

some telecommunications carriers and providers, particularly small and medium-sized carriers, to ensure that their systems are Y2K compliant. The Commission recognized that ensuring that telecommunications-related computer systems are Y2K compliant is an important public concern.

Accordingly, in light of the concerns raised by OMB, the Commission has agreed to delay, until April 1, 2000, the compliance date for rule 64.2001(a)(2)'s requirement that carriers highlight new service providers, and rule 64.2001(c), which requires that carriers identify deniable and nondeniable charges. Compliance with other principles and guidelines adopted in the Order, including rule 64.2001(a)(2)'s requirement that carriers separate charges on bills by service provider, is required November 12, 1999.

List of Subjects in 47 CFR Part 64

Communications common carriers, Consumer protection, Telecommunications.

Federal Communications Commission.

Magalie Roman Salas,
Secretary.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CC Docket No. 97-213; FCC 99-229]

Implementation of the Communications Assistance for Law Enforcement Act

AGENCY: Federal Communications Commission.

ACTION: Policy statement.

SUMMARY: This document examines the definition of "telecommunications carrier" set forth in section 102 of the Communications Assistance to Law Enforcement Act (CALEA), which determines which entities and services are subject to the assistance capability and other requirements of CALEA, and discusses how the definition applies to various types of service providers. It also provides guidance regarding the factors the Commission will consider in making determinations under section 109 of CALEA as to whether compliance with CALEA's assistance capability requirements is "reasonably achievable" for particular carriers, and the showings to be made by entities filing petitions under section 109.

FOR FURTHER INFORMATION CONTACT: Thomas Wasilewski, 202-418-1310.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Second Report and Order* (Second R&O) in CC Docket No. 97-213, FCC 99-229, adopted August 26, 1999, and released August 31, 1999. The complete text of the Second R&O is available on the Commission's Internet site, at www.fcc.gov. It is also available for inspection and copying during normal business hours in the FCC Reference Information Center, Courtyard Level, 445 12th Street, S.W., Washington, DC, and may be purchased from the Commission's copy contractor, International Transcription Services, Inc., CY-B400, 445 12th Street S.W., Washington, DC.

Synopsis of the Report and Order

1. The Commission adopts a Second Report and Order (Second R&O) in CC Docket No. 97-213, regarding implementation of sections 102 and 109 of the Communications Assistance for Law Enforcement Act, Public Law 103-414, 108 Stat. 4279 (1994) (CALEA). Although the Notice of Proposed Rule Making (NPRM) in this proceeding (which can be found at 62 FR 63302, Nov. 11, 1997) proposed certain rules, the Second R&O does not adopt rules regarding sections 102 and 109.

2. *Section 102 Issues:* CALEA does not modify the existing surveillance laws. Instead, it requires telecommunications carriers to ensure that their facilities are capable of providing the surveillance law enforcement is authorized to conduct. The language and legislative history of CALEA provide sufficient guidance as to what the term "telecommunications carrier" means, such that it can be applied to particular carriers, their offerings and facilities.

3. Subsections 102(8)(A) and (B) identify what entities are subject to CALEA: essentially, common carriers offering telecommunications services for sale to the public. Section 103(a) clarifies that the assistance capability requirements apply to "equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications. * * *" The House Report provides further clarification in terms of the functions of covered services, stating: "Thus, a carrier providing a customer with a service or facility that allows the customer to obtain access to a publicly switched network is responsible for complying with the capability requirements" (H.R. Rep. No. 103-827(I), at 26 (1994).) The House Report also describes CALEA's focus in terms of law enforcement agencies' traditional surveillance

requirements: "The only entities required to comply with the [assistance capability] requirements are telecommunications common carriers, the components of the public switched network where law enforcement agencies have served most of their surveillance orders." (*Id.*, at 21.) Further, the legislative history contains examples of the types of service providers subject to CALEA: "The definition of 'telecommunications carrier' includes such service providers as local exchange carriers, interexchange carriers, competitive access providers (CAPs), cellular carriers, providers of personal communications services (PCS), satellite-based service providers, cable operators, and electric and other utilities that provide telecommunications services for hire to the public, and any other wireline or wireless service for hire to the public." (140 Cong. Rec. H-10779 (daily ed. October 7, 1994) (statement of Rep. Hyde).)

4. The legislative history of CALEA makes clear that the requirements of CALEA do not necessarily apply to all offerings of a carrier. The House Report states: "[C]arriers are required to comply only with respect to services or facilities that provide a customer or subscriber with the ability to originate, terminate or direct communications." (H.R. Rep. No. 103-827(I), at 21.) Thus, an entity is a telecommunications carrier subject to CALEA to the extent it offers, and with respect to, such services.

5. CALEA also makes clear that its requirements do not apply to certain entities and services. Subsection 102(8)(C) of the definition specifically excludes information services, and the legislative history makes clear that CALEA does not apply to private network services:

[T]elecommunications services that support the transport or switching of communications for private networks or for the sole purpose of interconnecting telecommunications carriers * * * need not meet any wiretap standards. PBXs are excluded. So are automated teller machine (ATM) networks and other closed networks. Also excluded from coverage are all information services, such as Internet service providers or services such as Prodigy and America-On-Line.

All of these private network systems or information services can be wiretapped pursuant to court order, and their owners must cooperate when presented with a wiretap order, but these services and systems do not have to be designed so as to comply with the capability requirements.

