should include in their informal complaints, which are consistent with section 255 requirements as well as existing enforcement rules that have been adopted in other contexts. Specifically, we propose to include the following in any informal complaint: (1) The name, address, e-mail address and telephone number of the complainant, and the manufacturer or service provider defendant against whom the complaint is made; (2) a complete statement of facts explaining why the complainant contends that the defendant manufacturer or provider is in violation of section 255, 716 or 718, including details regarding the service or equipment and the relief requested, and all documentation that supports the complainant's contention; (3) the date or dates on which the complainant or person on whose behalf the complaint is being filed either purchased, acquired, or used (or attempted to purchase, acquire, or use) the equipment or service about which the complaint is being made; (4) the complainant's preferred format or method of response to the complaint by the Commission and defendant (*e.g.,* letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette recording, Braille; or some other method that will best accommodate the complainant's disability); and (5) any other information that is required by the Commission's accessibility complaint form. We seek comment on this proposal and request parties to consider what additional or modified requirements are necessary. Complaints that do not satisfy the pleading requirements will be dismissed without prejudice to refile. (The CVAA requirement for the Commission to issue an order concluding an investigation that is triggered by informal complaint, within 180 days of the filing complaint, will be tied to the Commission's receipt of complaint that satisfies its pleading requirements.)

137. We also recognize that the CVAA's recordkeeping requirements will allow the Commission to obtain records of the efforts taken by manufacturers or providers to implement sections 255, 716, and 718 and the Commission may use these records as necessary to determine whether a covered entity has complied with its legal obligations. Additionally, consistent with our rules implementing section 255 of the Act, we propose to maintain our current rule that the Commission will promptly forward any informal complaint meeting the appropriate filing requirements to each defendant named or determined to be implicated by the complaint. Also, consistent with our approach taken in our rules implementing section 255 of the Act, we propose to require manufacturers and service providers to establish points of contact for complaints and inquiries under section 255, 716 or 718. We continue to believe that this requirement will facilitate the ability of consumers to contact manufacturers and service providers directly about accessibility issues or concerns and ensure prompt and effective service of complaints on defendant manufacturers and service providers by Commission staff. We seek comment on this proposal.

138. As discussed above, the CVAA provides a party that is the subject of a complaint a reasonable opportunity to respond to such a complaint. Consistent with this requirement, we propose that answers to informal complaints must: (1) Be filed with the Commission and served on the complainant within twenty days of service of the complaint, unless the Commission or its staff specifies another time period; (2) respond specifically to each material allegation in the complaint; (3) set forth the steps taken by the manufacturer or service provider to make the product or service accessible and usable; (4) set forth the procedures and processes used by the manufacturer or service provider to evaluate whether it was achievable to make the product or service accessible and usable; (5) set forth the names, titles, and responsibilities of each decisionmaker in the evaluation process; (6) set forth the manufacturer's basis for determining that it was not achievable to make the product or service accessible and usable; (7) provide all documents supporting the manufacturer's or service provider's conclusion that it was not achievable to make the product or service accessible and usable; (8) include a certification by an officer of the manufacturer or service provider that it was not achievable to make the product or service accessible and usable; (9) set forth any claimed defenses; (10) set forth any remedial actions already taken or proposed alternative relief without any prejudice to any denials or defenses raised; (11) provide any other information or materials specified by the Commission as relevant to its consideration of the complaint; and (12) be prepared or formatted in the manner requested by the Commission and the complainant, unless otherwise permitted by the Commission for good cause shown. We seek comment on this proposal. We further propose that within ten (10) days after service of an answer, unless otherwise directed by the Commission, the complainant may file and serve a reply, which shall be responsive to matters contained in the answer and shall not contain new matters. We seek comment on this proposal as well. Given the statutory requirement for the Commission to issue an order concluding an investigation of an

informal complaint within 180 days of the filing of the complaint, are there other pleading requirements we should impose, and, if so, what should these be?

139. As noted above, the CVAA requires the Commission to issue an order that finds whether a violation has occurred within the time limits required by the Act, and to provide an explanation for its conclusion. Also, as we have noted, the statute provides that if the Commission determines that a violation has occurred, the Commission may direct the manufacturer or service provider to bring the service, or in the case of a manufacturer, the next generation of the equipment or device, into compliance with requirements of those sections within a reasonable time established by the Commission in its order. In addition, as also previously mentioned, before issuing a final order, the Commission is required to provide the responding party a reasonable opportunity to comment on any proposed remedial action. We would further note that the CVAA authorizes the Commission to direct manufacturers and service providers of ACS to bring their equipment and services into compliance either in the order concluding an investigation based on an informal complaint or "in a subsequent order." Recognizing the importance of the rapid implementation of remedies to achieving the CVAA's broader goals, however, we will endeavor to issue a determination regarding remedies within 180 days after an informal complaint is filed, or shortly thereafter in a subsequent order, whenever feasible. (The Commission must, however, conclude the investigation and include a determination whether any violation occurred within 180 days.) We seek comment on this approach.

140. We recognize that the Commission must exercise any remedial authority selectively and carefully, based on legislative history, particularly for consumer and wireless devices, clarifying that "the Commission shall provide [service providers and manufacturers] a reasonable time to bring the service or equipment at issue into compliance * * * [and should not] require retrofitting of such equipment that is already in the market." We seek comment on what we should consider a reasonable time in which to bring inaccessible devices or services into compliance and how best to impose compliance in this context consistent with our proposals for remedies and sanctions discussed above. We also seek input on what constitutes "reasonable opportunity" to comment on any proposed remedial action.

4. Formal Complaints

141. *Applicability of sections 1.720–1.736.* In addition to allowing aggrieved parties an opportunity to file informal complaints, section 717 states that such parties may use our more formal adjudicative procedures to pursue accessibility claims against manufacturers or service providers under sections 255, 716 and 718. This section further directs the Commission to establish regulations that facilitate the filing of such formal claims. To date, section 255 claims have been subject to the procedures laid out in §§ 1.720–1.736 of the Commission's rules. Under these rules, both complainants and defendants are required to (1) certify in their respective complaints and answers that they attempted in good faith to settle the dispute before the complaint was filed with the Commission; and (2) submit detailed, factual and legal support, accompanied by affidavits and documentation, for their respective positions in the initial complaint and answer. The rules also place strict limits on the availability of discovery and subsequent pleading opportunities to present and defend against claims of misconduct. Additionally, the rules include additional procedural and pleading requirements designed to expedite resolution of any formal complaint. We propose to require aggrieved parties to follow our existing formal complaint procedures, as modified in our proposed rules. These modifications include deleting references to provisions that are not relevant to consumer-filed complaints in the accessibility context (*e.g.,* provisions relating to complaints filed under section 271 of the Act), as well as to "rocket docket" procedures. Because the CVAA requires the Commission to address informal complaints within 180 days of filing, and because our accelerated docket procedures were designed to adjudicate disputes between carriers that satisfy certain criteria, we are inclined not to extend these procedures to formal complaints in the accessibility context. We seek comment on whether we should consider additional modifications to these rules in order to facilitate the filing of such formal complaints.

142. Additionally, we propose not to require parties to obtain Commission approval in order to file a formal complaint; we also propose not to require parties to invoke our informal complaint processes as a prerequisite to filing a formal complaint. No such requirements exist in the statute or our formal complaint rules and we find no basis in the existing record to conclude that such requirements are needed for complaints filed under section 255, 716 or 718. We seek comment on this proposal and ask parties to describe whether there are any circumstances that warrant such requirements.

VII. Section 718 Internet Browsers Built Into Telephones Used With Public Mobile Services

143. We seek further comment on the upcoming obligations imposed by section 718 which generally provides that "[i]f a manufacturer of a telephone used with public mobile services * * * includes an Internet browser in such telephone, or if a provider of mobile service arranges for the inclusion of a browser in telephones to sell to customers, the manufacturer or provider shall ensure that the functions of the included browser (including the ability to launch the browser) are accessible to and usable by individuals who are blind or have a visual impairment, unless doing so is not achievable."

144. While section 718's requirements will not take effect for three years, we agree with ACB that the accessibility of mobile Web access technologies is critical and seek comment on the best way(s) to implement section 718, so as to afford affected manufacturers and service providers an opportunity to provide input at the outset, as well as to make the necessary arrangements to achieve compliance by the time the provisions go into effect. We would particularly welcome input on how the Commission can best inform and assist covered entities on the means by which they can meet their obligation to provide access to Internet browsers in mobile phones. Specifically, we seek comment on Verizon's proposal that we "encourage industry forums and working groups to develop accessibility standards for mobile browsers" because a "cooperative effort" will be needed to ensure compliance. To what extent should the Commission help to facilitate this discussion, for example through an advisory committee or a working group that is part of the Commission's Consumer Advisory Committee? We also seek comment on Code Factory's recommendation that manufacturers and operating system developers develop an accessibility API to foster the incorporation of screen readers into mobile platforms across different phones which would render the Web browser and other mobile phone functions accessible to individuals who are blind or visually impaired.

VIII. Procedural Matters

Comment Period and Procedures

145. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing system (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov.* Filers should follow the instructions provided on the Web site for submitting comments.
- *For ECFS filers,* if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Comments shall be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- *Paper filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 pm All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.
- *People with Disabilities:* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).
- *Availability of Documents:* The public may view the documents filed in this proceeding during regular business hours in the FCC Reference Information Center, Federal Communications Commission, 445 12th Street, SW., Room CY–A257, Washington, DC 20554, and on the Commission's Internet Home Page: *http://www.fcc.gov.* Copies of comments and reply comments are also available through the Commission's duplicating contractor: Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, 1–800–378–3160.

Initial Regulatory Flexibility Analysis

146. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"), the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities that might result from adoption of the rules proposed in the Notice of Proposed Rulemaking ("NPRM"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the applicable deadlines for initial comments, or reply comments, as specified in the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA"). In addition, the NPRM and this IRFA (or summaries thereof) will be published in the **Federal Register**.

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

147. The purpose of these proposed rules is to implement Congress' mandate that people with disabilities have access to advanced communications services and equipment. Specifically, these rules are proposed to implement sections 716 and 717 of the Communications Act of 1934, as amended, which were added by the "Twenty-First Century Communications and Video Accessibility Act of 2010" ("CVAA"). Given the fundamental role that advanced communications services have come to play in today's world, the Commission believes that the CVAA represents the most significant governmental action for people with disabilities since the passage of the Americans with Disabilities Act of 1990 ("ADA"). The inability to access communications equipment and services can be life-threatening in emergency situations, can severely limit educational and employment opportunities, and can otherwise interfere with full participation in business, family, social, and other activities. Many of these proposals build on our rules implementing section 255 of the Communications Act, which was added by the Telecommunications Act of 1996 and provides for the accessibility of telecommunications services and equipment.

148. The NPRM makes proposals to implement the requirements of section 716, which requires that providers of advanced communications services and manufacturers of equipment used for such services make their products accessible to people with disabilities, unless it is not achievable to do so. It also proposes rules relating to section 717, which requires the Commission to establish new recordkeeping and enforcement procedures for manufacturers and providers subject to section 716 and section 255.

149. The Commission proposes that manufacturers and service providers comply with the requirements of section 716 either by building accessibility features into their equipment or service or by relying on third party applications or other accessibility solutions. The Commission also proposes that if it is not achievable for manufacturers and service providers to make their products accessible to people with disabilities, then they must make their products compatible with specialized devices commonly used by people with disabilities.

150. Furthermore, the Commission proposes that manufacturers and service providers consider performance objectives at the design stage as early and consistently as possible and implement such evaluation to the extent that it is achievable. The Commission proposes to incorporate into its

performance objectives the outcome-oriented definitions of "accessible," "compatibility," and "usable" contained in its rules regarding the accessibility of telecommunications services and equipment. It seeks comment on whether it should adopt more specific performance objectives and the procedures and timelines that it should use to develop these objectives.

151. The Commission also proposes to issue prospective guidelines concerning the new accessibility requirements. In addition, the Commission seeks comment on its proposal not to adopt any technical standards as safe harbors at this time.

152. The Commission proposes that the accessibility requirements generally should apply to a wide range of manufacturers and service providers, including applications developers and providers of applications or services downloaded and run by users over service providers' networks. It proposes, however, to consider exemptions for small entities and, if one or more such exemptions is adopted, further proposes to consider various criteria in setting standards for such exemptions. The Commission also proposes to consider waivers, both individual and blanket, for offerings which are designed for multiple purposes but are designed primarily for purposes other than using advanced communications services.

153. The Commission proposes to define "achievable" to mean "with reasonable effort and expense." In making determination about what is achievable under section 716, the Commission proposes to consider the following four factors and give them equal weight:

- "The nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question;"
- "The technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question * * *;"
- "The type of operations of the manufacturer or provider;" and
- "The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points."

154. The Commission proposes procedures to facilitate the filing of complaints and proposes a 180-day deadline to issue an order resolving informal complaints concerning the accessibility of products. In addition, the Commission proposes that manufacturers and providers subject to section 716 and section 255 maintain records of the (1) efforts to consult with people with disabilities; (2) accessibility features of their products; and (3) compatibility of their products with specialized devices.

155. Moreover, in light of the range of potential complaints that may be filed against covered entities (including small entities) under the CVAA and section 255, the NPRM seeks comment on how we should effectively implement section 717's recordkeeping requirements without imposing excessive burden or expense on covered entities or requiring multiple submissions of the same records to the Commission. The NPRM seeks input on what constitutes a "reasonable time period" during which covered entities will be required to maintain these records.

