

two (2) business days following the time for submission of a request that the Administrator not take review. If the Administrator takes review, the determination by the Director, Office of Ports and Domestic Shipping, will be stayed until final disposition. If review is not taken, the determination by the Director, Office of Ports and Domestic Shipping, will become final two (2) business days after the time for submission of requests that the Administrator not take review. If the last day of a time limit falls on a Saturday, Sunday, or Federal holiday, the time is extended to the next business day. In the absence of any petition for review, the determination by the Director, Office of Ports and Domestic Shipping will become final within ten (10) business days. Each decision to grant, deny, or revoke a waiver will be made in writing, and a copy of the written decision will be provided to each applicant and other parties to the decision. The Secretary, MARAD, may extend any of the time limits for good cause shown.

§ 388.7 Sunset provision.

We will grant no waivers on or after September 30, 2002.

Dated: February 7, 2000.

By Order of the Maritime Administrator.

Joel C. Richard,

Secretary.

[FR Doc. 00-3176 Filed 2-10-00; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 51

[CC Docket No. 98-147; FCC 99-330]

Deployment of Wireline Services Offering Advanced Telecommunications Capability

AGENCY: Federal Communications Commission

ACTION: Final rule.

SUMMARY: This document addresses whether the discounted resale obligation of section 251(c)(4) applies to incumbent LEC provision of advanced services without regard to their classification as telephone exchange or exchange access. The Commission determines that analysis of section 251(c)(4) requires a fact-specific evaluation of the features and characteristics of a particular transaction, and concludes that advanced services sold at retail by incumbent LECs to residential and business end-users are subject to the

section 251(c)(4) discounted resale obligation, without regard to their classification as telephone exchange service or exchange access service. The Commission, however, reaches a different result as to advanced services sold to Internet Service Providers for inclusion in a high-speed Internet service offering, concluding that these advanced services are inherently different from advanced services made available directly to business and residential end-users, and as such, are not subject to the discounted resale obligations of section 251(c)(4).

DATES: Effective March 13, 2000.

FOR FURTHER INFORMATION CONTACT: Staci Pies, Attorney Advisor, Common Carrier Bureau, Policy and Program Planning Division, 202-418-1580.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Second Report and Order (Second R&O), in CC Docket No. 98-147, adopted November 2, 1999, and released November 9, 1999. This Second Report and Order addresses the issue raised in the Notice of Proposed Rulemaking in this docket (*Advanced Services Order and NPRM*), 63 FR 45246, August 25, 1998. On December 22, 1999, the Commission released an Errata correcting various ministerial errors in the Second R&O. The complete text of the Second R&O and the Errata is available for inspection and copying during normal business hours in the FCC Reference Information Center, Courtyard Level, 445 12th Street, S.W., Washington, D.C. and also may be purchased from the Commission's copy contractor, International Transcription Services (ITS Inc.), CY-B400, 445 12th Street, SW, Washington, DC.

Synopsis of the Second Report and Order

I. Introduction

1. The Second R&O concludes, based on an examination of the statutory language, the Act's purpose, and the specific facts, that advanced services sold to residential and business end-users are subject to the section 251(c)(4) discounted resale obligation, without regard to their classification as telephone exchange service or exchange access service. Moreover, the Second R&O concludes that advanced services sold to Internet Service Providers under volume and term discount plans are inherently and substantially different from advanced services made available directly to business and residential end-users, and as such, are not retail services and are not subject to the discounted resale obligations of section 251(c)(4).

II. Discussion

2. The Second R&O finds that advanced services are telecommunications services that predominantly are offered to residential and business end-users and to Internet Service Providers—all subscribers that are not telecommunications carriers. Moreover, advanced services made available directly to business and residential end-users are provided "at retail."

3. The Second R&O finds that although Congress used the term "at retail" to identify the types of transactions that are subject to a wholesale discount, it is not clear how the Commission should interpret the term. The Act does not define the term "at retail," and the legislative history on section 251(c)(4) provides only minimal clarification of Congress' intentions with regard to the appropriate definition and application of the term. Although the legislative history suggests that the Commission should interpret section 251(c)(4) in such a way so as to create affordable resale opportunities in order to stimulate the development of local competition, while still allowing incumbents to recover their costs for providing these services, there is no indication in the legislative history that Congress considered how "at retail" should be construed in the context of the sale of data services to Internet Service Providers as an input component to their information service offerings to the ultimate end-user.