6. CALEA's definitions of "telecommunications carrier" and "information services" were not

modified by the 1996 Act, and the CALEA definitions therefore remain in force for purposes of CALEA. The pertinent sections of CALEA are not part of the Communications Act. Further, the 1996 Act expressly provides that it did not alter existing law by implication, and in the 1996 Act Congress did not repeal or even address the CALEA definitions. Although in virtually all cases the definitions of the two Acts will produce the same results, as a matter of law the entities and services subject to CALEA must be based on the CALEA definition, independently of their classification for the separate purposes of the Communications Act.

7. *Common Carriers and Utilities.* All entities previously classified as "common carriers" are considered telecommunications carriers for the purposes of CALEA, as are cable operators and electric and other utilities to the extent they offer telecommunications services for hire to the public. Such entities offer services (some subject to CALEA, some not) that use copper-wire, cable, fiber-optic, and wireless facilities to provide traditional telephone service, data service, Internet access, cable television, and other services. The Act's legislative history identifies such entities as subject to CALEA to the extent that their service offerings satisfy CALEA's description of covered services. Entities are not subject to CALEA, however, with respect to services and facilities leased for private networks, pursuant to the statute. In addition, cable television is an example of a service not covered by CALEA because it is not a "telecommunications" service, even if delivered via the same transmission facility as other, covered services.

8. It is unnecessary to adopt the FBI's recommendation not to use the adverb "indiscriminately" in clarifying the definition of telecommunications carrier. The FBI is concerned that the inclusion of this term may allow companies that hold themselves out to serve only particular groups to undermine CALEA, intentionally or inadvertently, by creating a loophole that would permit criminals to use telecommunications providers that do not indiscriminately offer their services to the public. However, the courts have long held that a common carrier is one that holds itself out to serve the public indiscriminately. This does not amount to a threshold test that a service provider is a common carrier only if it serves all who seek service. Instead, it is simply a restatement of the proposition that common carriage status involves offering one's services to the general public.

9. *Commercial Mobile Radio Services (CMRS).* CMRS providers are considered telecommunications carriers for the purposes of CALEA. This result is required by section 102(8)(B)(i) of CALEA, which states that the definition of "telecommunications carrier" includes "a person or entity engaged in providing commercial mobile service (as defined in section 332(d) of [the Communications Act])." Section 332(d) in turn defines the term "commercial mobile service" as "any mobile service * * * that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public. * * *"

10. Certain commenters claim that some entities normally classified as CMRS should not be considered subject to CALEA because they do not meet CALEA's definition of telecommunications carrier or are not technologically capable of CALEA compliance. Examples cited include providers serving niche business markets with limited interconnect capability, such as Industrial/Business Radio Services licensees offering for-profit interconnected service, local interconnected Specialized Mobile Radio (SMR) providers, and for-profit commercial interconnected 220 MHz service licensees. To the extent these services consist of interconnected service offered to the public, however, they meet the definition of CMRS set forth in section 332(d) and the entities offering them therefore must be considered telecommunications carriers subject to CALEA.

11. To the extent "traditional" SMR service offers interconnection, it meets the definition of CMRS and thus is subject to CALEA, but otherwise not. Similarly, push-to-talk "dispatch" service is subject to CALEA to the extent it is offered in conjunction with interconnected service, because in such case it is a switched service functionally equivalent to a combination of speed dialing and conference calling, but otherwise not. Thus, in any given case, the services an entity offers would determine its CALEA responsibilities.

12. The Commission recognizes that in certain cases compliance with the CALEA assistance capability requirements may be economically burdensome, or even impossible. In these cases, providers are allowed to seek extensions under section 107(c) of CALEA, or may seek relief under section 109. The Commission is also prepared to reexamine this issue once it has gained some experience in applying section 109. Exempting entire classes of

CMRS services is not warranted, however, absent a more complete record on the resultant impact on operators and on CALEA objectives.

13. *Private Mobile Radio Services (PMRS).* PMRS operators are not telecommunications carriers subject to CALEA when they offer PMRS services, but the determination of whether a particular mobile service offering is private or common carrier depends on the nature of the service and to whom it is offered. Although private and common carrier services are by definition mutually exclusive, see 47 U.S.C. 332(d)(3), a given carrier may offer both. Where a PMRS operator uses its facilities to offer interconnected service for profit to the public, or a substantial portion of the public, that service qualifies as CMRS, and thus is subject to CALEA.

14. *Resellers.* Resellers, as telecommunications carriers under the terms of section 102, are generally subject to CALEA. However, resellers' responsibility under CALEA is limited to their own facilities, and they will therefore not be held responsible for the CALEA compliance responsibilities of the carrier whose services they are reselling with respect to the latter's underlying facilities. Further, because their offerings are limited to essentially private networks, most PBX providers and many aggregators would fall outside the scope of CALEA.

15. *Pay Telephone Providers.* Pay telephone providers are excluded from the CALEA definition of telecommunications carrier. The CALEA legislative history states that "[t]he only entities required to comply with the functional requirements are telecommunications common carriers, the components of the public switched network where law enforcement agencies have always served most of their surveillance orders." (H.R. Rep. No. 103-827(I), at 21.) Moreover, pay telephone providers do not have the information and the means to effectuate lawful electronic surveillance, which is maintained by the carriers who provide switched telephone services to pay telephone providers.