156. The NPRM also recognizes the variety of business models and operations of entities covered under its proposed rules and, therefore, proposes that the Commission not mandate any one form in which records must be kept in order to comply with section 717. The NPRM, however, seeks comment on whether there is any reason for the Commission to mandate a standard form of recordkeeping to comply with section 717(a)(5) or to require covered entities to submit publicly available records or to re-submit records that the Commission already has received through a separate submission. Finally, given that the statute provides that these mandatory recordkeeping requirements do not take effect until one year after the effective date of regulations promulgated by the Commission pursuant to section 716(e), the NPRM seeks input regarding whether, and if so, in what fashion, the Commission should address this transition period, particularly for the purposes of enforcement.

B. Legal Basis

157. The legal basis for any action that may be taken pursuant to the NPRM is contained in sections 1–4, 255, 303(r), 403, 503, 716, 717, 718 of the Communications Act of 1934, as Amended, 47 U.S.C. 151–154, 255, 303(r), 403, 503, 617, 618, 619.

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

158. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that face possible significant economic impact by the adoption of proposed rules. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" 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) satisfies any additional criteria established by the SBA.

159. To assist the Commission in analyzing the total number of small entities potentially affected by the rules proposed in the NPRM, we ask commenters to estimate the number of small entities that may be affected by those rules. To assist in assessing the nature and number of small entities that face possible significant economic impact by adoption of our proposed rules, we seek comment on the industry categories below and our estimates of the entities in each category that can, under relevant SBA standards or standards previously approved by the SBA for small businesses, be classified as small. Where a commenter proposes an exemption from the requirements of section 716, we also seek estimates from that commenter on the number of small entities in each category that would be exempted from compliance with section 716 under the proposed exemption, the percentage of market share for the service or product that would be exempted, and the economic impact, if any, on those entities that are not covered by the proposed exemption. While the NPRM and this IRFA seek comment on whether and how the Commission should exempt small entities from the requirements of section 716 for the purposes of building a record on that issue, we will assume, for the narrow purpose of including a thorough regulatory impact analysis in this IRFA, that no such exemptions will be provided.

160. We divide the remainder of this section into three parts. In the first two, we identify those equipment manufacturers and those service providers that will be subject to our proposed rules and the industry categories within which they are classified. Within each category where possible, we estimate the total number of establishments or firms and the number of small entities (or the percentage) among them that face possible significant economic impact under the rules proposed in the NPRM. Where possible, we provide Census data on the number of "firms" in a given industrial category but, where that data is not available, we provide data on the number of "establishments." The number of "establishments" is a less

helpful indicator of the number of businesses in a given category than the number of "firms," because the latter term takes into account the concept of common ownership or control. Each single physical location counts as an "establishment," even though several "establishments" may be owned or controlled by one "firm." Thus, the data given in a category for "establishments" may reflect an inflated number of businesses in that category, including an inflated number of small businesses. In the third part, we identify additional industry categories in which small entities face possible significant economic impact by the adoption of those proposed rules. In the third part, as in the first two parts, we estimate, where possible, the number of establishments or firms and the number of small entities (or the percentages) that would face such possible impact by adoption of our proposed rules.

161. *Small Businesses.* Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.

1. Equipment Manufacturers

a. Manufacturers of Equipment To Provide VoIP

162. Entities manufacturing equipment used to provide interconnected Voice Over Internet Protocol ("VoIP"), non-interconnected VoIP, or both are generally found in one of two Census Bureau categories, "Electronic Computer Manufacturing" or "Telephone Apparatus Manufacturing." While we recognize, as noted in the NPRM, that the manufacturers of equipment used to provide interconnected VoIP will continue to be regulated under section 255 rather than under section 716, we include here an analysis of the possible significant economic impact of our proposed rules on manufacturers of equipment used to provide both interconnected and non-interconnected VoIP because it was not possible to separate available data on these two manufacturing categories for VoIP equipment. In light of this situation, our estimates below are in all likelihood overstating the number of small entities that manufacture equipment used to provide interconnected VoIP and which are subject to our proposed section 716 rules. However, in the absence of more accurate data, we present these figures to provide as thorough an analysis of the impact on small entities as we can at this time, with the understanding that we will modify our analysis as more accurate data becomes available in this proceeding.

163. *Electronic Computer Manufacturing.* The Census Bureau defines this category to include "* * * establishments primarily engaged in manufacturing and/or assembling electronic computers, such as mainframes, personal computers, workstations, laptops, and computer servers. Computers can be analog, digital, or hybrid * * * The manufacture of computers includes the assembly or integration of processors, coprocessors, memory, storage, and input/output devices into a user-programmable final product."

164. In this category, the SBA has deemed an electronic computer manufacturing business to be small if it has fewer than 1,000 employees. For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 421 such establishments that operated that year. Of those 421 establishments, 384 (approximately 91%) had fewer than 100 employees and only 37 had 100 employees or more, thus, while we cannot provide a more precise estimate, it is clear that a great majority of these establishments would be deemed small under the applicable SBA size standard. Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, we estimate that approximately 91% or more of the manufacturers of equipment used to provide VoIP in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

165. *Telephone Apparatus Manufacturing.* The Census Bureau defines this category to comprise "* * * establishments primarily engaged in manufacturing wire telephone and data communications equipment. These products may be standalone or board-level components of a larger system. Examples of products made by these establishments are central office switching equipment, cordless telephones (except cellular), PBX equipment, telephones, telephone answering machines, LAN modems, multi-user modems, and other data communications equipment, such as bridges, routers, and gateways."

166. In this category, the SBA has deemed a telephone apparatus manufacturing business to be small if it has fewer than 1,000 employees. For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 398 such establishments that operated that year. Of those 398 establishments, 393 (approximately 99%) had fewer than 1,000 employees and, thus, would be deemed small under the applicable SBA size standard. Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, the Commission continues to estimate that approximately 99% or more of the manufacturers of equipment used to provide VoIP in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

b. Manufacturers of Equipment To Provide Electronic Messaging

167. Entities that manufacture equipment (other than software) used to provide electronic messaging services are generally found in one of three Census Bureau categories: "Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing," "Electronic Computer Manufacturing," or "Telephone Apparatus Manufacturing."

168. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: "transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment."

169. In this category, the SBA has deemed a business manufacturing radio and television broadcasting equipment, wireless communications equipment, or both, to be small if it has fewer than 750 employees. For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 398 such establishments that operated that year. Of those 398 establishments, 393 (approximately 99%) had fewer than 1,000 employees and 912 (approximately 97%) had fewer than 500 employees. Between these two figures, the Commission estimates that about 915 establishments (approximately 97%) had fewer than 750 employees and, thus, would be considered small under the applicable SBA size standard. Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, Commission estimates that approximately 97% or more of the

manufacturers of equipment used to provide electronic messaging services in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

170. *Electronic Computer Manufacturing.* The Census Bureau defines this category, as noted above, to include "* * * establishments primarily engaged in manufacturing and/or assembling electronic computers, such as mainframes, personal computers, workstations, laptops, and computer servers. Computers can be analog, digital, or hybrid * * * The manufacture of computers includes the assembly or integration of processors, coprocessors, memory, storage, and input/output devices into a user-programmable final product."

171. In this category, as noted above, the SBA has deemed an electronic computer manufacturing business to be small if it has fewer than 1,000 employees. For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 421 such establishments that operated that year. Of those 421 establishments, 384 (approximately 91%) had fewer than 100 employees and 37 had 100 employees or more, thus, while we cannot provide a more precise estimate, it is clear that a great majority of these establishments would be deemed small under the applicable SBA size standard. Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, we estimate that approximately 91% or more of the manufacturers of equipment used to provide electronic messaging services in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

172. *Telephone Apparatus Manufacturing.* The Census Bureau, as noted above, defines this category to comprise "* * * establishments primarily engaged in manufacturing wire telephone and data communications equipment. These products may be standalone or board-level components of a larger system. Examples of products made by these establishments are central office switching equipment, cordless telephones (except cellular), PBX equipment, telephones, telephone answering machines, LAN modems, multi-user modems, and other data communications equipment, such as bridges, routers, and gateways."

173. In this category, as noted above, the SBA has deemed a telephone apparatus manufacturing business to be small if it has fewer than 1,000 employees. For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 398 such establishments that operated that year. Of those 398 establishments, 393 (approximately 99%) had fewer than 1,000 employees and, thus, would be deemed small under the applicable SBA size standard. Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, the Commission estimates that approximately 99% or more of the manufacturers of equipment used to provide electronic messaging services in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

c. Manufacturers of Equipment To Provide Interoperable Video Conferencing Services

174. Entities that manufacture equipment used to provide interoperable and other video conferencing services are generally found in the Census Bureau category: "Other Communications Equipment Manufacturing." The Census Bureau defines this category to include: "* * * establishments primarily engaged in manufacturing communications equipment (except telephone apparatus, and radio and television broadcast, and wireless communications equipment)."

175. *Other Communications Equipment Manufacturing.* In this category, the SBA has deemed a business manufacturing other communications equipment to be small if it has fewer than 750 employees. For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 452 such establishments that operated that year. Of those 452 establishments, all 452 (100%) had fewer than 1,000 employees and 448 of those 452 (approximately 99%) had fewer than 500 employees. Between these two figures, the Commission estimates that about 450 establishments (approximately 99.6%) had fewer than 750 employees and, thus, would be considered small under the applicable SBA size standard. Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, Commission estimates that approximately 99.6% or more of the manufacturers of equipment used to provide interoperable and other video conferencing services are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

d. Manufacturers of Software

176. Entities that publish software used to provide interconnected VoIP, non-interconnected VoIP, electronic messaging services, or interoperable video conferencing services are found in the Census Bureau category "Software Publishers."

177. *Software Publishers.* The Census Bureau defines this category to include "* * * establishments primarily engaged in computer software publishing or publishing and reproduction. Establishments in this industry carry out operations necessary for producing and distributing computer software, such as designing, providing documentation, assisting in installation, and providing support services to software purchasers. These establishments may design, develop, and publish, or publish only."

178. In this category, the SBA has deemed a publisher of software (or manufacturer of software under the CVAA) to be small if it has $25 million or less in average annual receipts. For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 5,313 such firms that operated that year. Of those 5,313 firms, 4,956 (approximately 93%) had $25 million or less in average annual receipts and, thus, would be deemed small under the applicable SBA size standard. Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, Commission estimates that approximately 93% or more of the manufacturers of software used to provide interconnected VoIP, non-interconnected VoIP, electronic messaging services, and interoperable video conferencing services in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

2. Service Providers

a. Providers of VoIP

179. Entities that provide interconnected or non-interconnected VoIP or both are generally found in one of two Census Bureau categories, "Wired Telecommunications Carriers" or "All Other Telecommunications."

180. *Wired Telecommunications Carriers.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and

infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."

181. In this category, the SBA has deemed a wired telecommunications carrier to be small if it has fewer than 1,500 employees. For this category of carriers, Census data for 2007, which supersede similar data from the 2002 Census, shows 3,188 firms in this category. Of these 3,188 firms, only 44 (approximately 1%) had 1,000 or more employees. While we could not find precise Census data on the number of firms in the group with fewer than 1,500 employees, it is clear that at least the 3,188 firms with fewer than 1,000 employees would be in that group. Thus, at least 3,144 of these 3,188 firms (approximately 99%) had fewer than 1,500 employees. Accordingly, the Commission estimates that at least 3,144 (approximately 99%) had fewer than 1,500 employees and thus, would be considered small under the applicable SBA size standard. On this basis, the Commission estimates that approximately 99% or more of the providers of interconnected VoIP, non-interconnected VoIP, or both in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM. Our estimates of the number of providers on non-interconnected VoIP (and the number of small entities within that group) are in all likelihood overstated because we could not draw in the data a distinction between such providers and those who provide interconnected VoIP. However, in the absence of more accurate data, we present these figures to provide as thorough an analysis of the impact on small entities as we can at this time, with the understanding that we will modify our analysis as more accurate data becomes available in this proceeding.

182. *All Other Telecommunications.* Under the 2007 U.S. Census definition of firms included in the category "All Other Telecommunications (NAICS Code 517919)" comprises "establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry."

183. In this category, the SBA has deemed a provider of "all other telecommunications" services to be small if it has $25 million or less in average annual receipts. For this category of service providers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 2,383 such firms that operated that year. Of those 2,383 firms, 2,346 (approximately 98%) had $25 million or less in average annual receipts and, thus, would be deemed small under the applicable SBA size standard. Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, Commission estimates that approximately 98% or more of the providers of interconnected VoIP, non-interconnected VoIP, or both in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM. As stated above, our estimates of the number of providers of non-interconnected VoIP (and the number of small entities within that group) are in all likelihood overstated because we could not draw in the data a distinction between such providers and those who provide interconnected VoIP. However, in the absence of more accurate data, we present these figures to provide as thorough an analysis of the impact on small entities as we can at this time, with the understanding that we will modify our analysis as more accurate data becomes available in this proceeding.

b. Providers of Electronic Messaging Services

184. Entities that provide electronic messaging services are generally found in one of the following Census Bureau categories, "Wireless Telecommunications Carriers (except Satellites)," "Wired Telecommunications," or "Internet Publishing and Broadcasting and Web Search Portals."

185. *Wireless Telecommunications Carriers (except Satellites).* The Census Bureau defines this category to include "* * * establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services."

