separate affiliate requirement to a more limited category of incumbent independent LECs.

Initial Regulatory Flexibility Analysis

2. As required by the Regulatory Flexibility Act (RFA), as amended,[1] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the expected economic impact on small entities by the policies and rules proposed in this NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on 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.

Need for, and Objectives of, the Proposed Rules

3. In this NPRM, the Commission seeks comment on whether or not the benefits of its separate affiliate requirement for in-region interexchange service provided by incumbent independent LECs continues to outweigh the costs and whether or not there are alternative safeguards that are as effective but impose fewer regulatory costs.[2]

Legal Basis

4. The legal basis for any action that may be taken pursuant to the NPRM is contained in sections 4, 201–202, 303 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 201–202, 303, and 403, and sections 1.1, 1.411, and 1.412 of the Commission's rules, 47 CFR 1.1, 1.411, and 1.412.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by any rules.[3] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''[4] For the purposes of this order, the RFA defines a ''small business'' to be the same as a ''small business concern'' under the Small Business Act, 15 U.S.C. 632, unless the Commission has developed one or more definitions that are appropriate to its activities.[5] 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).[6] Consistent with the SBA's Office of Advocacy's view, the Commission has included small incumbent LECs in this RFA analysis. The Commission emphasizes, however, that this RFA action has no effect on the its analyses and determinations in other, non-RFA contexts.

6. *Local Exchange Carriers.* The most reliable source of information regarding the number of LECs nationwide appears to be the data that the Commission collects annually in connection with the Telecommunications Relay Service (TRS).[7] According to our most recent data, there are 1,335 incumbent LECs.[8] Although some of these carriers may not be 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 LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are less than 1,335 small entity incumbent LECs that may be affected by the proposals in the NPRM.

Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

7. The Commission expects that any proposal it may adopt pursuant this NPRM will decrease existing reporting, recordkeeping or other compliance requirements.

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

8. The overall objective of this proceeding is to reduce existing regulatory burdens on small carriers to the extent consistent with the public interest.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

9. None.

Ordering Paragraphs

10. Pursuant to the authority contained in sections 2, 4(i)–4(j), 201, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 152, 154(i)–4(j), 201, 303(r), this NPRM is adopted.

11. The Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of this NPRM, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

[FR Doc. 01–24569 Filed 10–1–01; 8:45 am]

BILLING CODE 6712–01–P

[1] 5 U.S.C. 603. The RFA, see 5 U.S.C. 601 et seq., has been amended by the Contract With America Advancement Act of 1996, Public Law 104–121, 110 Stat. 847 (1996) (CWAAA). Title II of CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] 47 U.S.C. 64.1901–03.

[3] 5 U.S.C. 603(b)(3), 604(a)(3).

[4] 5 U.S.C. 601(6).

[5] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in 5 U.S.C. 632).

[6] 15 U.S.C. 632.

[7] 47 CFR 64.601 et seq.; Carrier Locator: Interstate Service Providers, FCC Common Carrier Bureau, Industry Analysis Division (rel. Oct. 2000) (Carrier Locator).

[8] Carrier Locator at Figure 1. The total for competitive LECs includes competitive access providers and competitive LECs.

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CC Docket No. 96–115; CC Docket No. 96–149; FCC 01–247]

Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission seeks comment on what methods of customer consent would serve the governmental interests at issue and afford informed consent in accordance with the First Amendment. The Commission also seeks comment on the interplay between section 222 and 272 of the Act in response to a voluntary remand granted by the United States Circuit Court of Appeals for the District of Columbia. The Commission seeks to obtain a more complete record on ways in which customers can consent to a carrier's use of their CPNI.

DATES: Comments due on or before November 1, 2001 and Reply Comments due on or before November 16, 2001.

FOR FURTHER INFORMATION CONTACT: Marcy Greene, Attorney Advisor, Policy and Program Planning Division, Common Carrier Division, (202) 418–2410.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Second Further Notice of Proposed Rulemaking

(Second Further Notice) in CC Docket Nos. 96–115 and 96–149, FCC 01–247, adopted August 28, 2001, and released September 7, 2001. The complete text of this Second Further Notice of Proposed Rulemaking is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW, Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com*. It is also available on the Commission's website at *http://www.fcc.gov*.