16. *Information Services (IS) and Calling Features.* Where facilities are used solely to provide an information service, whether offered by an exclusively-IS provider or by a common carrier that has established a dedicated IS system apart from its telecommunications system, such facilities are not subject to CALEA. Where facilities are used to provide both telecommunications and information services, however, such joint-use facilities are subject to CALEA in order

to ensure the ability to surveil the telecommunications services. (Moreover, CALEA is technology neutral, and a carrier's choice of technology when offering common carrier services thus does not change its obligations under CALEA.) For example, digital subscriber line (DSL) services are generally offered as tariffed telecommunications services, and therefore subject to CALEA, even though the DSL offering often would be used in the provision of information services. On the other hand, where an entity uses its own wireless or satellite facilities to distribute an information service only, the mere use of transmission facilities would not make the offering subject to CALEA as a telecommunications service.

17. Calling features such as call forwarding (and the corresponding voice mail feature, call redirection), call waiting, three-way (*i.e.*, conference) calling, and speed dialing are considered to be so closely related to basic service that they are treated as adjuncts to it. See North American Telecommunications Ass'n, 101 FCC 2d 349 (1985), *recon. denied*, 3 FCC Rcd 4385 (1988). They are also like traditional pen registers and traps and traces in that they relate to the set-up or routing of telecommunications, rather than its content. Moreover, the legislative history of CALEA explicitly states that they are covered services. Accordingly, these specific calling features will be considered covered by CALEA, whether offered over wireline or wireless facilities.

18. *Other Issues.* It is not necessary at this time either to identify by rule additional classes of entities within CALEA's definition of telecommunications carrier, pursuant to section 102(8)(B)(ii), or to exempt in the Commission's rules any classes pursuant to section 102(8)(C)(ii). Moreover, codification in the Commission's rules of a list of examples would run the risk of being considered definitive rather than merely illustrative, and such a list is therefore not adopted.

19. *Section 109 Issues:* Section 109(b)(1) of CALEA provides that any interested person may petition the Commission for a determination regarding whether compliance with the assistance capability requirements of section 103 of CALEA is "reasonably achievable" with respect to any equipment, facility, or service installed or deployed after January 1, 1995. Section 109(b) provides that, in making determinations as to reasonable achievability, "the Commission shall determine whether compliance would

impose significant difficulty or expense on the carrier or on the users of the carrier's system and shall consider the following factors":

A. The effect on public safety and national security;

B. The effect on rates for basic residential telephone service;

C. The need to protect the privacy and security of communications not authorized to be intercepted;

D. The need to achieve the capability assistance requirements of section 103 by cost-effective methods;

E. The effect on the nature and cost of the equipment, facility, or service at issue;

F. The effect on the operation of the equipment, facility, or service at issue;

G. The policy of the United States to encourage the provision of new technologies and services to the public;

H. The financial resources of the telecommunications carrier;

I. The effect on competition in the provision of telecommunications services;

J. The extent to which the design and development of the equipment, facility, or service was initiated before January 1, 1995;

K. Such other factors as the Commission determines are appropriate.

20. Some commenters suggested that certain of these factors should be accorded special significance, while others suggested that additional factors should be considered. It would be premature at this point to assign special weight to any one factor generally, or to adopt additional factors. Legislative history indicates that CALEA "seeks to balance three key policies: (1) to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies." (H.R. Rep. No. 103-827(I), at 13.) In light of the overall purpose of CALEA to preserve law enforcement's ability to conduct surveillance, the Commission must in all cases consider public safety and, where applicable, national security, in its analysis of section 109 petitions. At the same time, given the importance Congress has placed on the privacy and security of communications that are not the targets of court-ordered surveillance, and the need to ensure that the development of new technologies and services is not impeded, those factors involving privacy and innovation are also likely to be important in many cases. However, the technological

diversity of carrier networks, as well as other carrier characteristics, will, as a matter of course, mean that certain factors will be more important to the arguments of certain carriers than others, and that not all of the factors enumerated in section 109 may be relevant to the analysis of a given reasonable achievability petition.

21. A central concern to many commenters is the issue of how the Commission will approach the cost of CALEA compliance when evaluating section 109 petitions. As a general principle, in making judgments under section 109, the Commission will look only to the additional cost incurred in making equipment and facilities CALEA compliant. In many instances carriers will become CALEA compliant in the course of general network upgrades, and will recover any additional cost of CALEA compliance through their normal charges. (If, in particular, law enforcement and industry reach agreements regarding switch prioritization that enable the Commission to grant extensions of time under section 107(c) allowing carriers to make certain equipment CALEA compliant as part of the normal upgrade cycle, with resulting low compliance costs, the Commission would expect such compliance generally to be reasonably achievable. On the other hand, there may be cases in which law enforcement opposes any extension of time for making particular equipment CALEA compliant, resulting in substantial additional costs to a carrier. In those cases, compliance could be considered not to be reasonably achievable.) The Commission expects that CALEA solutions that would require a carrier to change vendors in order to purchase costly new switching equipment, or to replace costly existing facilities, would generally not be deemed reasonably achievable. Any petitioner who argues that it is unable to comply with CALEA for reasons of cost must present quantitative cost information that is as detailed, accurate and complete as possible, which the Commission will analyze along with any technological problems related to the nature of the equipment, facility, or service at issue. Large carriers with multiple switch types in networks that cover large or diverse areas may present data on a per-switch basis, in order to identify compliance problems specific to particular segments of the carrier's network.