186. In this category, the SBA has deemed a wireless telecommunications carrier to be small if it has fewer than 1,500 employees. For this category of carriers, Census data for 2007, which supersede similar data from the 2002 Census, shows 1,383 firms in this category. Of these 1,383 firms, only 15 (approximately 1%) had 1,000 or more employees. While there is no precise Census data on the number of firms in the group with fewer than 1,500 employees, it is clear that at least the 1,368 firms with fewer than 1,000 employees would be found in that group. Thus, at least 1,368 of these 1,383 firms (approximately 99%) had fewer than 1,500 employees. Accordingly, the Commission estimates that at least 1,368 (approximately 99%) had fewer than 1,500 employees and, thus, would be considered small under the applicable SBA size standard. On this basis, Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

187. *Wired Telecommunications Carriers.* For the 2007 U.S. Census definition of firms included in the category, "Wired Telecommunications Carriers (NAICS Code 517110)," see paragraph 35 above.

188. In this category, the SBA has deemed a wired telecommunications carrier to be small if it has fewer than 1,500 employees. For this category of carriers, Census data for 2007, which supersede similar data from the 2002 Census, shows 3,188 firms in this category. Of these 3,188 firms, only 44 (approximately 1%) had 1,000 or more employees. While we could not find precise Census data on the number of firms in the group with fewer than 1,500 employees, it is clear that at least the 3,188 firms with fewer than 1,000 employees would be in that group. Thus, at least 3,144 of these 3,188 firms (approximately 99%) had fewer than 1,500 employees. Accordingly, the

Commission estimates that of these 3,188 at least 3,144 (approximately 99%) had fewer than 1,500 employees and, thus, would be considered small under the applicable SBA size standard. On this basis, the Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

189. *Internet Publishing and Broadcasting and Web Search Portals.* The Census Bureau defines this category to include "* * * establishments primarily engaged in 1) publishing and/or broadcasting content on the Internet exclusively or 2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such as e-mail, connections to other Web sites, auctions, news, and other limited content, and serve as a home base for Internet users."

190. In this category, the SBA has deemed an Internet publisher or Internet broadcaster or the provider of a Web search portal on the Internet to be small if it has fewer than 500 employees. For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 2,705 such firms that operated that year. Of those 2,705 firms, 2,682 (approximately 99%) had fewer than 500 employees and, thus, would be deemed small under the applicable SBA size standard. Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

c. Providers of Interoperable Video Conferencing Services

191. Entities that provide interoperable video conferencing services are found in the Census Bureau Category "All Other Telecommunications."

192. *All Other Telecommunications.* For the 2007 U.S. Census definition of firms included in the category "All Other Telecommunications (NAICS Code 517919)," see paragraph 37 above.

193. In this category, the SBA has deemed a provider of "all other telecommunications" services to be small if it has $25 million or less in average annual receipts. For this category of service providers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 2,383 such firms that operated that year. Of those 2,383 firms, 2,346 (approximately 98%) had $25 million or less in average annual receipts and, thus, would be deemed small under the applicable SBA size standard. Accordingly, the majority of establishments in this category can be considered small under that standard. On this basis, Commission estimates that approximately 98% or more of the providers of interoperable video conferencing services are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

3. Additional Industry Categories

a. Certain Wireless Carriers and Service Providers

194. *Cellular Licensees.* The SBA has developed a small business size standard for small businesses in the category "Wireless Telecommunications Carriers (except satellite)." Under that SBA category, a business is small if it has 1,500 or fewer employees. The census category of "Cellular and Other Wireless Telecommunications" is no longer used and has been superseded by the larger category "Wireless Telecommunications Carriers (except satellite)." The Census Bureau defines this larger category to include "* * * establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services."

195. In this category, the SBA has deemed a wireless telecommunications carrier to be small if it has fewer than 1,500 employees. For this category of carriers, Census data for 2007, which supersede similar data from the 2002 Census, shows 1,383 firms in this category. Of these 1,383 firms, only 15 (approximately 1%) had 1,000 or more employees. While there is no precise Census data on the number of firms in the group with fewer than 1,500 employees, it is clear that at least the 1,368 firms with fewer than 1,000 employees would be found in that group. Thus, at least 1,368 of these 1,383 firms (approximately 99%) had fewer than 1,500 employees. Accordingly, the Commission estimates that at least 1,368 (approximately 99%) had fewer than 1,500 employees and, thus, would be considered small under the applicable SBA size standard. On this basis, Commission estimates that approximately 99% or more of the providers of electronic messaging services in this category are small and, thus, face possible significant economic impact from adoption of the rules proposed in the NPRM.

196. *Specialized Mobile Radio.* The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards "very small entity" bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 licenses. One bidder claiming small business status won five licenses.

197. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders that won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders,

19 claimed "small business" status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

198. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR services pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees. The Commission assumes, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities.

199. *Advanced Wireless Services.* In 2008, the Commission conducted the auction of Advanced Wireless Services ("AWS") licenses. This auction, which was designated as Auction 78, offered 35 licenses in the AWS 1710–1755 MHz and 2110–2155 MHz bands ("AWS–1"). The AWS–1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A bidder with attributed average annual gross revenues that exceeded $15 million and did not exceed $40 million for the preceding three years ("small business") received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed $15 million for the preceding three years ("very small business") received a 25 percent discount on its winning bid. A bidder that had a combined total assets of less than $500 million and combined gross revenues of less than $125 million in each of the last two years qualified for entrepreneur status. Four winning bidders that identified themselves as very small businesses won 17 licenses. Three of the winning bidders that identified themselves as small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

200. *700 MHz Band Commercial Licensees.* There is 80 megahertz of non-Guard Band spectrum in the 700 MHz Band that is designated for commercial use: 698–757, 758–763, 776–787, and 788–793 MHz Bands. With one exception, the Commission adopted criteria for defining two groups of small businesses for purposes of determining their eligibility for bidding credits at auction. These two categories are: (1) "Small business," which is defined as an entity with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years; and (2) "very small business," which is defined as an entity with attributed average annual gross revenues that do not exceed $15 million for the preceding three years. In Block C of the Lower 700 MHz Band (710–716 MHz and 740–746 MHz), which was licensed on the basis of 734 Cellular Market Areas, the Commission adopted a third criterion for determining eligibility for bidding credits: An "entrepreneur," which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small size standards.

201. An auction of 740 licenses for Blocks C (710–716 MHz and 740–746 MHz) and D (716–722 MHz) of the Lower 700 MHz Band commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business, or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: Five EAG licenses and 251 CMA licenses. Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.

202. The remaining 62 megahertz of commercial spectrum was auctioned on January 24 through March 18, 2008. As explained above, bidding credits for all of these licenses were available to "small businesses" and "very small businesses." Auction 73 concluded with 1,090 provisionally winning bids covering 1,091 licenses and totaling $19,592,420,000. The provisionally winning bids for the A, B, C, and E Block licenses exceeded the aggregate reserve prices for those blocks. The provisionally winning bid for the D Block license, however, did not meet the applicable reserve price and thus did not become a winning bid. Approximately 55 small businesses had winning bids. Currently, the 10 remaining megahertz associated with the D block have not yet been assigned.

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

204. *Government Transfer Bands.* The Commission adopted small business size standards for the unpaired 1390–1392 MHz, 1670–1675 MHz, and the paired 1392–1395 MHz and 1432–1435 MHz bands. Specifically, with respect to these bands, the Commission defined an entity with average annual gross revenues for the three preceding years not exceeding $40 million as a "small business," and an entity with average annual gross revenues for the three preceding years not exceeding $15 million as a "very small business." SBA has approved these small business size standards for the aforementioned bands. Correspondingly, the Commission adopted a bidding credit of 15 percent for "small businesses" and a bidding credit of 25 percent for "very small businesses." This bidding credit structure was found to have been consistent with the Commission's schedule of bidding credits, which may be found at § 1.2110(f)(2) of the Commission's rules. The Commission found that these two definitions will provide a variety of businesses seeking to provide a variety of services with opportunities to participate in the auction of licenses for this spectrum and will afford such licensees, who may have varying capital costs, substantial flexibility for the provision of services. The Commission noted that it had long recognized that bidding preferences for qualifying bidders provide such bidders with an opportunity to compete successfully against large, well-financed entities. The Commission also noted that it had found that the use of tiered or graduated small business definitions is useful in furthering its mandate under section 309(j) of the Act to promote opportunities for and disseminate licenses to a wide variety of applicants.

An auction for one license in the 1670–1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

b. Certain Equipment Manufacturers and Stores

205. *Part 15 Handset Manufacturers.* Manufacturers of unlicensed wireless handsets may also become subject to requirements in this proceeding for their handsets used to provide VoIP applications. The Commission has not developed a definition of small entities applicable to unlicensed communications handset manufacturers. Therefore, we will utilize the SBA definition applicable to Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment." The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: All such firms having 750 or fewer employees. According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year. Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999. Thus, under this size standard, the majority of firms can be considered small.

206. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment." The SBA has developed a small business size standard for firms in this category, which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2007, there were a total of 919 firms in this category that operated for the entire year. Of this total, 777 had less than 100 employees, and an additional 148 had over 100 employees. Thus, while we can provide a more precise estimate, under this size standard, the large majority of these firms can be considered small.

207. *Radio, Television, and Other Electronics Stores.* The Census Bureau defines this economic census category as follows: "This U.S. industry comprises: (1) Establishments known as consumer electronics stores primarily engaged in retailing a general line of new consumer-type electronic products; (2) establishments specializing in retailing a single line of consumer-type electronic products (except computers); or (3) establishments primarily engaged in retailing these new electronic products in combination with repair services." The SBA has developed a small business size standard for Radio, Television, and Other Electronics Stores, which is: All such firms having $9 million or less in annual receipts. According to Census Bureau data for 2007, there were 18,291 firms in this category that operated for the entire year. Of this total, 17,369 firms had annual sales of under $5 million, and 533 firms had sales of $5 million or more but less than $10 million. Thus, the majority of firms in this category can be considered small.

c. Wireline Carriers and Service Providers

208. *Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1000 or more. According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers. Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees. Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the rules proposed in the NPRM. Thus under this category, the majority of these incumbent local exchange service providers can be considered small.

209. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers can be considered small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees. In addition, 72 carriers have reported that they are Other Local Service Providers. Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by rules adopted pursuant to the NPRM.

210. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had

employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Interexchange carriers can be considered small entities. According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees. Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by rules adopted pursuant to the NPRM.

211. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Interexchange carriers can be considered small entities. According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and 2 have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed rules.

212. *Local Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000. Thus under this category and the associated small business size standard, the majority of these local resellers can be considered small entities. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services. Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by rules adopted pursuant to the Notice.

213. *Toll Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000. Thus under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services. Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our proposed rules.

214. *Payphone Service Providers (PSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these PSPs can be considered small entities. According to Commission data, 657 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 653 have 1,500 or fewer employees and four have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our action.

215. *Prepaid Calling Card Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000. Thus under this category and the associated small business size standard, the majority of these prepaid calling card providers can be considered small entities. According to Commission data, 193 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, all 193 have 1,500 or fewer employees and none have more than 1,500 employees. Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by rules adopted pursuant to the NPRM.

216. *800 and 800-Like Service Subscribers.* Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service ("toll free") subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000. Thus under this category and the associated small business size standard, the majority of resellers in this classification can be considered small entities. To focus specifically on the number of subscribers than on those firms which make subscription service available, the most reliable source of information regarding the number of these service subscribers appears to be data the Commission collects on the 800, 888, 877, and 866 numbers in use. According to our data for September 2009, the number of 800 numbers assigned was 7,860,000; the number of 888 numbers assigned was 5,888,687; the number of 877 numbers assigned was 4,721,866; and the number of 866 numbers assigned was 7,867,736. The Commission does not have data specifying the number of these subscribers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, the Commission estimates that there are 7,860,000 or fewer small entity 800 subscribers;

5,888,687 or fewer small entity 888 subscribers; 4,721,866 or fewer small entity 877 subscribers; and 7,867,736 or fewer small entity 866 subscribers.

d. Wireless Carriers and Service Providers

217. Below, for those services where licenses are subject to auctions, the Commission notes that, as a general matter, the number of winning bidders that qualify as small businesses at the close of a given auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

218. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category. Prior to that time, such firms were within the now-superseded categories of "Paging" and "Cellular and Other Wireless Telecommunications." Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

219. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions. The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, seven bidders won 31 licenses that qualified as very small business entities, and one bidder won one license that qualified as a small business entity.

220. *Common Carrier Paging.* The SBA considers paging to be a wireless telecommunications service and classifies it under the industry classification Wireless Telecommunications Carriers (except satellite). Under that classification, the applicable size standard is that a business is small if it has 1,500 or fewer employees. For the general category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The 2007 census also contains data for the specific category of "Paging" "that is classified under the seven-number NAICS code 5172101. According to Commission data, 291 carriers have reported that they are engaged in Paging or Messaging Service. Of these, an estimated 289 have 1,500 or fewer employees, and 2 have more than 1,500 employees. Consequently, the Commission estimates that the majority of paging providers are small entities that may be affected by our action. In addition, in the *220 MHz Third Report and Order,* the Commission developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small business size standards. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won.

221. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. According to Trends in Telephone Service data, 434 carriers reported that they were engaged in wireless telephony. Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees. Therefore, approximately half of these entities can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

222. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a "small business" for C- and F-Block licenses as an entity that has average gross revenues of $40 million or less in the three previous calendar years. For F-Block licenses, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved

small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small business status won approximately 40 percent of the 1,479 licenses in the first auction for the D, E, and F Blocks. On April 15, 1999, the Commission completed the reauction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22. Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

223. On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 claimed small business status. Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No. 58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses. On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71. Of the 12 winning bidders in that auction, five claimed small business status and won 18 licenses. On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block Broadband PCS licenses in Auction No. 78. Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.

224. *Narrowband Personal Communications Services.* To date, two auctions of narrowband personal communications services (PCS) licenses have been conducted. For purposes of the two auctions that have already been held, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order.* A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards.