Synopsis of the Second Further Notice of Proposed Rulemaking

1. In this document, the Commission seeks comment on the responsibilities of carriers in obtaining consent from customers for the use of CPNI and, specifically, on whether we should adopt opt-in or opt-out consent under section 222(c)(1). Pending the resolution by the Commission of the particular method of consent, the Commission offers in this document guidance to parties on how to obtain consent during this interim period. If carriers should choose to obtain customer approval by means of an opt-out approach, such carriers will need to provide customers with notification consistent with § 64.2007(f). Moreover, if a carrier has already provided a customer with notification premised upon an opt-in mechanism, the carrier, should it so choose, may continue to rely upon such notice.

2. The Commission notes that our current rules do not provide for any time period after which a customer's implicit approval of the use or sharing of CPNI may be reasonably assumed to have been given to the carrier. The Commission will consider that question in the Second Further Notice. In the interim, however, we expect that carriers shall not use the CPNI based on ''implicit approval'' (through opt-out) until customers have been afforded some reasonable period to respond to the notification. Pending resolution of the FNPRM, we will use a 30-day period from customer receipt of notice as a ''safe harbor,'' but may permit some shorter period if supported by an adequate explanation from the carrier.

Further Notice of Proposed Rulemaking

3. In this Second Further Notice, the Commission seeks to obtain a more complete record on ways in which customers can consent to a carrier's use of their CPNI. Taking into account the Tenth Circuit's opinion, the Commission seeks comment on what methods of approval would serve the governmental interests at issue, and afford informed consent, while also satisfying the constitutional requirement that any restrictions on speech be narrowly tailored. Specifically, the Commission seeks comment on the interests and policies underlying section 222 that are relevant to formulating an approval requirement, including an analysis of the privacy interests that are at issue, and on the extent to which we should take competitive concerns into account. To the extent that competition, in addition to privacy, is a legitimate government interest under section 222, the Commission seeks comment on the likely difference in competitive harms under opt-in and opt-out approvals. The Commission seeks comment on whether it is possible for the Commission to implement a flexible opt-in approach that does not run afoul of the First Amendment, or whether opt-out approval is the only means of addressing the constitutional concerns expressed by the 10th Circuit.

4. At the outset, the Commission also asks parties to comment on the scope of the Tenth Circuit's opinion. If the Commission were to conclude that the court vacated additional requirements, which it does not believe that it did, the Commission asks parties to comment on whether it would affect our overall findings regarding ''approval of the customer'' in section 222(c)(1). Would the Commission need to re-examine our interpretation of ''approval'' as it relates to the uses for which a carrier may use CPNI without customer approval, including to market customer premises equipment and information services, and to use CPNI to market to customers who have switched to another carrier?

5. In the *CPNI Order* (63 FR 20326, April 24, 1998) the Commission addressed specifically the requirement that a carrier obtain ''approval of the customer'' for use of CPNI outside the telecommunications service from which it was derived. In light of those statutory objectives, it further concluded that carriers must obtain express written, oral, or electronic approval by a customer to use a customer's CPNI beyond the existing service relationship. The Commission rejected an opt-out regime, under which a carrier could use CPNI beyond the existing service relationship as long as it has made a request to a customer for permission to use CPNI in that manner and the customer had not expressly objected to such use. Because the Tenth Circuit found that the opt-in requirements were not narrowly tailored to promote the government's asserted interests in protecting privacy and promoting competition, we initiate this proceeding to obtain a more complete record on consent mechanisms, and the Commission urges commenters to focus upon the concerns articulated by the court. In addition, the Commission asks parties to comment on whether there are any other laws or regulatory schemes governing matters similar to CPNI that the Commission might use as an analog.