4. Webster's Unabridged Dictionary defines the term "retail" as "the sale of commodities, goods, articles, etc. individually or in small quantities or parcels directly to the consumer." Similarly, Black's Law Dictionary defines retail as "[a] sale for final consumption in contrast to a sale for further sale or processing (*i.e.*, wholesale) * * * to the ultimate consumer." Based on these definitions, the Second R&O finds that retail transactions necessarily involve direct sales of a product or service to the ultimate consumer for her own personal use or consumption.

5. The Second R&O concludes that an Internet Service Provider is purchasing the DSL service for the sole purpose of combining the telecommunications service with its own information service and offering a new retail service, *i.e.*, high-speed Internet service, to the ultimate end-user. In this process, the Internet Service Provider adds value to the bulk DSL telecommunications service by dividing that service for individual consumer use and adding the Internet service, thus enabling the

Internet Service Provider to offer and sell the newly created information service to the ultimate consumer: the residential or business subscriber. For these reasons, the Internet Service Provider is not the ultimate end-user.

6. Further, the DSL services that incumbents are offering to Internet Service Providers specifically contemplate that the Internet Service Provider will be the entity providing to the ultimate end-user many services typically associated with retail sales, thus reinforcing the conclusions of the Second R&O that the bulk DSL services are not retail services offered to the ultimate end-users. Any Internet Service Provider that purchases a bulk DSL service must itself, rather than the incumbent, provide these typical retail services to the ultimate consumer. These facts underscore that bulk DSL services sold to Internet Service Providers are markedly different from the retail DSL services designed for individual end-user consumption.

7. In contrast, the Second R&O finds that some incumbent LECs are selling single lines of DSL service directly to residential and business end-users. These customers buy the DSL service to meet their own internal telecommunications needs. The Second R&O concludes that an incumbent LEC DSL offering to residential and business end-users is clearly a retail offering designed for and sold to the ultimate end-user. Accordingly, the Second R&O finds that DSL services designed for and sold to residential and business end-users are subject to the discounted resale obligations of section 251(c)(4). The Second R&O concludes, however, that section 251(c)(4) does not apply where the incumbent LEC offers DSL services as an input component to Internet Service Providers who combine the DSL service with their own Internet service.

8. The Second R&O notes that the conclusions therein do not change the regulatory status of the Internet Service Provider, which the Commission previously has concluded to be an information service provider rather than a telecommunications carrier.

9. The Second R&O finds that its conclusions are consistent with the Commission's decision regarding the scope of section 251(c)(4) as set forth in the *Local Competition First Report and Order*, 61 FR 45476, August 29, 1996, where the Commission resolved that the type of exchange access services predominantly offered to interexchange carriers are not subject to the discounted resale obligations of section 251(c)(4). Nonetheless, the Second R&O clarifies that advanced telecommunication

services sold directly to residential and business end-users are not exempt from these obligations, even though such services may be classified as exchange access services.

III. Final Regulatory Flexibility Analysis (FRFA)

1. As required by the Regulatory Flexibility Act (RFA), 5 U.S.C. section 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Advanced Services Order and NPRM*. The Commission sought written public comment on the proposals in the *Advanced Services Order and NPRM*, including comment on the IRFA. This present FRFA conforms to the RFA.

A. Need for and Objectives of This Second Report and Order and the Rules Adopted Herein

2. In order to encourage competition among carriers to develop and deploy new advanced services, it is critical that the marketplace for these services be conducive to investment, innovation, and meeting the needs of consumers. In this Second Report and Order, we seek to ensure that all carriers have economic incentives to innovate and invest in new technologies.