225. *220 MHz Radio Service—Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, the Commission applies the small business size standard under the SBA rules applicable. The SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. For this service, the SBA uses the category of Wireless Telecommunications Carriers (except Satellite). Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

226. *220 MHz Radio Service—Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order,* the Commission adopted a small business size standard for "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. This small business size standard indicates that a "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. A "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small business size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. In the first auction, 908 licenses were auctioned in three different-sized geographic areas: Three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.

227. *800 MHz and 900 MHz Specialized Mobile Radio Licenses.* The Commission awards small business bidding credits in auctions for Specialized Mobile Radio ("SMR") geographic area licenses in the 800 MHz and 900 MHz bands to entities that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards very small business bidding credits to entities that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 800 MHz and 900 MHz SMR Services. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction was completed in 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels was conducted in 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was conducted in 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

228. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels was conducted in 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. In an auction completed in 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded. Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

229. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR

pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

230. *700 MHz Guard Band Licensees.* In 2000, in the 700 MHz Guard Band Order, the Commission adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. SBA approval of these definitions is not required. An auction of 52 Major Economic Area licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

231. *Air-Ground Radiotelephone Service.* The Commission has previously used the SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.,* an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and under that definition, the Commission estimates that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $40 million. A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million. These definitions were approved by the SBA. In May 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction No. 65). On June 2, 2006, the auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

232. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service. A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS). For purposes of its analysis of the Rural Radiotelephone Service, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite), which is 1,500 or fewer employees. Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms in the Rural Radiotelephone Service can be considered small.

233. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite), which is 1,500 or fewer employees. Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

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

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

236. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses—an entity that has average gross revenues of $40 million or less in the three previous calendar years. An additional size standard for "very small business" is: An entity that, together with affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these small business size standards. The

auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by our action.

237. *Wireless Cable Systems. Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years. The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of bidding credits: (i) A bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

238. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." For these services, the Commission uses the SBA small business size standard for the category "Wireless Telecommunications Carriers (except satellite)," which is 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census' use the classifications "firms" does not track the number of "licenses".

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

240. *218–219 MHz Service.* The first auction of 218–219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years. In the *218–219 MHz Report and Order and Memorandum Opinion and Order,* the Commission established a small business size standard for a "small business" as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed $15 million for the preceding three years. A "very small business" is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed $3 million for the preceding three years. These size standards will be used in future auctions of 218–219 MHz spectrum.

241. *24 GHz—Incumbent Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. For this service, the Commission uses the SBA small business size standard for the category "Wireless Telecommunications Carriers (except satellite)," which is 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this

category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census' use of the classifications "firms" does not track the number of "licenses". The Commission believes that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

242. *24 GHz—Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for "small business" is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of $15 million. "Very small business" in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years. The SBA has approved these small business size standards. These size standards will apply to the future auction, if held.

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

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

245. The second category, *i.e.* "All Other Telecommunications" comprises "establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry." For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year. Of this total, 2,347 firms had annual receipts of under $25 million and 12 firms had annual receipts of $25 million to $49, 999,999. Consequently, the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

e. Cable and OVS Operators

246. Because section 706 requires us to monitor the deployment of broadband regardless of technology or transmission media employed, the Commission anticipates that some broadband service providers may not provide telephone service. Accordingly, the Commission describes below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

247. *Cable and Other Program Distributors.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007, which supersede data from the 2002 Census, show that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of such firms can be considered small.

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

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

250. *Open Video Services.* Open Video Service (OVS) systems provide subscription services. The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers." The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for the OVS service, the Commission relies on data currently available from the U.S. Census for the

year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service. Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises. The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities. The Commission further notes that it has certified approximately 45 OVS operators to serve 75 areas, and some of these are currently providing service. Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, DC, and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 44 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

f. Internet Service Providers, Web Portals and Other Information Services

251. *Internet Service Providers, Web Portals and Other Information Services.* In 2007, the SBA recognized two new small business, economic census categories. They are (1) Internet Publishing and Broadcasting and Web Search Portals, and (2) All Other Information Services.

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

253. The most current Economic Census data for all such firms are 2007 data, which are detailed specifically for ISPs within the categories above. For the first category, the data show that 396 firms operated for the entire year, of which 159 had nine or fewer employees. For the second category, the data show that 1,682 firms operated for the entire year. Of those, 1,675 had annual receipts below $25 million per year, and an additional two had receipts of between $25 million and $ 49,999,999. Consequently, we estimate that the majority of ISP firms are small entities.

254. *Internet Publishing and Broadcasting and Web Search Portals.* This industry comprises establishments primarily engaged in (1) publishing and/or broadcasting content on the Internet exclusively or (2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such as e-mail, connections to other web sites, auctions, news, and other limited content, and serve as a home base for Internet users. The SBA has developed a small business size standard for this category; that size standard is fewer than 500 employees. Thus, a firm in this category with less than 500 employees is considered a small business. According to Census Bureau data for 2007, there were 2,705 firms that provided one or more of these services for that entire year. Of these, 2,682 operated with less than 500 employees and 13 operated with 500 to 999 employees. Consequently, we estimate the majority of these firms are small entities that may be affected by our proposed actions.

255. *Data Processing, Hosting, and Related Services.* This industry comprises establishments primarily engaged in providing infrastructure for hosting or data processing services. These establishments may provide specialized hosting activities, such as web hosting, streaming services or application hosting; provide application service provisioning; or may provide general time-share mainframe facilities to clients. Data processing establishments provide complete processing and specialized reports from data supplied by clients or provide automated data processing and data entry services. The SBA has developed a small business size standard for this category; that size standard is $25 million or less in average annual receipts. According to Census Bureau data for 2007, there were 8,060 firms in this category that operated for the entire year. Of these, 6,726 had annual receipts of under $25 million, and 155 had receipts between $25 million and $49,999,999 million. Consequently, we estimate that the majority of these firms are small entities that may be affected by our proposed actions.

256. *All Other Information Services.* "This industry comprises establishments primarily engaged in providing other information services (except new syndicates and libraries and archives)." Our action pertains to interconnected VoIP services, which could be provided by entities that provide other services such as e-mail, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The SBA has developed a small business size standard for this category; that size standard is $7.0 million or less in average annual receipts. According to Census Bureau data for 2007, there were 367 firms in this category that operated for the entire year. Of these, 334 had annual receipts of under $5 million, and an additional 11 firms had receipts of between $5 million and $9,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

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

257. We summarize below the requirements in the NPRM and proposed rules regarding compliance with sections 716 and 717, including recordkeeping and reporting obligations. Additional information on each of these requirements can be found in the NPRM.

258. *Recordkeeping.* The NPRM proposes, beginning one year after the effective date of regulations promulgated by the Commission pursuant to section 716(e), to require that each manufacturer of equipment (including software) used to provide ACS and each provider of such services

subject to sections 255, 716, and 718, not exempted under rules proposed in that NPRM, maintain, in the ordinary course of business and for a reasonable period, certain records. These records are to document the efforts taken by such manufacturer or service provider to implement sections 255, 716, and 718, including: (1) Information about the manufacturer's or provider's efforts to consult with individuals with disabilities; (2) descriptions of the accessibility features of its products and services; and (3) information about the compatibility of such products and services with peripheral devices or specialized customer premise equipment commonly used by individuals with disabilities to achieve access.

259. *Reporting Obligations.* The CVAA and the Commission's proposed rules require that an officer of each manufacturer of equipment (including software) used to provide ACS and an officer of each provider of such services submit to the Commission an annual certificate that records are being kept in accordance with the above recordkeeping requirements, unless such manufacturer or provider has been exempted from compliance with section 716 under applicable rules.

260. *Costs of Compliance.* Because of the diverse manufacturers of equipment used to provide ACS and diverse providers of ACS that may be subject to section 716, the possible exemption of certain small entities from compliance with that section, the multiple general and entity-specific factors used in determining, whether for a given manufacturer (or service provider) accessibility for a particular item of ACS equipment (or a particular service) is achievable, and the various provisions of section 716 and the proposed rules on when and to what extent accessibility must be incorporated into a given item of ACS equipment or service, it is difficult to estimate the costs of compliance for those small entities that may not be covered by an exemption or waiver, should the Commission choose to adopt any such exemptions or waivers. Accordingly, the NPRM seeks comment on the costs of compliance with these proposed rules.

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

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

262. In addition to the factors in the RFA identified above, the achievability factors in the CVAA also serve to mitigate adverse impacts and reduce burdens on small entities. In the NPRM, the Commission proposes to make determinations about what is achievable by giving four factors equal weight. Two of these factors take into account the resources available to covered entities and may have a direct impact on small entities and the obligations they face under the CVAA: the second factor, the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, and the third factor, the type of operations of the manufacturer or provider. In addition, consideration of the first factor (the nature and cost of the steps needed to meet the requirements with respect to the specific equipment or service in question) and the fourth factor (the extent to which the service provider or manufacturer in question offers accessibility services or equipment containing varying degrees of functionality and features, and offered at different price points) would benefit all entities subject to section 716, including small entities.

263. The Commission proposes not to consider additional factors and only to consider the factors enumerated in the statute, in light of legislative history directing the Commission to weigh the factors equally. While adoption of this proposal would prevent the Commission from considering additional factors that may benefit small entities, it would also require that the Commission consider only the factors listed above, which clearly serve to reduce the burden on small entities. The Commission does, however, seek comment on whether it might have the discretion to weigh other factors not specified in the statute. In addition, the Commission proposes to construe the factors broadly and to weigh any relevant considerations in determining their meaning.

264. The Commission also proposes to consider exemptions from section 716 for small entities and, if one or more such exemptions were adopted, further proposes to consider various criteria in setting standards for such exemptions. The Commission could have proposed not to exercise its discretionary authority to exempt small entities or could have proposed one or more specific size standards for any such exemptions but determined that it was necessary to build a more complete factual record on what factors it should consider in making this determination. Specifically, before making a specific proposal, the Commission seeks to understand the impact any such proposal would have on small entities, the marketplace of ACS services and equipment, and on people with disabilities.

265. In addition, the Commission proposes consideration of specific performance objectives and seeks comment on alternative ways to develop procedures and timelines to develop these objectives. Such alternatives could be structured to reduce the burdens on small entities of compliance with section 716.

266. The Commission also proposes not to adopt technical standards as safe harbors at this time. It determined that it needed to develop a more complete record on this issue before taking action.

267. Finally, the Commission does not propose separate recordkeeping and reporting obligations for small entities. The Commission, however, has proposed that it will not mandate any one form in which records must be kept, to take into account that covered entities have a variety of business models and modes of operation.

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

268. Section 255(e) of the Communications Act, as amended, 47 U.S.C. 255(e), directs the United States Access Board (Access Board) to develop equipment accessibility guidelines "in conjunction with" the Commission, and periodically to review and update those guidelines. We view the Board's current guidelines as well as its draft guidelines as starting points for our interpretation and implementation of sections 716 and 717 of the Communications Act, as amended, 47 U.S.C. 617, 618, as well as section 255, but because they do not currently cover ACS or equipment used to provide or access ACS, we must necessarily adapt these guidelines in our comprehensive implementation scheme. As such, it is our tentative view that our proposed rules do not overlap, duplicate, or conflict with either Access Board Final Rules, or (if later adopted) the Access Board Draft Guidelines.

Paperwork Reduction Act of 1995

269. *Initial Paperwork Reduction Analysis.* The Notice of Proposed Rulemaking contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due 60 days after the date of publication in the **Federal Register**. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees." We note that we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the IRFA.

IX. Ordering Clauses

270. Accordingly, *it is ordered* that pursuant to sections 1–4, 255, 303(r), 403, 503, 716, and 717 of the Communications Act of 1934, as amended, 47 U.S.C. 151–154, 255, 303(r), 403, 503, 617, 618, this Notice of Proposed Rulemaking in CG Docket No. 10–145, WT Docket No. 96–198, and CG Docket No. 10–213 is adopted.

271. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 1

Administrative practice and procedure, Communications common carriers, Individuals with disabilities, Radio, Reporting and recordkeeping requirements, Satellites, Telecommunications.

47 CFR Parts 6 and 7

Communications equipment, Individuals with disabilities, Telecommunications.

47 CFR Part 8

Advanced communications services equipment, Manufacturers of equipment used for advanced communications services, Providers of advanced communications services, Individuals with disabilities, Recordkeeping and enforcement requirements.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 parts 1, 6, 7, and 8 as follows:

PART 1—PRACTICE AND PROCEDURE

1. The authority citation for part 1 reads as follows:

Authority: 15 U.S.C. 79 *et seq.;* 47 U.S.C. 151, 154, 160, 201, 225, 303, 617 and 618.

2. Amend § 1.80 by redesignating paragraphs (b)(3), (4) and (5) as paragraphs (b)(4), (5) and (6) and by adding new paragraph (b)(3) and revising newly redesignated paragraph (b)(4) to read as follows:

§ 1.80 Forfeiture proceedings.

* * * * *

(b) * * *

(3) If the violator is a manufacturer or service provider subject to the requirements of section 255, 716 or 718 of the Communications Act, and is determined by the Commission to have violated any such requirement, the manufacturer or service provider shall be liable to the United States for a forfeiture penalty of not more than $100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act.

(4) In any case not covered in paragraphs (b)(1), (2), or (3) of this section, the amount of any forfeiture penalty determined under this section shall not exceed $16,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $112,500 for any single act or failure to act described in paragraph (a) of this section.