6. The Commission seeks comment on the interests and policies underlying section 222 that are relevant to formulating an approval requirement to implement section 222(c)(1). In the *CPNI Order*, the Commission articulated two governmental interests: Protection of customer privacy and promotion of competition. The court indicated that ''[w]hile, in the abstract, these may constitute legitimate and substantial interests, we have concerns about the proffered justifications *in the context of this case*.'' Commenters should also discuss, with as much specificity as possible, how a carrier's use of CPNI could erode privacy. The Tenth Circuit recognized that ''disclosure of CPNI information could prove embarrassing to some,'' but beyond that was uncertain about the government's privacy interest. The Commission seeks comment on that aspect of the court's analysis and ask what other privacy concerns may be implicated by access to CPNI.

7. The court also said that it ''would prefer to see a more empirical explanation and justification for the government's asserted interest [in privacy].'' The Commission seeks comments responsive to the court's concern. The court was not persuaded that competition was a legitimate or substantial state interest underlying section 222. The Commission seeks comments that address those reservations, and on the extent to which competitive concerns should be taken into account in our interpretation of the approval requirements under section 222(c)(1). The Commission further seeks comment about the potential competitive ramifications of construing section 222 without regard to competitive issues, and how such a construction might affect the competitive goals of the 1996 Act. The Commission seeks comment on the likely difference in competitive effects under opt-in and opt-out approvals. It requests empirical or other evidence to illustrate the competitive advantages, if any, that opt-out approval affords a carrier. The Commission asks whether, and to what extent, any such competitive advantages may undermine

the goals of section 222 or, more generally, the goals of the 1996 Act.

8. The Commission seeks comment on any potential harms that may arise from adopting either an opt-out or opt-in approach. The Commission inquires to whom a carrier might make CPNI available, and seeks comments about the extent to which such dissemination would affect customer privacy interests. The Commission asks parties to address the relative costs and convenience of CPNI use under both opt-in and opt-out approaches. Finally, the Commission seeks comment on the court's statement that opt-out is a ''substantially less restrictive alternative.'' The Commission seeks comment more broadly on what methods of approval would serve the governmental interests at issue, and afford informed consent, while also satisfying the constitutional requirement that any restrictions on speech be narrowly tailored.

9. The Commission seeks comment on whether adoption of an opt-out mechanism is consistent with the rationale for the total service approach set forth in the *CPNI Order*. If the Commission adopts an opt-out approach such that a carrier need not obtain the customer's affirmative approval to market services not already subscribed to by the customer, is it necessary or appropriate for us to adopt an alternative to the total service approach? In particular, would there be an impact on the competitive goals of the Act if adoption of an opt-out mechanism increased the likelihood of customer approval for the use of CPNI to market services not already subscribed to by the customer? Alternatively, would adoption of an opt-out mechanism achieve the appropriate balance among the interests of privacy, competition, equity, and efficiency?

10. Finally, the Commission notes that in the Wireless Communications and Public Safety Act of 1999 (911 Act), Congress amended section 222 of the Communications Act by adding provisions regarding CPNI. The amendments were enacted as incentives for greater deployment of wireless E911 services. The new CPNI provisions are intended to encourage that objective by providing separate provisions to protect certain wireless location information, and by expressly authorizing carriers to release this information to specified third parties for specified emergency purposes. The Commission seeks comment on what affect, if any, the provisions of section 222(f) have on our interpretation of the provisions of section 222(c)(1) and the customer approval requirements that are under consideration here.

11. The Commission also seeks comment on whether modifications should be made to the current notification requirements in our rules so that they are most effective in ensuring that customers are clearly informed of their rights, and on how carriers should manage later requests for privacy from the customer. In sum, the Commission seeks comment on all of these approval and notification approaches as well as any other options for ensuring that customers receive adequate notification of their rights under section 222 of the Act.