22. In order to distinguish the additional costs of CALEA compliance from the costs of general network upgrades, costs will be considered related to CALEA compliance only if

carriers can show that they would not have been incurred but for the implementation of CALEA. For instance, costs incurred as an incidental consequence of CALEA compliance are not directly related to CALEA compliance and should be excluded from the carrier's showing. Finally, general overhead costs cannot be allocated to CALEA compliance, only additional overheads incremental to and resulting from CALEA compliance.

23. Carrier size and geographic location may be significant considerations under section 109. However, if law enforcement and the telecommunications industry agree on a flexible CALEA deployment schedule that results in an extension of the current compliance deadline for equipment and facilities in areas that are not high priorities for law enforcement, it is not likely that many small rural carriers will need relief under section 109.

24. Implementation of section 109 should seek to minimize any adverse effects of CALEA compliance on quality of service and subscriber rates. This approach is consistent with the mandate to the Commission in section 109(b)(1) to determine "whether compliance would impose significant difficulty or expense on the carrier or the users of the carrier's systems . . ." Moreover, the same section directs the Commission to consider the effect of compliance on rates for "basic residential telephone service," reflecting a special Congressional concern about rate impacts for that service. (In addition, under section 107(b), one of the factors that the Commission is to consider in establishing technical requirements or standards is minimizing the cost of compliance on residential ratepayers.) However, the arguments in this record that CALEA compliance will increase rates, affect quality of service, make particular technologies and services unprofitable, prevent the introduction of services to the market, or price services out of the reach of certain groups of customers, are at this point inherently speculative. Any such arguments made in individual petitions under section 109 will be given substantial weight only to the extent they are made with particularity and are grounded on specific quantitative data.

25. The Commission may consider the financial resources of individual telecommunications carriers under section 109(b)(1)(H), and industrywide competitive pressures under section 109(b)(1)(I), in evaluating section 109 petitions. Requests for relief based on such factors must be supported by carrier- or industry-specific facts,

including quantitative data. Special consideration for a new market entrant would not necessarily be tantamount to an unfair subsidy.

26. Any petitioner who seeks relief under section 109 on the basis of the delay in the adoption of assistance capability standards must present carrier- or equipment-specific facts demonstrating that such delay actually has made CALEA compliance infeasible. Claims alleging a lack of CALEA-compliant software and hardware on the market will be taken into consideration in the evaluation of section 109 petitions, but only if raised with sufficient specificity and supported with a particularized showing. Law enforcement need not demonstrate that equipment or facilities have been used for criminal activity in cases where reasonable achievability petitions are filed before CALEA-compliant hardware or software is available. With respect to the FBI's delay in issuing capacity requirements, there has now been ample time for industry to evaluate these requirements, and the Commission does not expect to grant section 109 petitions on the basis of the timing of the issuance of the requirements.

27. Pursuant to section 109(b)(1)(J), the extent to which the design and development of equipment was initiated before January 1, 1995, will be considered to the extent appropriate in the Commission's examination of section 109 petitions. In commenting on section 109(b)(1)(J), certain parties argue as well that the definition of "installed or deployed" adopted by the FBI as part of its cost recovery rules is excessively narrow in restricting its application to equipment, facilities, and services "operable and available for use" by a carrier's customers by January 1, 1995. (The FBI's final cost recovery rules are set forth at 28 CFR 100.9-100.21. The FBI's definition in its rules of "installed or deployed" is found at 28 CFR 100.10.) Under section 109(e) of CALEA, the Attorney General is vested with the responsibility for establishing cost control regulations governing the Federal Government's payment of costs associated with bringing equipment installed or deployed on or before January 1, 1995, into compliance with CALEA. The Commission is assigned only a consultative role with respect to such cost control regulations. 47 U.S.C. 1008(e)(2).

Thus, it is not within the Commission's authority to adopt rules defining "installed or deployed."

28. Equipment manufacturers and their associations are interested parties to this proceeding, and therefore will be allowed to file section 109 petitions.

The filing of a section 109 petition will not automatically toll the CALEA compliance deadline; such tolling would be tantamount to an automatic extension of the deadline, which may not be appropriate in all cases.

29. In light of industry's significant role in developing the assistance capability standards of CALEA, section 109 is to be reserved for the examination of specific carrier compliance problems, and is not to be used as a vehicle for rearguing the standards that have been established for compliance with section 103.

30. Some carriers may file petitions under section 107(c) for extensions of time to comply with CALEA, which the Commission may grant if it "determines that compliance with the assistance capability requirements under section 103 is not reasonably achievable through application of technology available within the compliance period." To the extent the Commission finds it appropriate to grant extensions of time under section 107(c), it may be necessary to provide relief under section 109 only in unusual cases.

31. *Procedural matters.* This action is taken pursuant to sections 1, 2, 4(i), 201(a), 229, 301, 303 and 332(c) of the Communications Act of 1934, 47 U.S.C. 151, 152, 154(i), 201(a), 229, 301, 303, 332(c)(1)(B).

32. *Ordering clauses.* Accordingly, IT IS ORDERED that the Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act and as set forth below, is adopted.

33. *It is Further Ordered* that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this SECOND REPORT AND ORDER, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Final Regulatory Flexibility Analysis

34. As required by the Regulatory Flexibility Act (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking in this proceeding.² The Commission sought written public comment on the proposals in the NPRM, including the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

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

² 62 FR 63302, Nov. 11, 1997, 13 FCC Rcd 3149, 3184-94 (1997) (NPRM).