* * * * *

PART 6—ACCESS TO TELECOMMUNICATIONS SERVICE, TELECOMMUNICATIONS EQUIPMENT AND CUSTOMER PREMISES EQUIPMENT BY PERSONS WITH DISABILITIES

3. The authority citation for part 6 reads as follows:

Authority: 47 U.S.C. 151–154, 251, 255, 303(r), 617, 618.

Subpart D—[Removed]

4. Remove Subpart D, consisting of §§ 6.15 through 6.23.

PART 7—ACCESS TO VOICEMAIL AND INTERACTIVE MENU SERVICES AND EQUIPMENT BY PEOPLE WITH DISABILITIES

5. The authority citation for part 7 reads as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 208, 255, 617, 618.

Subpart D—[Removed]

6. Remove Subpart D, consisting of §§ 7.17 through 7.23.

7. Add part 8 to read as follows:

PART 8—ACCESS TO ADVANCED COMMUNICATIONS SERVICES AND EQUIPMENT BY PEOPLE WITH DISABILITIES

Subpart A—Scope

Sec.

8.1 Applicability.
8.2 Exclusions.
8.3 Waivers.

Subpart B—Definitions

8.4 Definitions.

Subpart C—Implementation Requirements—What Must Covered Entities Do?

8.5 Obligations
8.6 Performance objectives.
8.7 through 8.15 [Reserved]

Subpart D—Recordkeeping and Enforcement

8.16 Generally.
8.17 Recordkeeping.
8.18 Informal or formal complaints.
8.19 Informal complaints; form and content.
8.20 Procedure; designation of agents for service.
8.21 Answers and replies to informal complaints.
8.22 Review and disposition of informal complaints.
8.23 General pleading requirements.
8.24 Format and content of formal complaints.
8.25 Damages.

Authority: 47 U.S.C. 151–154, 255, 303, 403, 503, 617, 618 unless otherwise noted.

Subpart A—Scope

§ 8.1 Applicability.

Subject to the exclusions described in this part, the rules in this part apply to:

(a) Any provider of advanced communications services, as that term is defined in this part, offering such services in or affecting interstate commerce;

(b) Any manufacturer of equipment used for advanced communications services, including but not limited to end user equipment, network equipment, and software, that such manufacturer offers for sale or otherwise distributes in interstate commerce.

§ 8.2 Exclusions.

(a) Subject to the exception in paragraph (c) of this section, no person shall be subject to the requirements of the rules in this part with respect to advanced communications services or the equipment used to provide or access such services to the extent such person transmits, routes, or stores in intermediate or transient storage the communications made available through the provision of advanced communications services by a third party.

(b) Subject to the exception in paragraph (c) of this section, no person shall be subject to the requirements of the rules in this part with respect to advanced communications services or the equipment used to provide or access such services to the extent such person provides an information location tool, such as a directory, index, reference, pointer, menu, guide, user interface, or hypertext link, through which an end user obtains access to such video programming, online content, applications, services, advanced communications services, or equipment used to provide or access advanced communications services.

(c) The exclusions in paragraphs (a) and (b) of this section shall not apply to any person who relies on third party applications, services, software, hardware, or equipment to comply with the requirements of this part with respect to the provision of advanced communications services or the manufacture of equipment used to provide such services.

(d) The requirements of this part shall not apply to any equipment or services, including interconnected VoIP service, that were subject to the requirements of section 255 of the Act on October 7, 2010, which remain subject to section 255 of the Act, as amended, and subject to the rules in parts 6 and 7 of this chapter.

(e) None of the rules in this part shall apply to customized equipment or services that are not offered directly to the public regardless of the facilities used. Also, none of the rules in this part shall apply to customized equipment or services that are not offered to such classes of users as to be effectively available to the public regardless of the facilities used. However, this paragraph shall not be construed to create an exemption for equipment or for services designed for and used by members of the general public.

§ 8.3 Waivers.

Multi-purpose Services and Equipment:

(a) *Manufacturer.* On its own motion or in response to a petition by a manufacturer of equipment used to provide or access advanced communications service or by any interested party, the Commission may waive the requirements of this part for a feature or function of equipment used to provide or access advanced communications services, or for any class of such equipment that:

(1) Is capable of accessing advanced communications services and;

(2) Is designed for multiple purposes, but is designed primarily for purposes other than providing or accessing advanced communications services.

(b) *Service Provider.* On its own motion or in response to a petition by a provider of advanced communications services or by any interested party, the Commission may waive the requirements of this part for a feature or function of equipment used to provide or access advanced communications services, or for any class of such equipment that:

(1) Is capable of accessing advanced communications services and;

(2) Is designed for multiple purposes, but is designed primarily for purposes other than providing or accessing advanced communications services.

Subpart B—Definitions

§ 8.4 Definitions.

(a) The term *accessible* shall have the meaning provided in § 8.6(b).

(b) The term *achievable* shall mean with reasonable effort or expense, as determined by the Commission. In making such a determination, the Commission shall consider:

(1) The nature and cost of the steps needed to meet the requirements of section 716 of the Act and this part with respect to the specific equipment or service in question, such that if accessibility to and usability by individuals with disabilities can be achieved only by a fundamental alteration to the specific equipment or service in question, then such accessibility and usability is not achievable;

(2) The technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies;

(3) The type and operations of the manufacturer or provider; and

(4) The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.

(c) The term *advanced communications services* shall mean:

(1) Interconnected VoIP service, as that term is defined in this section;

(2) Non-interconnected VoIP service, as that term is defined in this section;

(3) Electronic messaging service, as that term is defined in this section; and

(4) Interoperable video conferencing service, as that term is defined in this section.

(d) The term *application* shall mean software designed to perform or to help the user perform a specific task or specific tasks, such as communicating by voice, electronic text messaging, or video conferencing.

(e) The term *compatible* shall have the meaning provided in § 8.6(d).

(f) The term *customer premises equipment* shall mean equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.

(g) The term *customized equipment or services* shall mean equipment and services that are customized to unique specifications requested by a consumer and not otherwise available to the general public, including public safety networks and devices, but shall not apply to equipment distributed to and

services used by public or private sector employees, including public safety employees.

(h) The term *disability* shall mean a physical or mental impairment that substantially limits one or more of the major life activities of an individual; a record of such an impairment; or being regarded as having such an impairment.

(i) The term *electronic messaging service* means a service that provides real-time or near real-time non-voice messages in text form between individuals over communications networks.

(j) The term *end user equipment* shall mean equipment designed for consumer use, including equipment designed for use by individuals with disabilities.

(k) The term *hardware* shall mean a tangible communications device, equipment, or physical component of communications technology, including peripheral devices, such as a smart phone, a laptop computer, a desk top computer, a screen, a keyboard, a speaker, or an amplifier.

(l) The term *interconnected VoIP service* shall have the same meaning as in § 9.3 of this chapter.

(m) An *interoperable video conferencing service* means a service that provides real-time video communications, including audio, to enable users to share information of the user's choosing.

(n) The term *manufacturer* shall mean an entity that makes or produces a product, including equipment used for advanced communications services, including end user equipment, network equipment, and software.

(o) The term *network equipment* shall mean equipment facilitating the use of a computer network, including routers, network interface cards, networking cables, modems, and other related hardware.

(p) The term *nominal cost* in regard to accessibility and usability solutions shall mean small enough so as to generally not be a factor in the consumer's decision to acquire a product or service that the consumer otherwise desires.

(q) A *non-interconnected VoIP service* is a service that:

(1) Enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and

(2) Requires Internet protocol-compatible customer premises equipment (CPE); and

(3) Is not an interconnected VoIP service.

(r) The term *peripheral devices* shall mean devices employed in connection with equipment, including software, covered by this part to translate, enhance, or otherwise transform advanced communications services into a form accessible to individuals with disabilities.

(s) The term *proprietary technology* shall mean hardware, software, and services such as devices, Internet service, and software applications, that are unique and legally owned, or for which a copyright or license is held, by an entity that does not offer such technology free or on an open source basis.

(t) The term *service provider* shall mean a provider of advanced communications services that are offered in or affecting interstate commerce, including a provider of applications and services that can be used for advanced communications services and that can be accessed (*i.e.,* downloaded or run) by users over a service provider's network.

(u) The term *software* shall mean computer programs, procedures, rules, and related data and documentation that direct the use and operation of a computer or related device and instruct it to perform a given task or function.

(v) The term *specialized customer premises equipment* shall mean customer premise equipment which is commonly used by individuals with disabilities to achieve access.

(w) The term *usable* shall have the meaning provided in § 8.6(c).

Subpart C—Implementation Requirements—What Must Covered Entities Do?

§ 8.5 Obligations.

(a) *General Obligations.* (1) With respect to equipment manufactured after the effective date of the regulations, a manufacturer of equipment used for advanced communications services, including end user equipment, network equipment, and software, must ensure that the equipment and software that such manufacturer offers for sale or otherwise distributes in interstate commerce shall be accessible to and usable by individuals with disabilities, unless such requirements are not achievable

(2) With respect to services provided after the effective date of the regulations, a provider of advanced communications services must ensure that services offered by such provider in or affecting interstate commerce are accessible to and usable by individuals with disabilities, unless such requirements are not achievable.

(3) If accessibility is not achievable either by building it in or by using third party accessibility solutions, then a manufacturer or service provider shall ensure that its equipment or service is compatible with existing peripheral devices or specialized customer premises equipment.

(4) Providers of advanced communications services shall not install network features, functions, or capabilities that impede accessibility or usability.

(5) Advanced communications services and the equipment and networks used with these services may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through such services, equipment or networks.

(b) *Product design, development, and evaluation.* (1) Manufacturers and service providers must consider performance objectives set forth in § 8.7 at the design stage as early and as consistently as possible and must implement such evaluation to the extent that it is achievable.

(2) Manufacturers and service providers must identify barriers to accessibility and usability as part of such evaluation.

(c) *Information Pass Through.* Equipment used for advanced communications services, including end user equipment, network equipment, and software must pass through cross-manufacturer, nonproprietary, industry-standard codes, translation protocols, formats or other information necessary to provide advanced communications services in an accessible format, if achievable. Signal compression technologies shall not remove information needed for access or shall restore it upon decompression.

(d) *Information, documentation, and training.* Manufacturers and service providers must ensure access to information and documentation they provide to customers, if achievable. Such information and documentation includes user guides, bills, installation guides for end user devices, and product support communications, in alternate formats, as needed. The requirement to provide access to information also includes ensuring that individuals with disabilities can access, at no extra cost, call centers and customer support regarding both the product generally and the accessibility features of the product.

§ 8.6 Performance objectives.

(a) Generally—Manufacturers and service providers shall ensure that equipment and services covered by this part are accessible, usable, and compatible as those terms are defined in

paragraphs (b) through (d) of this section.

(b) Accessible—The term accessible shall mean that:

(1) Input, control, and mechanical functions shall be locatable, identifiable, and operable in accordance with each of the following, assessed independently:

(i) Operable without vision. Provide at least one mode that does not require user vision.

(ii) Operable with low vision and limited or no hearing. Provide at least one mode that permits operation by users with visual acuity between 20/70 and 20/200, without relying on audio output.

(iii) Operable with little or no color perception. Provide at least one mode that does not require user color perception.

(iv) Operable without hearing. Provide at least one mode that does not require user auditory perception.

(v) Operable with limited manual dexterity. Provide at least one mode that does not require user fine motor control or simultaneous actions.

(vi) Operable with limited reach and strength. Provide at least one mode that is operable with user limited reach and strength.

(vii) Operable with a Prosthetic Device. Controls shall be operable without requiring body contact or close body proximity.

(viii) Operable without time-dependent controls. Provide at least one mode that does not require a response time or allows response time to be by-passed or adjusted by the user over a wide range.

(ix) Operable without speech. Provide at least one mode that does not require user speech.

(x) Operable with limited cognitive skills. Provide at least one mode that minimizes the cognitive, memory, language, and learning skills required of the user.

(2) All information necessary to operate and use the product, including but not limited to, text, static or dynamic images, icons, labels, sounds, or incidental operating cues, [shall] comply with each of the following, assessed independently:

(i) Availability of visual information. Provide visual information through at least one mode in auditory form.

(ii) Availability of visual information for low vision users. Provide visual information through at least one mode to users with visual acuity between 20/70 and 20/200 without relying on audio.

(iii) Access to moving text. Provide moving text in at least one static presentation mode at the option of the user.

(iv) Availability of auditory information. Provide auditory information through at least one mode in visual form and, where appropriate, in tactile form.

(v) Availability of auditory information for people who are hard of hearing. Provide audio or acoustic information, including any auditory feedback tones that are important for the use of the product, through at least one mode in enhanced auditory fashion (*i.e.,* increased amplification, increased signal-to-noise ratio, or combination).

(vi) Prevention of visually-induced seizures. Visual displays and indicators shall minimize visual flicker that might induce seizures in people with photosensitive epilepsy.

(vii) Availability of audio cutoff. Where a product delivers audio output through an external speaker, provide an industry standard connector for headphones or personal listening devices (*e.g.,* phone-like handset or earcup) which cuts off the speaker(s) when used.

(viii) Non-interference with hearing technologies. Reduce interference to hearing technologies (including hearing aids, cochlear implants, and assistive listening devices) to the lowest possible level that allows a user to utilize the product.

(ix) Hearing aid coupling. Where a product delivers output by an audio transducer which is normally held up to the ear, provide a means for effective wireless coupling to hearing aids.

(c) Usable: The term *usable* shall mean that individuals with disabilities have access to the full functionality and documentation for the product, including instructions, product information (including accessible feature information), documentation and technical support functionally equivalent to that provided to individuals without disabilities.