3. We amend our rules to clarify that advanced services sold to Internet Service Providers as an input component to the Internet Service Providers' own retail Internet service offering are not subject to the discounted resale obligations of section 251(c)(4). We also amend our rules to clarify that, notwithstanding the fact that advanced services sold to Internet Service Providers are excluded from the residential resale obligations of section 251(c)(4), advanced telecommunication services sold directly to residential and business end-users are not exempt from these obligations, even though such services may be classified as exchange access services.

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

4. In the IRFA, we stated that any rule changes would impose minimum burdens on small entities. We indicated that the IRFA solicited comment on alternatives to our proposed rules that would minimize the impact they may have on small entities. The comments we received did not respond directly to the issue addressed in this Order.

C. Description and Estimates of the Number of Small Entities Affected by the Second Report and Order

5. The RFA generally defines "small entity" as having the same meaning as

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

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

7. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

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

9. *Wireline Carriers and Service Providers.* SBA has developed a definition of small entities for telephone communications companies other than radiotelephone companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992. According to SBA’s definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons. All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA’s definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions and rules of the present action.

10. *Local Exchange Carriers, Resellers and Internet Service Providers.* Neither the Commission nor SBA has developed

a definition of small local exchange carriers (LECs), competitive local exchange carriers (CLECs), resellers, or Internet Service Providers (ISPs). The closest applicable definition for these carrier-types under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of these carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, there are 1,410 LECs, 129 CLECs, and 351 resellers.

11. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of these carriers that would qualify as small business concerns under SBA’s definition. Consequently, we estimate that there are fewer than 1,410 small entity LECs or small incumbent LECs, 129 CLECs, and 351 resellers that may be affected by the decisions and rules of the present action.

12. *Internet Service Providers.* SBA has developed a small business size standard for “Information Retrieval Services,” SIC code 7375. This category includes establishments primarily engaged in providing online database information retrieval services, on a contract or fee basis. According to SBA regulations, a small business under this category is one having annual receipts of \$18 million or less. Based on firm size data provided by the Bureau of the Census, 3,123 firms are small under SBA’s \$18 million size standard for SIC code 7375. Although some of these ISPs might not be independently owned and operated, we are unable at this time to estimate with greater precision the number of ISPs that would qualify as small business concerns under SBA’s definition. Consequently, we estimate that there are 3,123 or fewer small entity ISPs that may be affected by the decisions and rules of the present action.

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

13. We require incumbent LECs to make available at a wholesale discount advanced services sold at retail to residential and business end-users, without regard to their classification as telephone exchange service or exchange access service. We determine that complying with these rules may require use of operational, accounting, billing, and legal skills. We believe, however,

that incumbent LECs will already have these skills.

14. The burden of compliance with this requirement is minimal because, pursuant to section 251(c), incumbent LECs already must comply with state mandated wholesale discount requirements for all telecommunications services they provide at retail to subscribers who are not telecommunications carriers.

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

15. Section 251(c)(4) imposes on all incumbent LECs, including small incumbent LECs, the duty to offer for resale at wholesale rates “any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.” The Commission’s conclusions in this order clarify this statutory obligation. The order imposes no additional obligations on incumbent LECs.

F. Report to Congress

16. The Commission will send a copy of the Second Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. See 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the Second Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Second Report and Order and FRFA (or summaries thereof) will also be published in the **Federal Register**. See 5 U.S.C. 604(b).

IV. Procedural Matters

17. Accordingly, *It is ordered that*, pursuant to sections 1 through 4, 10, 201, 202, 251 through 254, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151–154, 160, 201, 202, 251–254, 256, 271, and 303(r), the Second Report and Order is hereby *Adopted*. The requirements adopted in this Second Report and Order shall be effective March 13, 2000.

18. The actions contained in this Second Report and Order have been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose no new or modified reporting and recordkeeping requirements or burdens on the public.

List of Subjects in 47 CFR Part 51

Communications, Common carriers, Telecommunications

Federal Communications Commission.
Magalie Roman Salas,
Secretary.

Rule Changes

Part 51 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 51—INTERCONNECTION

1. The authority for part 51 continues to read as follows:

Authority: Sections 1–5, 7, 201–05, 207–09, 218, 225–27, 251–54, 271, 332, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151–55, 157, 201–05, 207–09, 218, 225–27, 251–54, 271, 332, unless otherwise noted.