Interplay of Section 222 and 272

12. On October 8, 1999, AT&T filed a petition for review of the *CPNI Order* with the U.S. Circuit Court of Appeals for the District of Columbia, challenging the Commission's CPNI decisions as they relate to the interplay between section 222 and section 272 of the Communications Act. On July 25, 2000, the D.C. Circuit granted the Commission's motion for remand of the AT&T appeal. The consent mechanism that the Commission eventually adopts in response to the Tenth Circuit's Order could impact our previous findings regarding the interplay between these two sections, and we therefore find it necessary to raise the relevant issues here. The Commission's finding in the *CPNI Order*, which we affirmed in the *CPNI Reconsideration Order* (64 FR 53242, October 1, 1999), that the term ''information'' in section 272(c)(1) does not include CPNI remains intact. Specifically, section 272(c)(1) states that a Bell Operating Company (BOC), in its dealing with its section 272 separate affiliate, ''may not discriminate between the company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards * * *'' The Commission found that in the context of the entire 1996 Act, it is not readily apparent that the meaning of ''information'' in section 272 necessarily includes CPNI, and that the most reasonable interpretation of the interplay between sections 222 and 272 is that section 272 ''does not impose any additional CPNI requirements on BOCs' sharing of CPNI with their section 272 affiliates when they share information with their section 272 affiliates according to the requirements of section 222.'' The Commission found this to be reasonable because if we deemed ''information'' to include CPNI under section 272(c)(1), then the BOCs would be unable to share CPNI with their affiliates to the extent contemplated by section 222, but would instead be subject to the more affirmative nondiscrimination requirements in section 272. Adhering to these requirements would mean that BOCs could share CPNI among their section 272 affiliates only pursuant to express approval, and CPNI sharing under section 222(c)(1)(A) (based on implied approval under the total service approach) would be precluded.

13. More specifically, under the terms of section 272, the Commission found that the nondiscrimination requirements contained in that section would, in the context of an opt-in approach, ''pose a potentially insurmountable burden because a BOC soliciting approval to share CPNI with its affiliate would have to solicit approval for countless other carriers as well, known or unknown.'' Although this was only one of several reasons supporting the Commission's interpretation of the interplay between sections 222 and 272, it would likely have to revisit this conclusion if we adopt an opt-out approach as a final rule. Under an opt-out approach, however, a BOC may be free to share its local customer's CPNI with its long distance affiliate regardless of whether the local customer has chosen the affiliate as his or her long distance service provider. The Commission is concerned about the possible competitive and customer privacy ramifications of such an interpretation, and seeks comment on whether it should revisit its interpretation of the interplay between sections 222 and 272 if the Commission adopts an opt-out approach. In particular, would the Commission have to alter its fundamental conclusion that BOCs may share CPNI with their section 272 affiliates pursuant to section 222 without regard to the nondiscrimination requirements in section 272?

Initial Regulatory Flexibility Analysis

14. As required by the Regulatory Flexibility Act (RFA), as amended,[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and rules proposed in this *Second Further Notice of Proposed Rulemaking* (*Second Further Notice*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Second Further Notice.* The Commission will send a

[1] 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Public Law 104–121, 110 Stat. 847 (1996) (CWAAA). Title II of CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

copy of the *Second Further Notice,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. *See* 5 U.S.C. 603(a). In addition, the *Second Further Notice* and IRFA (or summaries thereof) will be published in the **Federal Register**.

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

15. The Commission is issuing the *Second Further Notice* to seek comment on an appropriate method by which carriers must secure their customers' consent to use the customer's CPNI. This is necessary to respond to the Tenth Circuit's decision vacating the opt-in consent method. Under the opt-in method, a carrier was required to notify the customer of his or her rights with regard to CPNI and then obtain express written, oral or electronic customer approval before the carrier may use CPNI to market services to the customer that are outside the existing service relationship that the customer has with the carrier. The opt-in method is distinguished from the opt-out method under which approval to use the customer's CPNI is inferred from the customer-carrier relationship unless the customer requests specifically that his or her CPNI be restricted.

16. The Tenth Circuit concluded that although the Commission had asserted that the opt-in method would protect consumer privacy and promote competition for telecommunications services in accordance with the goals of section 222 of the Act,[2] it did not demonstrate that opt-in directly and materially advanced these interests. The court concluded that the Commission's determination that an opt-in requirement would best protect a consumer's privacy interests was not narrowly tailored because the Commission had failed to adequately consider an opt-out option. The court stated that an opt-out option should have been more fully investigated as it is inherently less restrictive of speech. Further, the court ruled the Commission did not adequately show that an opt-out strategy would not offer sufficient protection of consumer privacy.[3] In vacating portions of the *CPNI Order,* the court did not require the Commission to find specifically that the opt-out option was the correct approach. Instead, it found fault with the Commission's ''inadequate consideration of the approval mechanism alternatives in light of the First Amendment.'' [4]