(d) Compatible: The term *compatible* shall mean compatible with peripheral devices and specialized customer premises equipment, and in compliance with the following provisions, as applicable:

(1) External electronic access to all information and control mechanisms. Information needed for the operation of products (including output, alerts, icons, on-line help, and documentation) shall be available in a standard electronic text format on a cross-industry standard port and all input to and control of a product shall allow for real time operation by electronic text input into a cross-industry standard external port and in cross-industry standard format. The cross-industry standard port shall not require manipulation of a connector by the user.

(2) Connection point for external audio processing devices. Products providing auditory output shall provide the auditory signal at a standard signal level through an industry standard connector.

(3) TTY connectability. Products that provide a function allowing voice communication and which do not themselves provide a TTY functionality shall provide a standard non-acoustic connection point for TTYs. It shall also be possible for the user to easily turn any microphone on and off to allow the user to intermix speech with TTY use.

(4) TTY signal compatibility. Products, including those providing voice communication functionality, shall support use of all cross-manufacturer non-proprietary standard signals used by TTYs.

§§ 8.7–8.15 [Reserved]

Subpart D—Recordkeeping and Enforcement

§ 8.16 Generally.

(a) The rules in this subpart regarding recordkeeping and enforcement are applicable to all manufacturers and service providers that are subject to the requirements of sections 255, 716, and 718 of the Act.

(b) The requirements set forth in § 8.17 of this subpart shall be effective [DATE ONE YEAR AFTER THE EFFECTIVE DATE OF THE FINAL RULE].

§ 8.17 Recordkeeping.

(a) Each manufacturer and service provider subject to sections 255, 716, or 718 of the Act, must maintain, in the ordinary course of business and for a reasonable period, records of the efforts taken by such manufacturer or provider to implement sections 255, 716, and 718, as applicable, including:

(1) Information about the manufacturer's or service provider's efforts to consult with individuals with disabilities;

(2) Descriptions of the accessibility features of its products and services; and

(3) Information about the compatibility of its products and services with peripheral devices or specialized customer premise equipment commonly used by individuals with disabilities to achieve access.

(b) An officer of each manufacturer and service provider subject to section 255, 716, or 718 of the Act, must sign and file an annual compliance certificate with the Commission. The

officer must state in the certificate that he or she has personal knowledge that the manufacturer or service provider has established operating procedures that are adequate to ensure compliance with the rules in this subpart and that records are being kept in accordance with this section. The certificate shall identify the agent designated for service pursuant to § 8.20(b) of this subpart and provide contact information for this agent.

(c) Upon the service of a complaint, formal or informal, on a manufacturer or service provider under this section, a copy of the records maintained by the manufacturer or service provider that are directly relevant to the equipment or service that is the subject of the complaint shall be provided to the Commission in accordance with § 8.21(a) of this subpart. Requests for confidential treatment of documents or information submitted under this section may be filed in accordance with § 0.459 of this chapter.

(d) In response to a filed formal or informal complaint, a manufacturer or service provider may, instead of providing a duplicate document, record or other information directly related to the equipment or service that is the subject of the complaint, direct the Commission to documents or records already in the Commission's possession by providing sufficient specificity for Commission staff to locate the relevant record or document or portion thereof, including (title of proceeding or report, date, page/para. #s, etc.).

§ 8.18 Informal or formal complaints.

Complaints against manufacturers or service providers, as defined under this subpart, for alleged violations of this subpart may be either informal or formal.

§ 8.19 Informal complaints; form and content.

(a) An informal complaint alleging a violation of sections 255, 716 or 718 of the Act or this chapter may be transmitted to the Commission via any reasonable means, *e.g.,* letter, facsimile transmission, telephone (202–418–2517 (voice); 202–418–2922 (TTY)), Internet-e-mail (*dro@fcc.gov*), audio-cassette recording, and Braille.

(b) An informal complaint shall include:

(1) The name, address, e-mail address, and telephone number of the complainant;

(2) The name and address of the manufacturer or service provider defendant against whom the complaint is made;

(3) The date or dates on which the complainant or person on whose behalf the complaint is being filed either purchased, acquired, or used or attempted to purchase, acquire, or use the equipment or service about which the complaint is being made;

(4) A complete statement of fact explaining why the complainant contends that the defendant manufacturer or provider is in violation of section 255, 716 or 718 of the Act or this chapter, including details regarding the service or equipment and the relief requested, and all documentation that supports the complainant's contention;

(5) The complainant's preferred format or method of response to the complaint by the Commission and defendant (*e.g.,* letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette recording, Braille; or some other method that will best accommodate the complainant's disability, if any; and

(6) Any other information that is required by the Commission's accessibility complaint form.

§ 8.20 Procedure; designation of agents for service.

(a) The Commission shall promptly forward any informal complaint meeting the requirements of § 8.19 of this subpart to each manufacturer and service provider named in or determined by the staff to be implicated by the complaint.

(b) To ensure prompt and effective service of informal and formal complaints filed under this subpart, every manufacturer and service provider subject to the requirements of section 255, 716, or 718 of the Act and this subpart, shall designate an agent, and may designate additional agents if it so chooses, upon whom service may be made of all notices, inquiries, orders, decisions, and other pronouncements of the Commission in any matter before the Commission. Such designation shall include, for the manufacturer or the service provider, a name or department designation, business address, telephone number, and, if available TTY number, facsimile number, and Internet e-mail address.

§ 8.21 Answers and replies to informal complaints.

(a) Any manufacturer or service provider to whom an informal complaint is directed by the Commission under this subpart shall file and serve an answer. The answer shall:

(1) Be filed with the Commission and served on the complainant within twenty days of service of the complaint, unless the Commission or its staff specifies another time period;

(2) Respond specifically to each material allegation in the complaint;

(3) Set forth the steps taken by the manufacturer or service provider to make the product or service accessible and usable;

(4) Set forth the procedures and processes used by the manufacturer or service provider to evaluate whether it was achievable to make the product or service accessible and usable;

(5) Set forth the names, titles, and responsibilities of each decision maker in the evaluation process;

(6) Set forth the manufacturer's basis for determining that it was not achievable to make the product or service accessible and usable;

(7) Provide all documents supporting the manufacturer's or service provider's conclusion that it was not achievable to make the product or service accessible and usable;

(8) Include a certification by an officer of the manufacturer or service provider that it was not achievable to make the product or service accessible and usable;

(9) Set forth any claimed defenses;

(10) Set forth any remedial actions already taken or proposed alternative relief without any prejudice to any denials or defenses raised;

(11) Provide any other information or materials specified by the Commission as relevant to its consideration of the complaint; and

(12) Must be prepared or formatted in the manner requested by the Commission and the complainant, unless otherwise permitted by the Commission for good cause shown.

(b) The complainant may file and serve a reply. The reply shall:

(1) Be served on the Commission and the complainant within ten days after service of answer, unless otherwise directed by the Commission;

(2) Be responsive to matters contained in the answer and shall not contain new matters.

§ 8.22 Review and disposition of informal complaints.

(a) The Commission will investigate the allegations in any informal complaint filed that satisfies the requirements of § 8.18(b) of this subpart, and, within 180 days after the date on which such complaint was filed with the Commission, issue an order finding whether the manufacturer or service provider that is the subject of the complaint violated section 255, 716, or 718 of the Act, or the Commission's implementing rules, and provide a basis therefor, unless such complaint is resolved before that time.

(b) If the Commission determines in an order issued pursuant to paragraph

(a) of this section that the manufacturer or service provider violated section 255, 716, or 718 of the Act, or the Commission's implementing rules, the Commission may, in such order, or in a subsequent order:

(1) Direct the manufacturer or service provider to bring the service, or in the case of a manufacturer, the next generation of the equipment or device, into compliance with the requirements of sections 255, 716, or 718 of the Act, and the Commission's rules, within a reasonable period of time; and

(2) Take such other enforcement action as the Commission is authorized and as it deems appropriate.

(c) Any manufacturer or service provider that is the subject of an order issued pursuant to paragraph (b)(1) of this section shall have a reasonable opportunity, as established by the Commission, to comment on the Commission's proposed remedial action before the Commission issues a final order with respect to that action.

§ 8.23 General pleading requirements.

Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments. Commission proceedings may also require or permit other written submissions such as briefs, written interrogatories, and other supplementary documents or pleadings.

(a) Pleadings must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity.

(b) Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation, or a defense to such alleged violation.

(c) Facts must be supported by relevant documentation or affidavit.

(d) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority.

(e) Opposing authorities must be distinguished.

(f) Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies.

(g) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.

(h) All statements purporting to summarize or explain Commission orders or policies must cite, in standard legal form, the Commission ruling upon which such statements are based.

(i) Pleadings shall identify the name, address, telephone number, and facsimile transmission number for either the filing party's attorney or, where a party is not represented by an attorney, the filing party.

§ 8.24 Format and content of formal complaints.

(a) Subject to paragraph (e) of this section governing supplemental complaints filed pursuant to § 8.25 of this subpart, a formal complaint shall contain:

(1) The name of each complainant and defendant;

(2) The occupation, address and telephone number of each complainant and, to the extent known, each defendant;

(3) The name, address, and telephone number of complainant's attorney, if represented by counsel;

(4) Citation to the section of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated.

(5) A complete statement of facts which, if proven true, would constitute such a violation. All material facts must be supported, pursuant to the requirements of § 8.30(c) of this subpart and paragraph (a)(11) of this section, by relevant affidavits and documentation, including copies of relevant written agreements, offers, counter-offers, denials, or other related correspondence. The statement of facts shall include a detailed explanation of the manner and time period in which a defendant has allegedly violated the Act, Commission order, or Commission rule in question, including a full identification or description of the communications, transmissions, services, or other carrier conduct complained of and the nature of any injury allegedly sustained by the complainant. Assertions based on information and belief are expressly prohibited unless made in good faith and accompanied by an affidavit explaining the basis for the plaintiff's belief and why the complainant could not reasonably ascertain the facts from the defendant or any other source;

(6) Proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the complaint;

(7) The relief sought, including recovery of damages and the amount of damages claimed, if known;

(8) Certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement with each defendant prior to the filing of the formal complaint. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter outlining the allegations that form the basis of the complaint it anticipated filing with the Commission to the defendant carrier or one of the defendant's registered agents for service of process that invited a response within a reasonable period of time and a brief summary of all additional steps taken to resolve the dispute prior to the filing of the formal complaint. If no additional steps were taken, such certificate shall state the reason(s) why the complainant believed such steps would be fruitless;

(9) Whether a separate action has been filed with the Commission, any court, or other government agency that is based on the same claim or same set of facts, in whole or in part, or whether the complaint seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment proceeding that is concurrently before the Commission;

(10) An information designation containing:

(i) The name, address, and position of each individual believed to have firsthand knowledge of the facts alleged with particularity in the complaint, along with a description of the facts within any such individual's knowledge;

(ii) A description of all documents, data compilations and tangible things in the complainant's possession, custody, or control, that are relevant to the facts alleged with particularity in the complaint. Such description shall include for each document:

(A) The date it was prepared, mailed, transmitted, or otherwise disseminated;

(B) The author, preparer, or other source;

(C) The recipient(s) or intended recipient(s);

(D) Its physical location; and

(E) A description of its relevance to the matters contained in the complaint; and

(iii) A complete description of the manner in which the complainant identified all persons with information and designated all documents, data compilations and tangible things as being relevant to the dispute, including, but not limited to, identifying the individual(s) that conducted the information search and the criteria used

to identify such persons, documents, data compilations, tangible things, and information;

(11) Copies of all affidavits, documents, data compilations and tangible things in the complainant's possession, custody, or control, upon which the complainant relies or intends to rely to support the facts alleged and legal arguments made in the complaint;

(12) A completed Formal Complaint Intake Form;

(13) A declaration, under penalty of perjury, by the complainant or complainant's counsel describing the amount, method, and the complainant's 10-digit FCC Registration Number, if any;

(14) A certificate of service; and

(15) A FCC Registration Number is required under part 1, subpart W. Submission of a complaint without the FCC Registration Number as required by part 1, subpart W will result in dismissal of the complaint.

(b) The following format may be used in cases to which it is applicable, with such modifications as the circumstances may render necessary:

Before the Federal Communications Commission, Washington, DC 20554

In the matter of
Complainant,
v.
Defendant.
File No. (To be inserted by the Enforcement Bureau)

Complaint

To: The Commission.

The complainant (here insert full name of each complainant and, if a corporation, the corporate title of such complainant) shows that:

(1) (Here state post office address, and telephone number of each complainant).

(2) (Here insert the name, and, to the extent known, address and telephone number of defendants).

(3) (Here insert fully and clearly the specific act or thing complained of, together with such facts as are necessary to give a full understanding of the matter, including relevant legal and documentary support).

Wherefore, complainant asks (here state specifically the relief desired).

(Date)

(Name of each complainant)

(Name, address, and telephone number of attorney, if any)

(c) The complainant may petition the staff, pursuant to § 1.3 of this chapter, for a waiver of any of the requirements of this section. Such waiver may be granted for good cause shown.