³ See 5 U.S.C. 604.

35. *Need for and Purpose of this Action.* In the Second R&O, the Commission, in compliance with 47 U.S.C. 229, promulgates policies implementing the Communications Assistance for Law Enforcement Act.⁴ In enacting CALEA, Congress sought to "make clear a telecommunications carrier's duty to cooperate in the interception of communications for law enforcement purposes * * *"⁵ The Second R&O addresses in particular certain issues relevant to sections 102 and 109 of CALEA: (1) the definition of "telecommunications carrier" set forth in section 102, which determines which entities and services are subject to the assistance capability and other requirements of CALEA; and (2) the factors the Commission will consider in making determinations under section 109 of the Act as to whether compliance with CALEA is reasonably achievable for particular carriers.

36. The policies adopted in the Second R&O implement Congress's goal of ensuring that telecommunications carriers support the lawful electronic surveillance needs of law enforcement agencies as telecommunications technologies evolve. These policies promote the three key policies Congress sought to balance in enacting CALEA: "(1) to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies."⁶

37. *Summary of the Issues Raised by Public Comments Made in Response to the IRFA.* In the NPRM, the Commission asked for comments that specifically addressed issues raised in the IRFA.⁷ The IRFA focused on proposed reporting, recordkeeping and other compliance requirements relating primarily to sections 105 and 107 of CALEA. These matters lie outside the immediate scope of the Second R&O, which is limited to clarifying what entities, services, and facilities are subject to CALEA (pursuant to section 102) and examining the factors the Commission will consider when determining if compliance with CALEA's assistance capability requirements is reasonably achievable (pursuant to section 109). No party filed

comments directly responding to the IRFA that addressed issues dealt with in the Second R&O. Many parties, however, submitted comments on the Commission's proposals affecting small businesses set forth in the NPRM. These included requests that we exempt certain categories of telecommunications carriers from the assistance capability requirements, based on their limited operations or the burden of implementing the facility changes necessary to meet the requirements, and that in considering whether compliance is reasonably achievable, we attach special significance to the economic impact on "smaller carrier[s]." We summarize our action on these comments below.

38. *Description and Estimate of the Number of Small Entities to Which the Actions Taken May Apply.* The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the action taken.⁸ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁹ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁰ A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹¹ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."¹² Nationwide, as of 1992, there were approximately 275,801 small organizations.¹³ And finally, "small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of

less than 50,000."¹⁴ As of 1992, there were approximately 85,006 such jurisdictions in the United States.¹⁵ This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.¹⁶ The United States Bureau of the Census (Census Bureau) estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities. Below, we further describe and estimate the number of small business concerns that may be affected by the actions taken in this Second Report and Order.

39. As noted, under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the SBA.¹⁷ 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.¹⁸ We first discuss the number of small telecommunications entities falling within these SIC categories, then attempt to refine further those estimates to correspond with the categories of telecommunications companies that are commonly used under our rules.

40. *Total Number of Telecommunications Entities Affected.* 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.¹⁹ This number contains a variety of different categories of entities, 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

⁸ 5 U.S.C. 603(b)(3).

⁹ 5 U.S.C. 601(6).

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

¹¹ Small Business Act, 15 U.S.C. 632.

¹² 5 U.S.C. 601(4).

¹³ 1992 Economic Census, Bureau of the Census, U.S. Dept. of Commerce, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Administration).

¹⁴ 5 U.S.C. 601(5).

¹⁵ 1992 Census of Governments, Bureau of the Census, U.S. Dept. of Commerce.

¹⁶ *Id.*

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

¹⁸ 13 CFR 121.201.

¹⁹ 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, Bureau of the Census, U.S. Dept. of Commerce, at Firm Size 1-123 (1995) (1992 Census).

⁴ Public Law 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.).

⁵ CALEA, *supra*, at preamble.

⁶ H.R. Rep. 103-827(0), at 16 (1994).

⁷ NPRM at pars. 54-76.

operated.”²⁰ 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 actions taken in the Second R&O.

41. The most reliable source of current information regarding the total numbers of common carrier and related providers nationwide, including the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its “Carrier Locator” report, derived from filings made in connection with the Telecommunications Relay Service (TRS).²¹ According to data in the most recent report, there are 3,604 interstate carriers.²² These 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.

42. We have included small incumbent local exchange carriers (LECs) in this 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.”²³ 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.²⁴ 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.

43. *Wireline Carriers and Service Providers (SIC 4813)*. The Census Bureau reports that there were 2,321 telephone communications companies other than radiotelephone companies in operation for at least one year at the end of 1992.²⁵ 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 actions taken in the Second R&O.

44. *Local Exchange Carriers, Interexchange Carriers, Competitive Access Providers, and Resellers*. Neither the Commission nor SBA has developed a definition of small LECs, interexchange carriers (IXCs), competitive access providers (CAPs), or resellers. The closest applicable definition for these carrier-types under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.²⁶ 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.²⁷ According to our most recent data, there are 1,410 LECs, 151 IXCs, 129 CAPs, and 351 resellers.²⁸ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of these carriers that would qualify as small business concerns under SBA’s definition. Consequently, we estimate

that there are fewer than 1,410 small entity LECs or small incumbent LECs, 151 IXCs, 129 CAPs, and 351 resellers that may be affected by the actions taken in the Second R&O.