2. Section 51.605 is amended by revising paragraph (b), and adding paragraphs (c), (d) and (e) to read as follows:

§ 51.605 Additional obligations of incumbent local exchange carriers.

* * * * *

(b) For purposes of this subpart, exchange access services, as defined in section 3 of the Act, shall not be considered to be telecommunications services that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers.

(c) For purposes of this subpart, advanced telecommunications services sold to Internet Service Providers as an input component to the Internet Service Providers' retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers.

(d) Notwithstanding paragraph (b) of this section, advanced telecommunications services that are classified as exchange access services are subject to the obligations of paragraph (a) of this section if such services are sold on a retail basis to residential and business end-users that are not telecommunications carriers.

(e) Except as provided in § 51.613, an incumbent LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC.

2. Section 51.607 is revised to read as follows:

§ 51.607 Wholesale pricing standard.

The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the rate for the telecommunications service, less

avoided retail costs, as described in section 51.609. For purposes of this subpart, exchange access services, as defined in section 3 of the Act, shall not be considered to be telecommunications services that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers.

[FR Doc. 00–3196 Filed 2–10–00; 8:45 am]

BILLING CODE 6712–01–U

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

CFR 48 Parts 1825 and 1852

Standard Clause for Export Controlled Technology

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This is a final rule amending the NASA FAR Supplement (NFS) to add a contract clause the purpose of which is to assure contractors (and offerors) understand that they are responsible for export compliance in accordance with law and regulation, and that they should not rely on NASA to obtain necessary licenses in execution of the contracted work. This clause complies with performance based contracting principles. It notifies the contractor of its responsibilities under the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR) during contract performance. Additional, tailored clauses may be required when specific exemptions or licenses are applicable, as, for example, with the International Space Station. These clauses would be developed on a case-by-case basis.

EFFECTIVE DATE: February 11, 2000.

FOR FURTHER INFORMATION CONTACT: Patrick Flynn, NASA, Office of Procurement, Contract Management Division (Code HK), (202) 358–0460.

SUPPLEMENTARY INFORMATION:

A. Background

A proposed rule was published in the **Federal Register** on October 28, 1999 (64 FR 58031–58032). No comments were received. This final rule adopts the proposed rule without change.

B. Regulatory Flexibility Act

NASA certifies that this regulation will not have significant economic impact on a substantial number of small business entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*)

because it does not impose any new requirements.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the NFS do not impose any recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 1825 and 1852

Government procurement.

Tom Luedtke,

Associate Administrator for Procurement.

Accordingly, 48 CFR Parts 1825 and 1852 are amended as follows:

1. The authority citation for 48 CFR Parts 1825 and 1852 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1)

PART 1825—FOREIGN ACQUISITION

2. Sections 1825.970, 1825.970–1, and 1825.970–2 are added to read as follows:

1825.970 Export control.

1825.970–1 Background.

(a) NASA contractors and subcontractors are subject to U.S. export control laws and regulations, including the International Traffic in Arms Regulations (ITAR), 22 CFR Parts 120 through 130, and the Export Administration Regulations (EAR), 15 CFR Parts 730 through 799. The contractor is responsible for obtaining the appropriate licenses or other approvals from the Department of State or the Department of Commerce when it exports hardware, technical data, or software, or provides technical assistance to a foreign destination or “foreign person”, as defined in 22 CFR 120.16, and there are no applicable or available exemptions/exceptions to the ITAR/EAR, respectively. A person who is lawfully admitted for permanent residence in the United States is not a “foreign person”. (See 22 CFR 120.16 and 15 CFR 734.2(b)(2)(ii).)

(b) The exemption at 22 CFR 125.4(b)(3) of the ITAR provides that a contractor may export technical data without a license if the contract between the agency and the exporter provides for the export of the data. The clause at 1852.225–70, Alternate I, provides contractual authority for the exemption, but the exemption is available only after the contracting officer, or designated representative, provides written authorization or direction enabling its