(d) Supplemental complaints:

(1) Supplemental complaints filed pursuant to § 8.25 shall conform to the requirements set out in this section and § 8.23 of this subpart, except that the requirements in §§ 8.23(b), 8.24(a)(4), (a)(5), (a)(8), (a)(9), (a)(12), and (a)(13) of this subpart shall not apply to such supplemental complaints;

(2) In addition, supplemental complaints filed pursuant to § 8.25 of this subpart shall contain a complete statement of facts which, if proven true, would support complainant's calculation of damages for each category of damages for which recovery is sought. All material facts must be supported, pursuant to the requirements of § 8.23(c) of this subpart and paragraph (a)(11) of this section, by relevant affidavits and other documentation. The statement of facts shall include a detailed explanation of the matters relied upon, including a full identification or description of the communications, transmissions, services, or other matters relevant to the calculation of damages and the nature of any injury allegedly sustained by the complainant. Assertions based on information and belief are expressly prohibited unless made in good faith and accompanied by an affidavit explaining the basis for the complainant's belief and why the complainant could not reasonably ascertain the facts from the defendant or any other source;

(3) Supplemental complaints filed pursuant to § 8.25 of this subpart shall contain a certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement with respect to damages for which recovery is sought with each defendant prior to the filing of the supplemental complaint. Such certification shall include a statement that, no later than 30 days after the release of the liability order, the complainant mailed a certified letter to the primary individual who represented the defendant carrier during the initial complaint proceeding outlining the allegations that form the basis of the supplemental complaint it anticipates filing with the Commission and inviting a response from the carrier within a reasonable period of time. The certification shall also contain a brief summary of all additional steps taken to resolve the dispute prior to the filing of the supplemental complaint. If no additional steps were taken, such certification shall state the reason(s) why the complainant believed such steps would be fruitless.

§ 8.25 Damages.

(a) A complaint against a common carrier may seek damages. If a complainant wishes to recover damages, the complaint must contain a clear and unequivocal request for damages.

(b) If a complainant wishes a determination of damages to be made in the same proceeding as the determinations of liability and prospective relief, the complaint must contain the allegations and information required by paragraph (h) of this section.

(c) Notwithstanding paragraph (b) of this section, in any proceeding to which no statutory deadline applies, if the Commission decides that a determination of damages would best be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the Commission may at any time order that the initial proceeding will determine only liability and prospective relief, and that a separate, subsequent proceeding initiated in accordance with paragraph (e) of this section will determine damages.

(d) If a complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the complainant must:

(1) Comply with paragraph (a) of this section, and

(2) State clearly and unequivocally that the complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief will be made.

(e) If a complainant proceeds pursuant to paragraph (d) of this section, or if the Commission invokes its authority under paragraph (c) of this section, the complainant may initiate a separate proceeding to obtain a determination of damages by filing a supplemental complaint that complies with § 8.24(d) of this subpart and paragraph (h) of this section within sixty days after public notice (as defined in § 1.4(b) of this chapter) of a decision that contains a finding of liability on the merits of the original complaint.

(f) If a complainant files a supplemental complaint for damages in accordance with paragraph (e) of this section, the supplemental complaint shall be deemed, for statutory limitations purposes, to relate back to the date of the original complaint.

(g) Where a complainant chooses to seek the recovery of damages upon a supplemental complaint in accordance with the requirements of paragraph (e) of this section, the Commission will resolve the separate, preceding liability complaint within any applicable

complaint resolution deadlines contained in the Act.

(h) In all cases in which recovery of damages is sought, it shall be the responsibility of the complainant to include, within either the complaint or supplemental complaint for damages filed in accordance with paragraph (e) of this section, either:

(1) A computation of each and every category of damages for which recovery is sought, along with an identification of all relevant documents and materials or such other evidence to be used by the complainant to determine the amount of such damages; or

(2) An explanation of:

(i) The information not in the possession of the complaining party that is necessary to develop a detailed computation of damages;

(ii) Why such information is unavailable to the complaining party;

(iii) The factual basis the complainant has for believing that such evidence of damages exists;

(iv) A detailed outline of the methodology that would be used to create a computation of damages with such evidence.

(i) Where a complainant files a supplemental complaint for damages in accordance with paragraph (e) of this section, the following procedures may apply:

(1) Issues concerning the amount, if any, of damages may be either designated by the Enforcement Bureau for hearing before, or, if the parties agree, submitted for mediation to, a Commission Administrative Law Judge. Such Administrative Law Judge shall be chosen in the following manner:

(i) By agreement of the parties and the Chief Administrative Law Judge; or

(ii) In the absence of such agreement, the Chief Administrative Law Judge shall designate the Administrative Law Judge.

(2) The Commission may, in its discretion, order the defendant either to post a bond for, or deposit into an interest bearing escrow account, a sum equal to the amount of damages which the Commission finds, upon preliminary investigation, is likely to be ordered after the issue of damages is fully litigated, or some lesser sum which may be appropriate, provided the Commission finds that the grant of this relief is favored on balance upon consideration of the following factors:

(i) The complainant's potential irreparable injury in the absence of such deposit;

(ii) The extent to which damages can be accurately calculated;

(iii) The balance of the hardships between the complainant and the defendant; and

(iv) Whether public interest considerations favor the posting of the bond or ordering of the deposit.

(3) The Commission may, in its discretion, suspend ongoing damages proceedings for fourteen days, to provide the parties with a time within which to pursue settlement negotiations and/or alternative dispute resolution procedures.

(4) The Commission may, in its discretion, end adjudication of damages with a determination of the sufficiency of a damages computation method or formula. No such method or formula shall contain a provision to offset any claim of the defendant against the complainant. The parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the Commission-mandated method or formula. Within thirty days of the release date of the damages order, parties shall submit jointly to the Commission either:

(i) A statement detailing the parties' agreement as to the amount of damages;

(ii) A statement that the parties are continuing to negotiate in good faith and a request that the parties be given an extension of time to continue negotiations; or

(iii) A statement detailing the bases for the continuing dispute and the reasons why no agreement can be reached.

(j) Except where otherwise indicated, the rules governing initial formal complaint proceedings govern supplemental formal complaint proceedings, as well.

§ 8.26 Joinder of complainants and causes of action.

(a) Two or more complainants may join in one complaint if their respective causes of action are against the same defendant and concern substantially the same facts and alleged violation of the Communications Act.

(b) Two or more grounds of complaint involving the same principle, subject, or statement of facts may be included in one complaint, but should be separately stated and numbered.

§ 8.27 Answers.

(a) Any defendant upon whom copy of a formal complaint is served shall answer such complaint in the manner prescribed under this section within twenty days of service of the formal complaint by the complainant, unless otherwise directed by the Commission.

(b) The answer shall advise the complainant and the Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint. Every effort shall be made to narrow the issues in the answer. The defendant shall state concisely its defense to each claim asserted, admit or deny the averments on which the complainant relies, and state in detail the basis for admitting or denying such averment. General denials are prohibited. Denials based on information and belief are expressly prohibited unless made in good faith and accompanied by an affidavit explaining the basis for the defendant's belief and why the defendant could not reasonably ascertain the facts from the complainant or any other source. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the defendant shall specify so much of it as is true and shall deny only the remainder. The defendant may deny the allegations of the complaint as specific denials of either designated averments or paragraphs.

(c) The answer shall contain proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the answer.

(d) Averments in a complaint or supplemental complaint filed pursuant to § 8.25 of this subpart are deemed to be admitted when not denied in the answer.

(e) Affirmative defenses to allegations contained in the complaint shall be specifically captioned as such and presented separately from any denials made in accordance with paragraph (c) of this section.

(f) The answer shall include an information designation containing:

(1) The name, address, and position of each individual believed to have firsthand knowledge of the facts alleged with particularity in the answer, along with a description of the facts within any such individual's knowledge;

(2) A description of all documents, data compilations and tangible things in the defendant's possession, custody, or control, that are relevant to the facts alleged with particularity in the answer. Such description shall include for each document:

(i) The date it was prepared, mailed, transmitted, or otherwise disseminated;

(ii) The author, preparer, or other source;

(iii) The recipient(s) or intended recipient(s);

(iv) Its physical location; and

(v) A description of its relevance to the matters in dispute.

(3) A complete description of the manner in which the defendant identified all persons with information and designated all documents, data compilations and tangible things as being relevant to the dispute, including, but not limited to, identifying the individual(s) that conducted the information search and the criteria used to identify such persons, documents, data compilations, tangible things, and information.

(g) The answer shall attach copies of all affidavits, documents, data compilations and tangible things in the defendant's possession, custody, or control, upon which the defendant relies or intends to rely to support the facts alleged and legal arguments made in the answer.

(h) The answer shall contain certification that the defendant has, in good faith, discussed or attempted to discuss, the possibility of settlement with the complainant prior to the filing of the formal complaint. Such certification shall include a brief summary of all steps taken to resolve the dispute prior to the filing of the formal complaint. If no such steps were taken, such certificate shall state the reason(s) why the defendant believed such steps would be fruitless;

(i) The defendant may petition the staff, pursuant to § 1.3 of this chapter, for a waiver of any of the requirements of this section. Such waiver may be granted for good cause shown.

§ 8.28 Cross-complaints and counterclaims.

Cross-complaints seeking any relief within the jurisdiction of the Commission against any party (complainant or defendant) to that proceeding are expressly prohibited. Any claim that might otherwise meet the requirements of a cross-complaint may be filed as a separate complaint in accordance with §§ 8.23 through 8.37 of this subpart. For purposes of this subpart, the term "cross-complaint" shall include counterclaims.

§ 8.29 Replies.

(a) Within three days after service of an answer containing affirmative defenses presented in accordance with the requirements of § 8.27(e) of this subpart, a complainant may file and serve a reply containing statements of relevant, material facts and legal arguments that shall be responsive to only those specific factual allegations and legal arguments made by the defendant in support of its affirmative defenses. Replies which contain other allegations or arguments will not be accepted or considered by the Commission.

(b) Failure to reply to an affirmative defense shall be deemed an admission of such affirmative defense and of any facts supporting such affirmative defense that are not specifically contradicted in the complaint.

(c) The reply shall contain proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the reply.

(d) The reply shall include an information designation containing:

(1) The name, address and position of each individual believed to have firsthand knowledge about the facts alleged with particularity in the reply, along with a description of the facts within any such individual's knowledge.

(2) A description of all documents, data compilations and tangible things in the complainant's possession, custody, or control that are relevant to the facts alleged with particularity in the reply. Such description shall include for each document:

(i) The date prepared, mailed, transmitted, or otherwise disseminated;

(ii) The author, preparer, or other source;

(iii) The recipient(s) or intended recipient(s);

(iv) Its physical location; and

(v) A description of its relevance to the matters in dispute.

(3) A complete description of the manner in which the complainant identified all persons with information and designated all documents, data compilations and tangible things as being relevant to the dispute, including, but not limited to, identifying the individual(s) that conducted the information search and the criteria used to identify such persons, documents, data compilations, tangible things, and information;

(e) The reply shall attach copies of all affidavits, documents, data compilations and tangible things in the complainant's possession, custody, or control upon which the complainant relies or intends to rely to support the facts alleged and legal arguments made in the reply.

(f) The complainant may petition the staff, pursuant to § 1.3 of this chapter, for a waiver of any of the requirements of this section. Such waiver may be granted for good cause shown.

§ 8.30 Motions.

(a) A request to the Commission for an order shall be by written motion, stating with particularity the grounds and authority therefor, and setting forth the relief or order sought.

(b) All dispositive motions shall contain proposed findings of fact and conclusions of law, with supporting legal analysis, relevant to the contents of the pleading. Motions to compel discovery must contain a certification by the moving party that a good faith attempt to resolve the dispute was made prior to filing the motion. All facts relied upon in motions must be supported by documentation or affidavits pursuant to the requirements of § 8.23(c) of this subpart, except for those facts of which official notice may be taken.

(c) The moving party shall provide a proposed order for adoption, which appropriately incorporates the basis therefor, including proposed findings of fact and conclusions of law relevant to the pleading. The proposed order shall be clearly marked as a "Proposed Order." The proposed order shall be submitted both as a hard copy and on computer disk in accordance with the requirements of § 8.36(d) of this subpart. Where appropriate, the proposed order format should conform to that of a reported FCC order.

(d) Oppositions to any motion shall be accompanied by a proposed order for adoption, which appropriately incorporates the basis therefor, including proposed findings of fact and conclusions of law relevant to the pleading. The proposed order shall be clearly captioned as a "Proposed Order." The proposed order shall be submitted both as a hard copy and on computer disk in accordance with the requirements of § 8.36(d) of this subpart. Where appropriate, the proposed order format should conform to that of a reported FCC order.

(e) Oppositions to motions may be filed and served within five business days after the motion is filed and served and not after. Oppositions shall be limited to the specific issues and allegations contained in such motion; when a motion is incorporated in an answer to a complaint, the opposition to such motion shall not address any issues presented in the answer that are not also specifically raised in the motion. Failure to oppose any motion may constitute grounds for granting of the motion.

(f) No reply may be filed to an opposition to a motion.

(g) Motions seeking an order that the allegations in the complaint be made more definite and certain are prohibited.

(h) Amendments or supplements to complaints to add new claims or requests for relief are prohibited. Parties are responsible, however, for the continuing accuracy and completeness of all information and supporting

authority furnished in a pending complaint proceeding as required under § 8.23(g) of this subpart.

§ 8.31 Formal complaints not stating a cause of action; defective pleadings.

(a) Any document purporting to be a formal complaint which does not state a cause of action under the Communications Act or a Commission rule or order will be dismissed. In such case, any amendment or supplement to such document will be considered a new filing which must be made within the statutory periods of limitations of actions contained in section 415 of the Communications Act.

(b) Any other pleading filed in a formal complaint proceeding not in conformity with the requirements of the applicable rules in this part may be deemed defective. In such case the Commission may strike the pleading or request that specified defects be corrected and that proper pleadings be filed with the Commission and served on all parties within a prescribed time as a condition to being made a part of the record in the proceeding.

§ 8.32 Discovery.