45. *Wireless Carriers (SIC 4812)*. The Census Bureau reports that there were 1,176 radiotelephone (wireless) companies in operation for at least one year at the end of 1992, of which 1,164 had fewer than 1,000 employees.²⁹ Even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA’s definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the actions taken in the Second R&O.

46. *Cellular, PCS, SMR and Other Mobile Service Providers*. In an effort to further refine our calculation of the number of radiotelephone companies that may be affected by the actions taken in the Second R&O, we consider the data that we collect annually in connection with the TRS for the subcategories Wireless Telephony (which includes PCS, Cellular, and SMR) and Other Mobile Service Providers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to these broad subcategories, so we will utilize the closest applicable definition under SBA rules, which is for radiotelephone communications companies.³⁰ According to our most recent TRS data, 732 companies reported that they are engaged in the provision of Wireless Telephony services and 23 companies reported that they are engaged in the provision of Other Mobile Services.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 Wireless Telephony Providers and Other Mobile Service Providers, except as described below, that would qualify as small business

²⁰ 15 U.S.C. 632(a)(1).

²¹ Carrier Locator: Interstate Service Providers, Fig. 1 (Jan. 1999) (Carrier Locator). See also 47 CFR 64.601–608.

²² Carrier Locator at Fig. 1.

²³ 5 U.S.C. 601 (3).

²⁴ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. 632(a) (Small Business Act); 5 U.S.C. 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. 13 CFR 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket, 96–98, *First Report and Order*, 61 FR 45475, Aug. 29, 1996, 11 FCC Rcd 15499, 16144–45 (1996).

²⁵ 1992 Census, *supra*, at Firm Size 1–123.

²⁶ 13 CFR 121.210, SIC Code 4813.

²⁷ See 47 CFR 64.601 *et seq.*; Carrier Locator at Fig. 1.

²⁸ Carrier Locator at Fig. 1. The total for resellers includes both toll resellers and local resellers. The TRS category for CAPs also includes competitive local exchange carriers (CLECs) (total of 129 for both).

²⁹ 1992 Census, *supra*, at Firm Size 1–123.

³⁰ *Id.* To the extent that the Commission has adopted definitions for small entities in connection with the auction of particular wireless licenses, we discuss those definitions below.

³¹ Carrier Locator at Fig. 1.

concerns under SBA's definition. Consequently, we estimate that there are fewer than 732 small entity Wireless Telephony Providers and fewer than 23 small entity Other Mobile Service Providers that might be affected by the actions taken in the Second R&O.

47. *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 business" for Blocks C and F as an entity that has average gross revenues of not more than \$40 million in the three previous calendar years.³² These regulations defining "small business" in the context of broadband PCS auctions have been approved by SBA.³³ No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There have been 237 winning bidders that qualified as small entities in the four auctions that have been held for licenses in Blocks C, D, E and F, all of which may be affected by the actions taken in the Second R&O.

48. *SMR Licensees.* The Commission has defined "small business" in auctions for geographic area SMR licenses as a firm that had average annual gross revenues of not more than \$15 million in the three previous calendar years, and the SBA has approved this definition.³⁴ The actions taken in the Second R&O may apply to SMR providers that either acquired geographic area licenses through auction or held licenses before the auctions. We do not have data reflecting the total number of firms holding pre-auction licenses, nor how many of these providers have annual revenues of less than \$15 million. Consequently, for purposes of this FRFA, we estimate that all of the pre-auction SMR authorizations may be held by small entities, some of which may be affected by the actions taken in the Second R&O.

49. The Commission has held two auctions for geographic area SMR licenses. Sixty winning bidders in the 900 MHz auction qualified as small entities, and 38 in the 800 MHz auction. Based on this information, we estimate that the number of geographic area SMR licensees that may be affected by the actions taken in the Second R&O includes these 98 small entities. An additional 230 channels in the lower portion of the 800 MHz SMR band will be made available in a future auction. However, the Commission has not yet determined how many licenses will be offered, and thus at this time there is no basis on which to estimate how many small entities may win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we estimate, for purposes of this FRFA, that all of the licenses may be awarded to small entities, some of which may be affected by the actions taken in the Second R&O.

50. *220 MHz Radio Service.* The 220 MHz service has both Phase I and Phase II licenses. There are approximately 1,515 Phase I non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the definition under the SBA rules applicable to radiotelephone communications companies.³⁵ According to the Census Bureau, only 12 radiotelephone firms out of a total of 1,176 such firms which operated during 1992 had 1,000 or more employees.³⁶ Therefore, if this general ratio continues to 1999 in the context of Phase I 220 MHz licensees, we estimate that nearly all such licensees are small businesses under the SBA's definition.

51. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the 220 MHz Third Report and Order we adopted criteria for defining small businesses for purposes of determining their eligibility for special provisions such as bidding credits.³⁷ We have defined a small

business as an entity that has average gross revenues not exceeding \$15 million for the preceding three years.³⁸ The Commission has held two auctions for Phase II 220 MHz licenses, and in them 53 entities that qualified as small or very small entities were winning bidders.