17. Taking into account the Tenth Circuit's concerns, we seek comment in the *Second Further Notice* on several significant issues concerning what methods of approval would serve the governmental interests at issue under section 222 of the Act, and afford informed consent, while also satisfying the constitutional requirement that any restrictions on speech be narrowly tailored. We seek comment specifically on the extent to which an opt-in or opt-out method of customer approval would be consistent with both the court's concerns and section 222, and on whether we should make modification to our customer notification requirements in § 64.7002 of our rules, 47 CFR 64.7002, based on the form of approval that we adopt.[5]

18. We also ask for information on any potential harms to business entities, especially smaller business entities within the class of companies directly affected by the proposed rule, that may arise from adopting either an opt-in or opt-out approach, including the extent to which dissemination of CPNI would affect a customer's privacy.[6] We also ask for comment on how we can ensure that the consent approach we adopt balances the interests of privacy, competition, equity and efficiency.[7]

19. In addition, we ask parties to indicate whether or not adoption of an opt-out mechanism undermines the total service approach. The total service approach is not a consent mechanism like the opt-in or opt-out approach, but instead describes the scope of services for which a customer grants his or her consent for the carrier to use CPNI. Specifically, under the total service approach, the customer's implied approval is limited to the parameters of the customer's existing service, while the customer must grant the carrier affirmative approval in order for the carrier to use the customer's CPNI to market other services to the customer. If a carrier need not obtain the customer's affirmative approval to market services not already subscribed to by the customer, is it necessary or appropriate for us to adopt an alternative to the total service approach.[8]

b. Legal Basis

20. The *Second Further Notice* is adopted pursuant to sections 1, 4(i), 222, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 222, and 303(r).

c. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

21. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules.[9] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [10] For the purposes of this order, the RFA defines a ''small business'' to be the same as a ''small business concern'' under the Small Business Act, 15 U.S.C. s 632, unless the Commission has developed one or more definitions that are appropriate to its activities.[11] 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).[12] 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.[13] We first discuss generally the total number of small telephone companies falling within both of those SIC categories. Then, we discuss the number of small businesses within the two subcategories, and attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

22. Although affected incumbent local exchange carriers (ILECs) may have no more than 1,500 employees, we do not believe that such entities should be considered small entities within the meaning of the RFA because they either are dominant in their field of operations or are not independently owned and operated, and are therefore by definition not ''small entities'' or ''small business

[2] 47 U.S.C. 222

[3] *Id.* at 1238–39.

[4] *Id.* at 1240, n. 15 (''The dissent accuses us of 'advocating' an opt-out approach. We do not 'advocate' any specific approach.'').

[5] See infra paragraphs 14–23.

[6] See infra paragraph 9.

[7] See infra paragraph 21.

[8] See infra paragraph 21.

[9] 5 U.S.C. 603(b)(3), 604(a)(3).

[10] 5 U.S.C. 601(6).

[11] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in 5 U.S.C. 632).

[12] 15 U.S.C. 632.

[13] 13 CFR 121.201. The North American Industry Classification System (NAICS) has replaced the SIC system for describing types of industries. SIC 4812 corresponds to NAICS 513321, 513322, 51333 (Radiotelephone Communications). SIC 4813 corresponds to NAICS 51331, 51333, 51334 (Telephone Communications, Except Radiotelephone).

concerns'' under the RFA. Accordingly, our use of the terms ''small entities'' and ''small businesses'' does not encompass small ILECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately consider small ILECs within this analysis and use the term ''small ILECs'' to refer to any ILECs that arguably might be defined by SBA as ''small business concerns.'' [14]

23. *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.[15] 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 because they are not ''independently owned and operated.'' [16] 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 either small entities or small incumbent LECs that may be affected by this order.

24. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[17] According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons.[18] 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 the SBA's definition. Consequently, we estimate that fewer than 2,295 small entity telephone communications companies other than radiotelephone companies are small entities or small ILECs that may be affected by this order.

25. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a definition of small providers of local exchange services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).[19] According to our most recent data, there are 1,335 incumbent LECs, 349 competitive LECs, and 87 resellers.[20] 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 LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 1,335 small entity incumbent LECs, 349 competitive LECs, and 87 resellers that may be affected by the proposals in the *Second Further Notice.*

26. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 204 companies reported that they were engaged in the provision of interexchange services.[21] 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 IXCs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 204 small entity IXCs that may be affected by this order.

27. *Competitive Access Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs 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, 349 companies reported that they were engaged in the provision of either competitive access services or competitive local exchange service.[22] 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 CAPs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 349 small entity CAPs that may be affected by this order.

28. *Operator Service Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator service providers 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, 21 companies reported that they were engaged in the provision of operator services.[23] Although it seems certain that some of these companies 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 operator

[14] 13 CFR 121.210 (SIC 4813).

[15] United States Department of Commerce, Bureau of the Census, 1992 Census of transportation Communications and Utilities: Establishment and Firm Size, at Firm Size 1–123 (1995) (1992 Census).

[16] 15 U.S.C. 632(a)(1).

[17] 1992 Census, at Firm Size 1–123.

[18] 13 CFR 121.201 (SIC 4813/NAICS 51331).

[19] 47 CFR 64.601 *et seq.*; Carrier Locator: Interstate Service Providers, FCC Common Carrier Bureau, Industry Analysis Division (rel. Oct. 2000) (Carrier Locator).

[20] Carrier Locator at Figure 1. The total for competitive LECs includes competitive access providers and competitive LECs.

[21] Carrier Locator at Figure 1.

[22] Carrier Locator at Figure 1.

[23] Carrier Locator at Figure 1.

service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 21 small entity operator service providers that may be affected by this order.

29. *Pay Telephone Operators.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of pay telephone operators 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, 758 companies reported that they were engaged in the provision of pay telephone services.[24] 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 pay telephone operators that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 758 small entity pay telephone operators that may be affected by this order.

30. *Wireless Carriers.* The SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.[25] According to the SBA's definition, a small business radiotelephone company is one employing no more than 1,500 persons.[26] The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned are operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by this order.

31. *Cellular Service and Mobile Service Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of cellular service 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, 806 companies reported that they were engaged in the provision of cellular services.[27] 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 cellular service and mobile service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 804 small entity cellular service carriers that may be affected by this order.

32. *Broadband PCS Licensees.* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined ''small entity'' for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[28] For Block F, an additional classification for ''very small business'' was added, and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[29] These regulations defining ''small entity'' in the context of broadband PCS auctions have been approved by SBA.[30] No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F. Based on this information, we estimate that the number of small broadband PCS licenses will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small PCS providers as defined by SBA and the Commissioner's auction rules.

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

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

[24] Carrier Locator at Figure 1.

[25] 1992 Census at Firm Size 1–123.

[26] 13 CFR § 121.201 (SIC 4812/NAICS 513322).

[27] Carrier Locator at Figure 1. The total for cellular carriers includes cellular, Personal Communications Service (PCS) and Specialized Mobile Radio (SMR) carriers.

[28] See Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order, FCC 96–278, WT Docket No. 96–59, paras. 57–60 (June 24, 1996), 61 FR 33859 (July 1, 1996); see also 47 CFR 24.720(b).

[29] Id. at paragraph 60.

[30] Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93–253, Fifth Report and Order, 9 FCC Rcd 5532, 5581–84 (1994).

purposes of this IRFA, that all of the licenses may be awarded to small entities, some of which may be affected by the decisions and rules proposed in the Notice.

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

36. *Toll Resellers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under the SBA's rules is for all telephone communications companies. The most reliable source of information regarding the number of toll resellers 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, 454 companies reported that they were engaged in the resale of telephone toll services.[31] 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 toll resellers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 454 small entity resellers that may be affected by this order.

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

37. Because we have not made any tentative conclusions or suggested proposed rules, we are unable at this time to describe any projected reporting, recordkeeping, or other compliance requirements.