(a) A complainant may file with the Commission and serve on a defendant, concurrently with its complaint, a request for up to ten written interrogatories. A defendant may file with the Commission and serve on a complainant, during the period starting with the service of the complaint and ending with the service of its answer, a request for up to ten written interrogatories. A complainant may file with the Commission and serve on a defendant, within three calendar days of service of the defendant's answer, a request for up to five written interrogatories. Subparts of any interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. Requests for interrogatories filed and served pursuant to this procedure may be used to seek discovery of any non-privileged matter that is relevant to the material facts in dispute in the pending proceeding, provided, however, that requests for interrogatories filed and served by a complainant after service of the defendant's answer shall be limited in scope to specific factual allegations made by the defendant in support of its affirmative defenses. This procedure may not be employed for the purpose of delay, harassment or obtaining information that is beyond the scope of permissible inquiry related to the material facts in dispute in the pending proceeding.

(b) Requests for interrogatories filed and served pursuant to paragraph (a) of this section shall contain a listing of the interrogatories requested and an explanation of why the information sought in each interrogatory is both necessary to the resolution of the dispute and not available from any other source.

(c) A responding party shall file with the Commission and serve on the propounding party any opposition and objections to the requests for interrogatories as follows:

(1) By the defendant, within ten calendar days of service of the requests for interrogatories served simultaneously with the complaint and within five calendar days of the requests for interrogatories served following service of the answer;

(2) By the complainant, within five calendar days of service of the requests for interrogatories; and

(3) In no event less than three calendar days prior to the initial status conference as provided for in § 8.35(a) of this subpart.

(d) Commission staff will consider the requests for interrogatories, properly filed and served pursuant to paragraph (a) of this section, along with any objections or oppositions thereto, properly filed and served pursuant to paragraph (b) of this section, at the initial status conference, as provided for in § 8.35(a)(5) of this subpart, and at that time determine the interrogatories, if any, to which parties shall respond, and set the schedule of such response.

(e) The interrogatories ordered to be answered pursuant to paragraph (d) of this section are to be answered separately and fully in writing under oath or affirmation by the party served, or if such party is a public or private corporation or partnership or association, by any officer or agent who shall furnish such information as is available to the party. The answers shall be signed by the person making them. The answers shall be filed with the Commission and served on the propounding party.

(f) A propounding party asserting that a responding party has provided an inadequate or insufficient response to a Commission-ordered discovery request may file a motion to compel within ten days of the service of such response, or as otherwise directed by Commission staff, pursuant to the requirements of § 8.30 of this subpart.

(g) The Commission may, in its discretion, require parties to provide documents to the Commission in a scanned or other electronic format that provides:

(1) Indexing by useful identifying information about the documents; and

(2) Technology that allows staff to annotate the index so as to make the format an efficient means of reviewing the documents.

(h) The Commission may allow additional discovery, including, but not limited to, document production, depositions and/or additional interrogatories. In its discretion, the Commission may modify the scope, means and scheduling of discovery in light of the needs of a particular case and the requirements of applicable statutory deadlines.

§ 8.33 Confidentiality of information produced or exchanged by the parties.

(a) Any materials generated in the course of a formal complaint proceeding may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(1) through (9). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

(b) Materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(1) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(2) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;

(3) Consultants or expert witnesses retained by the parties;

(4) The Commission and its staff; and

(5) Court reporters and stenographers in accordance with the terms and conditions of this section.

(c) These individuals shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each

individual who is provided access to the information shall sign a notarized statement affirmatively stating that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(d) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraph (b) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(e) Upon termination of a formal complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

§ 8.34 Other required written submissions.

(a) The Commission may, in its discretion, or upon a party's motion showing good cause, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence.

(b) Unless otherwise directed by the Commission, all briefs shall include all legal and factual claims and defenses previously set forth in the complaint, answer, or any other pleading submitted in the proceeding. Claims and defenses previously made but not reflected in the briefs will be deemed abandoned. The Commission may, in its discretion, limit the scope of any briefs to certain subjects or issues. A party shall attach to its brief copies of all documents, data compilations, tangible things, and affidavits upon which such party relies or intends to rely to support the facts alleged and legal arguments made in its brief and such brief shall contain a full explanation of how each attachment is relevant to the issues and matters in dispute. All such attachments to a brief shall be documents, data compilations or tangible things, or affidavits made by persons, that were identified by any party in its information designations filed pursuant to §§ 8.24(a)(10)(i), (a)(10)(ii), 8.27(f)(1), (f)(2), and 8.29(d)(1), (d)(2) of this subpart. Any other supporting documentation or affidavits that is attached to a brief must be accompanied by a full explanation of the relevance of such materials and why such materials were not identified in the information designations. These briefs shall contain the proposed findings of fact and conclusions of law which the filing party is urging the Commission to adopt, with specific citation to the record, and supporting relevant authority and analysis.

(c) In cases in which discovery is not conducted, absent an order by the Commission that briefs be filed, parties may not submit briefs. If the Commission does authorize the filing of briefs in cases in which discovery is not conducted, briefs shall be filed concurrently by both the complainant and defendant at such time as designated by the Commission staff and in accordance with the provisions of this section.

(d) In cases in which discovery is conducted, briefs shall be filed concurrently by both the complainant and defendant at such time designated by the Commission staff.

(e) Briefs containing information which is claimed by an opposing or third party to be proprietary under § 8.33 of this subpart shall be submitted to the Commission in confidence pursuant to the requirements of § 0.459 of this chapter and clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall also be filed with the Commission for inclusion in the public file. Edited versions shall be filed within five days from the date the unedited brief is submitted, and served on opposing parties.

(f) Initial briefs shall be no longer than twenty-five pages. Reply briefs shall be no longer than ten pages. Either on its own motion or upon proper motion by a party, the Commission staff may establish other page limits for briefs.

(g) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including affidavits and exhibits.

(h) The parties shall submit a joint statement of stipulated facts, disputed facts, and key legal issues no later than two business days prior to the initial status conference, scheduled in accordance with the provisions of § 8.35(a) of this subpart.

§ 8.35 Status conference.

(a) In any complaint proceeding, the Commission may, in its discretion, direct the attorneys and/or the parties to appear before it for a status conference. Unless otherwise ordered by the Commission, an initial status conference shall take place, at the time and place designated by the Commission staff, ten business days after the date the answer is due to be filed. A status conference may include discussion of:

(1) Simplification or narrowing of the issues;

(2) The necessity for or desirability of additional pleadings or evidentiary submissions;

(3) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;

(4) Settlement of all or some of the matters in controversy by agreement of the parties;

(5) Whether discovery is necessary and, if so, the scope, type and schedule for such discovery;

(6) The schedule for the remainder of the case and the dates for any further status conferences; and

(7) Such other matters that may aid in the disposition of the complaint.

(b)(1) Parties shall meet and confer prior to the initial status conference to discuss:

(i) Settlement prospects;

(ii) Discovery;

(iii) Issues in dispute;

(iv) Schedules for pleadings;

(v) Joint statement of stipulated facts, disputed facts, and key legal issues; and

(2) Parties shall submit a joint statement of all proposals agreed to and disputes remaining as a result of such meeting to Commission staff at least two business days prior to the scheduled initial status conference.

(c) In addition to the initial status conference referenced in paragraph (a) of this section, any party may also request that a conference be held at any time after the complaint has been filed.

(d) During a status conference, the Commission staff may issue oral rulings pertaining to a variety of interlocutory matters relevant to the conduct of a formal complaint proceeding including, inter alia, procedural matters, discovery, and the submission of briefs or other evidentiary materials.

(e) Parties may make, upon written notice to the Commission and all attending parties at least three business days prior to the status conference, an audio recording of the Commission staff's summary of its oral rulings. Alternatively, upon agreement among all attending parties and written notice to the Commission at least three business days prior to the status conference, the parties may make an audio recording of, or use a stenographer to transcribe, the oral presentations and exchanges between and among the participating parties, insofar as such communications are "on-the-record" as determined by the Commission staff, as well as the Commission staff's summary of its oral rulings. A complete transcript of any

audio recording or stenographic transcription shall be filed with the Commission as part of the record, pursuant to the provisions of paragraph (f)(2) of this section. The parties shall make all necessary arrangements for the use of a stenographer and the cost of transcription, absent agreement to the contrary, will be shared equally by all parties that agree to make the record of the status conference.

(f) The parties in attendance, unless otherwise directed, shall either:

(1) Submit a joint proposed order memorializing the oral rulings made during the conference to the Commission by 5:30 p.m., Eastern Time, on the business day following the date of the status conference, or as otherwise directed by Commission staff. In the event the parties in attendance cannot reach agreement as to the rulings that were made, the joint proposed order shall include the rulings on which the parties agree, and each party's alternative proposed rulings for those rulings on which they cannot agree. Commission staff will review and make revisions, if necessary, prior to signing and filing the submission as part of the record. The proposed order shall be submitted both as hard copy and on computer disk in accordance with the requirements of § 8.36(d) of this subpart; or

(2) Pursuant to the requirements of paragraph (e) of this section, submit to the Commission by 5:30 p.m., Eastern Time, on the third business day following the status conference or as otherwise directed by Commission staff either:

(i) A transcript of the audio recording of the Commission staff's summary of its oral rulings;

(ii) A transcript of the audio recording of the oral presentations and exchanges between and among the participating parties, insofar as such communications are "on-the-record" as determined by the Commission staff, and the Commission staff's summary of its oral rulings; or

(iii) A stenographic transcript of the oral presentations and exchanges between and among the participating parties, insofar as such communications are "on-the-record" as determined by the Commission staff, and the Commission staff's summary of its oral rulings.

(g) Status conferences will be scheduled by the Commission staff at such time and place as it may designate to be conducted in person or by telephone conference call.

(h) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver by that party and will not preclude the Commission staff from conferring with those parties and/or counsel present.

§ 8.36 Specifications as to pleadings, briefs, and other documents; subscription.

(a) All papers filed in any formal complaint proceeding must be drawn in conformity with the requirements of §§ 1.49 and 1.50 of this chapter.

(b) All averments of claims or defenses in complaints and answers shall be made in numbered paragraphs. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth.

(c) The original of all pleadings and other submissions filed by any party shall be signed by the party, or by the party's attorney. The signing party shall include in the document his or her address, telephone number, facsimile number and the date on which the document was signed. Copies should be conformed to the original. Unless specifically required by rule or statute, pleadings need not be verified. The signature of an attorney or party shall be a certificate that the attorney or party has read the pleading, motion, or other paper; that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed solely for purposes of delay or for any other improper purpose.

(d) All proposed orders shall be submitted both as hard copies and on computer disk formatted to be compatible with the Commission's computer system and using the Commission's current word processing software. Each disk should be submitted in "read only" mode. Each disk should be clearly labeled with the party's name, proceeding, type of pleading, and date of submission. Each disk should be accompanied by a cover letter. Parties who have submitted copies of tariffs or reports with their hard copies need not include such tariffs or reports on the disk. Upon showing of good cause, the Commission may waive the requirements of this paragraph.

§ 8.37 Copies; service; separate filings against multiple defendants.

(a) Complaints may generally be brought against only one named defendant; such actions may not be brought against multiple defendants unless the defendants are commonly owned or controlled, are alleged to have acted in concert, are alleged to be jointly liable to complainant, or the complaint concerns common questions of law or fact. Complaints may, however, be consolidated by the Commission for disposition.

(b) The complainant shall file an original copy of the complaint and, on the same day:

(1) File three copies of the complaint with the Office of the Commission Secretary;

(2) Serve two copies on the Enforcement Bureau; and

(3) If a complaint is addressed against multiple defendants, file three copies of the complaint with the Office of the Commission Secretary for each additional defendant.

(c) Generally, a separate file is set up for each defendant. An original plus two copies shall be filed of all pleadings and documents, other than the complaint, for each file number assigned.

(d) The complainant shall serve the complaint by hand delivery on either the named defendant or one of the named defendant's registered agents for service of process on the same date that the complaint is filed with the Commission in accordance with the requirements of paragraph (b) of this section.

(e) Upon receipt of the complaint by the Commission, the Commission shall promptly send, by facsimile transmission to each defendant named in the complaint, notice of the filing of the complaint. The Commission shall send, by regular U.S. mail delivery, to each defendant named in the complaint, a copy of the complaint. The Commission shall additionally send, by regular U.S. mail to all parties, a schedule detailing the date the answer will be due and the date, time and location of the initial status conference.

(f) All subsequent pleadings and briefs filed in any formal complaint proceeding, as well as all letters, documents or other written submissions, shall be served by the filing party on the attorney of record for each party to the proceeding, or, where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or by facsimile transmission followed by regular U.S. mail delivery, together with a proof of such service in accordance with the requirements of § 1.47(g) of this chapter. Service is deemed effective as follows:

(1) Service by hand delivery that is delivered to the office of the recipient by 5:30 p.m., local time of the recipient, on a business day will be deemed

served that day. Service by hand delivery that is delivered to the office of the recipient after 5:30 p.m., local time of the recipient, on a business day will be deemed served on the following business day;

(2) Service by overnight delivery will be deemed served the business day following the day it is accepted for overnight delivery by a reputable overnight delivery service such as, or comparable to, the US Postal Service Express Mail, United Parcel Service or Federal Express; or

(3) Service by facsimile transmission that is fully transmitted to the office of the recipient by 5:30 p.m., local time of the recipient, on a business day will be deemed served that day. Service by facsimile transmission that is fully transmitted to the office of the recipient after 5:30 p.m., local time of the recipient, on a business day will be deemed served on the following business day.

(g) Supplemental complaint proceedings. Supplemental complaints filed pursuant to § 8.25 of this subpart shall conform to the requirements set out in this section, except that the complainant need not submit a filing fee, and the complainant may effect service pursuant to paragraph (f) of this section rather than paragraph (d) of this section numerals.

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