52. *Paging.* The Wireless Telecommunications Bureau has announced a series of auctions of paging licenses, offering a total of 16,630 non-nationwide geographic area licenses.³⁹ The first auction will commence on February 24, 2000, and will consist of 2,499 licenses.⁴⁰ For purposes of these auctions, a small business is defined as an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than \$15 million. The SBA has approved this definition.⁴¹ Given the fact that nearly all radiotelephone companies had fewer than 1,000 employees, and that no reasonable estimate of the number of prospective paging licensees could be made, the Commission has assumed, for purposes of the evaluations and conclusions in the FRFA, that all the auctioned 16,630 geographic area licenses would be awarded to small entities.⁴²

53. In addition, our Third CMRS Competition Report estimated that as of January 1998, there were more than 600 paging companies in the United States.⁴³ The Third CMRS Competition Report also indicated that at least ten of the top twelve publicly held paging companies had average gross revenues in excess of \$15 million for the three

Wireless Telecommunications Bureau, FCC (Jan. 6, 1988).

³⁸ 47 CFR 90.1021(b) See also *220 MHz Third Report and Order*, supra, 12 FCC Rcd at 11068-69, par. 291.

³⁹ See Future Development of Paging Systems, *Second Report and Order and Further Notice of Proposed Rulemaking*, WT Docket 96-18, 62 FR 11616, Mar. 12 1997, 12 FCC Rcd 2732, 2863 (1997).

⁴⁰ Public Notice, "Auction of 929 and 91 MHz Paging Service Spectrum," Report No. AUC-99-26-B, DA No. 99-1591, 64 FR 48623, September 7, 1999 (Wireless Telecom. Bur. Aug. 12 1999).

⁴¹ See Letter from A. Alvarez, Administrator, SBA, to A.J. Zoslov, Chief, Auctions Division, Wireless Telecommunications Bureau, FCC (Dec. 2, 1998).

⁴² See Future Development of Paging Systems, *Second Report and Order and Further Notice of Proposed Rulemaking*, WT Docket 96-18, 62 FR 11615, March 12, 1997, 12 FCC Rcd 2732, 2863-64 (1997).

⁴³ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Third Report*, FCC 98-9, 63 FR 11612, March 10, 1998, at 40 (June 11, 1998) (Third CMRS Competition Report).

³² 47 CFR 24.720(b)(1).

³³ Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 59 FR 37566, July 22, 1994, 9 FCC Rcd 5532, 5581-84 (1994).

³⁴ 47 CFR 90.1814(b)(1) and 90.912(b)(1). See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-583, *Second Order on Reconsideration and Seventh Report and Order*, 60 FR 48913, Sept. 21, 1995, 11 FCC Rcd 2639, 2693-702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order*, *Eighth Report and Order*, and *Second Further Notice of Proposed Rulemaking*, 61 FR 6212, Feb. 16, 1996, 11 FCC Rcd 1463 (1995).

³⁵ See supra par. 40.

³⁶ 1992 Census, supra, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms; 1992, SIC code 4812 (issued May 1995).

³⁷ *220 MHz Third Report and Order*, PR Docket No. 89-552, 62 FR 16004, Apr. 3, 1997, 12 FCC Rcd 10943, 11068-70, pars. 291-295 (1997). The SBA has approved these definitions. See Letter from A. Alvarez, Administrator, SBA, to D. Phythyon, Chief,

years preceding 1998.⁴⁴ Data obtained from publicly available company documents and SEC filings indicate that this is also true for the three years preceding 1999.

54. *Narrowband PCS.* The Commission has auctioned 11 nationwide and 30 regional licenses 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 FRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

55. *Rural Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.⁴⁵ A significant subset of the Rural Radiotelephone Service consists of Basic Exchange Telephone Radio Systems (BETRS).⁴⁶ We will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.⁴⁷ There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

56. *Air-Ground Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Air-Ground Radiotelephone Service.⁴⁸ Accordingly, we will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.⁴⁹ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify

as small entities under the SBA definition.

57. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico.⁵⁰ At present, there are approximately 55 licensees in this service. We are unable at this time to estimate the number of licensees that would qualify as small entities under the SBA's definition for radiotelephone communications.

58. *Wireless Communications Services (WCS).* This service can be used for fixed, mobile, radio location and digital audio broadcasting satellite uses. The Commission defined "small business" for the WCS auction as an entity with average gross revenues that are not more than \$40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues that are not more than \$15 million for each of the three preceding years. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as very small business entities, and one that qualified as a small business entity. We conclude that the number of geographic area WCS licensees that may be affected by the actions taken in the Second R&O includes these eight entities.

59. *Cable Services or Systems.* The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating \$11 million or less in revenue annually.⁵¹ This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were 1,788 total cable and other pay television services and 1,423 had less than \$11 million in revenue.⁵²

60. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers

nationwide.⁵³ Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.⁵⁴ Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators.

61. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate 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."⁵⁵ The Commission has determined that there are 66,000,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 660,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.⁵⁶ Based on available data, we find that the number of cable operators serving 660,000 subscribers or less totals 1,450.⁵⁷ We do not request nor do we collect information concerning whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000,⁵⁸ and thus are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act. It should be further noted that recent industry estimates project that there will be a total of 66,000,000 subscribers.

62. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements. In the

⁵³ 47 CFR 76.901(e). The Commission developed this definition based on its determination that a small cable operator is one with annual revenues of \$100 million or less. Implementation of Sections of the 1992 Cable Act: Regulation, *Sixth Report and Order and Eleventh Order on Reconsideration*, 60 FR 10534, February 27, 1995, 10 FCC Rcd 7393 (1995).