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

38. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[32]

39. As noted above, we do not propose a specific method for how carriers should obtain customer consent to use CPNI for marketing purposes, rather we seek comment on ways in which carriers can obtain their customers' consent and the extent to which an opt-in or opt-out approach would satisfy both section 222 and the Tenth Circuit's concerns that any restrictions on speech be no more than necessary to serve the asserted state interests. Section 222 applies to all telecommunications carriers, and therefore, any rules that we adopt regarding customer consent will be applicable to all carriers.[33] Accordingly, we cannot exempt small entities from complying with any consent rules that we adopt.

40. We have, however, taken the limited resources of small entities into account in promulgating certain existing CPNI rules,[34] and intend to do so again in addressing the customer consent requirements. Specifically, we recognize that an opt-in approach would require small entities to have a process in place to obtain express approval from their customers to use CPNI. While such a process could place a burden on small entities in terms of developing, tracking and maintaining customer consent, it would confer a countervailing benefit by permitting them to gain approval to use a customer's CPNI for a broad range of service offerings with a single request through written, oral or electronic means that remains in effect unless or until the customer revokes it.[35] Therefore, we ask parties to comment on whether the burden outweighs the benefit under an opt-in scheme.

41. We also note that the Commission, in response to concerns from all carriers about the cost of compliance, has already streamlined the ''flagging'' and ''audit trail'' requirements that are required to protect against unauthorized access to a customer's CPNI.[36] Small entities may continue to take advantage of these streamlined rules even if the Commission adopts an opt-in requirement.

42. Under an opt-out approach, a small entity need not obtain express approval, but would only be required to notify its customers of their CPNI rights and then process any requests for privacy after such notification. This could be less administratively onerous than obtaining opt-in approval. However, we seek comment indicating small entities' perception of the probable impact of this burden.

43. We ask small entities to particularly keep in mind these types of requirements when they comment in the *Second Further Notice* on any potential harms that may arise from adopting either form of consent,[37] and overall, we ask for comment in response to this IRFA on what competitive or economic impact either an opt-in or opt-out approach would have on small entities and on whether there is any alternative form of consent that we should consider to minimize the economic impact on them.

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

44. None.

Ordering Clauses

45. Pursuant to sections 1, 4(i), 222 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 222 and 303(r), the Clarification Order and Second Further Notice of Proposed Rulemaking are adopted.

46. The Commission's Office of Public Affairs, Reference Operations Division, Shall Send a copy of this Clarification Order and Second Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

[31] Carrier Locator at Figure 1.

[32] 5 U.S.C. 603(c).

[33] CPNI Order, 13 FCC Rcd at 8098–8100, paragraphs 49–50.

[34] See CPNI Reconsideration Order, 14 FCC Rcd at 14472–75, paragraphs 125–27 (adjusting certain CPNI safeguards to ease the costs of compliance for small carriers).

[35] See CPNI Reconsideration Order, 14 FCC Rcd at 8142–43, 8146, 8151, paragraphs 104, 109, 116.

[36] CPNI Reconsideration Order, 13 FCC Rcd at 14472–75, paragraphs 124–27.

[37] See supra paragraph 19.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

[FR Doc. 01–24570 Filed 10–1–01; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 171, 173, 174, 175, 176, 177, and 178

[Docket No. RSPA–98–4952 (HM–223)]

RIN 2137–AC68

Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage; Cancellation of Public Meetings

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Proposed rule; cancellation of public meetings

SUMMARY: On June 14, 2001, RSPA published a notice of proposed rulemaking to clarify the applicability of the Hazardous Materials Regulations to specific functions and activities, including hazardous materials loading, unloading, and storage operations. On August 2, 2001, we announced two public meetings to facilitate public comment on the proposed rule. One public meeting was scheduled for September 14, 2001, in Washington, D.C.; on September 12, 2001, it was postponed. A second public meeting was scheduled for October 30, 2001, in Diamond Bar, California. The October 30 public meeting is cancelled; the September 14 public meeting will not be rescheduled.

DATES: The comment period closing date remains November 30, 2001.