⁵⁴ Paul Kagan Associates, Inc., "Cable TV Investor," Feb. 29, 1996 (based on figures for December 30, 1995).

⁵⁵ 47 U.S.C. 543 (m)(2).

⁵⁶ 47 U.S.C. 76.1403(b).

⁵⁷ Paul Kagan Associates, Inc., "Feb. 29, 1996 (based on figures for Dec. 30, 1995).

⁵⁸ We do receive such information on a case-by-case basis only if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.1403(b) of the Commission's rules. See 47 CFR 76.1403(d).

⁴⁴ See Third CMRS Competition Report, App. C at 5.

⁴⁵ The service is defined in 47 CFR 22.99.

⁴⁶ BETRS are defined in 47 CFR 22.757, 22.759.

⁴⁷ See *supra* par. 40.

⁴⁸ The service is defined in 47 CFR 22.99.

⁴⁹ 13 CFR 121.201, SIC Code 4812.

⁵⁰ This service is governed by Subpart I or Part 22 of the Commission's Ruled. See 47 CFR 22.1001-.1037.

⁵¹ 13 CFR 121.201, SIC 4841.

⁵² 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D, SIC code 4841 (U.S. Bureau of Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

Second R&O we affirm our proposals in the NPRM to clarify what entities, services, and facilities are subject to CALEA.⁵⁹ In addition, we provide guidance regarding the factors the Commission will consider when determining under section 109 of CALEA if compliance with the assistance capability requirements of the Act is reasonably achievable, as well as the showings that entities filing petitions under section 109 will be expected to make.⁶⁰ These actions impose no reporting, recordkeeping or other compliance requirements beyond those imposed by CALEA itself.

63. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered. We have largely adopted the tentative conclusions of the NPRM as to what entities are and are not subject to the assistance capability requirements. Although section 102(8)(B)(ii) of CALEA gives us the discretion, we have decided not to exempt any categories in our rules. We have resolved the concern mentioned most frequently in the comments' regarding the dispatch service of "traditional" SMR operators—by finding such operations to be outside CALEA's definition of "telecommunications carrier" insofar as the service is not interconnected with the public switched network. We have considered AMTA's argument that CMRS providers serving niche business markets with limited interconnect capability are not technologically capable of CALEA compliance, but we have found that to the extent their services meet the definition of CMRS set forth in section 332(d) of the Communications Act, such entities must be considered subject to CALEA. In response to those commenters who argue that a private mobile radio service (PMRS) operator cannot be subject to CALEA for any reason, we have found that where a PMRS operator uses its facilities to offer a service that qualifies as CMRS, that service is subject to CALEA.

64. We recognize that compliance with the assistance capability requirements may be economically burdensome for some entities. CALEA provides two mechanisms through which carriers may seek relief: they may petition the Commission for an extension of the compliance date under section 107(c), and they may petition the Commission for a determination that compliance is not reasonably achievable under section 109(b). We believe these

mechanisms provide the best approach to avoiding undue burdens on small entities, without undercutting the objectives of CALEA.⁶¹ We are also prepared to reexamine whether any categories of service providers should be exempted, once we have gained some experience in applying section 109.

65. We have decided that in determining whether compliance with the assistance capability requirements is reasonably achievable, we will not at this time accord special significance to any particular factor enumerated in section 109 and we will not adopt any additional factors. As we note in the Second R&O, "the technological diversity of carrier networks, as well as other carrier characteristics, will, as a matter of course, mean that certain factors will be more important to the arguments of certain carriers than others, and not all of the factors enumerated in section 109 may be relevant to the analysis of a given reasonable achievability petition."⁶² We recognize, however, that carrier size may be a significant consideration in particular cases, and we reject AT&T's assertion that special consideration for a new market entrant could be tantamount to an unfair subsidy.

66. Report to Congress. The Commission shall send a copy of the Second R&O, including this FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.⁶³ In addition, the Commission shall send a copy of the Second R&O, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Second R&O and FRFA (or summaries thereof) will also be published in the **Federal Register**.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 99-26594 Filed 10-8-99; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 99-2035; MM Docket No. 99-167; RM-9391]

Radio Broadcasting Services; Mount Olive and Staunton, IL

AGENCY: Federal Communications Commission.

⁶¹ See *id.*, pars. 36-45.

⁶² *Id.*, par. 37.

⁶³ See 5 U.S.D. 801 (a)(1)(A).

ACTION: Final rule.

SUMMARY: The Commission, at the request of Talley Broadcasting Corporation, reallocates Channel 287A from Mount Olive to Staunton, Illinois as its first local aural transmission service, and modifies Station WAOX(FM)'s construction permit accordingly. See 64 FR 28133, May 25, 1999. Channel 287A can be reallocated to Staunton in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at petitioner's authorized construction permit site. The coordinates for Channel 287A at Staunton are 39-02-37 North Latitude and 89-44-56 West Longitude. With this action, this proceeding is terminated.

DATES: Effective November 15, 1999.

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 99-167, adopted September 22, 1999, and released October 1, 1999. The full text of this Commission decision 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. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857-3800, 1231 20th Street, NW, Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Illinois, is amended by removing Mount Olive, Channel 287A, and adding Staunton, Channel 287A.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 99-26418 Filed 10-8-99; 8:45 am]

BILLING CODE 6712-01-U

⁵⁹ Second Report and Order, pars. 6-28.

⁶⁰ *Id.* pars. 29-45.