ADDRESSES: *Written comments.* Submit comments to the Dockets Management System, U.S. Department of Transportation, Room PL 401, 400 Seventh Street, SW., Washington, DC 20590–0001. Comments should identify Docket Number RSPA–98–4952 (HM–223) and be submitted in two copies. If you wish to receive confirmation of receipt of your written comments, include a self-addressed, stamped postcard. You may also e-mail comments by accessing the Dockets Management System Web site at *http://dms.dot.gov/* and following the instructions for submitting a document electronically.

The Dockets Management System is located on the Plaza level of the Nassif Building at the Department of Transportation at the above address. You can review public dockets there between the hours of 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. You can also review comments on-line at the DOT Dockets Management System Web site at *http://dms.dot.gov/.*

FOR FURTHER INFORMATION CONTACT: Michael Johnsen (202) 366–8553, Office of Hazardous Materials Standards, Research and Special Programs Administration; or Susan Gorsky (202) 366–8553, Office of Hazardous Materials Standards, Research and Special Programs Administration.

SUPPLEMENTARY INFORMATION:

Background

On June 14, 2001, the Research and Special Programs Administration (RSPA, we) published a notice of proposed rulemaking (NPRM) (66 FR 32420) under Docket RSPA–98–4952 (HM–223) to clarify the applicability of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) to specific functions and activities, including hazardous materials loading and unloading operations and storage of hazardous materials during transportation. The HM–223 rulemaking has four overall goals. First, we want to maintain nationally uniform standards applicable to functions performed in advance of transportation to prepare hazardous materials for transportation. Second, we want to maintain nationally uniform standards applicable to transportation functions. Third, we want to distinguish functions that are subject to the HMR from functions that are not subject to the HMR. Finally, we want to clarify that facilities within which HMR-regulated functions are performed may also be subject to federal, state, or local regulations governing occupational safety and health or environmental protection.

To achieve these goals, the NPRM proposes to list in the HMR pre-transportation and transportation functions to which the HMR apply. Pre-transportation functions are functions performed to prepare hazardous materials for movement in commerce by persons who offer a hazardous material for transportation or cause a hazardous material to be transported. Transportation functions are functions performed as part of the actual movement of hazardous materials in commerce, including loading, unloading, and storage of hazardous materials that is incidental to their movement. The NPRM also proposes to clarify that ''transportation in commerce,'' for purposes of applicability of the HMR, begins when a carrier takes possession of a hazardous material and continues until the carrier delivers the package containing the hazardous material to its destination as indicated on shipping papers. In addition, the NPRM proposes to include in the HMR an indication that facilities at which functions regulated by the HMR occur may also be subject to applicable standards and regulations of other federal agencies and state, local, and tribal governments. Finally, the NPRM proposes to include in the HMR the statutory criteria under which non-federal governments may be precluded from regulating in certain areas under the preemption provisions of the federal hazardous materials transportation law (49 U.S.C. 5101 *et seq.*)

On August 2, 2001, we announced that we planned to host two public meetings to facilitate public comment on the NPRM (66 FR 40174). The first public meeting was scheduled for September 14, 2001, in Washington, D.C. The second public meeting was to be held in Diamond Bar, California, on October 30, 2001. We also extended the comment period for the NPRM to November 30, 2001.

On September 12, 2001, we announced on our website (*http://hazmat.dot.gov*) and by telephone to registered participants that the September 14 meeting was postponed, but that we likely would reschedule it for a later date. As of September 25, only ten persons had indicated to us that they planned to make presentations at the Washington meeting; only four persons had registered with us to speak at the California meeting on October 30, and two of them were among the ten Washington speakers. Therefore, we decided to cancel the California public meeting. Further, we decided against rescheduling the Washington meeting. The comment period for the NPRM remains open until November 30, 2001. We urge all interested persons to submit written comments on the NPRM. We will consider late-filed comments to the extent possible as we consider whether to proceed to a final rule.

If you believe that written comments are not sufficient to assure that your views on the NPRM are communicated to us and that a public meeting to facilitate comment on the NPRM is necessary, please submit a statement explaining why a public meeting is necessary to the HM–223 docket. If there is sufficient interest, we will reconsider our decision on the public meetings.