

substantially prevent implementation of the requirements of that section and the purposes of the Act, and authorizes state commissions to make certain factual determinations necessary to implementation of the granular analysis we adopt here.

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

71. In this section, the Commission responds to various arguments raised by TeleTruth, the National Federation of Independent Businesses (NFIB), and the Office of Advocacy of the Small Business Administration (SBA Advocacy) relating to the IRFA presented in the *NPRM*. It also addresses concerns raised by Senator (then-Representative) James Talent in a letter submitted in response to the *UNE Remand Order*, which was later incorporated into this proceeding. To the extent the Commission received comments raising general small business concerns during this proceeding, those comments are discussed throughout the Order and are summarized in Part X.A.5, below.

72. As an initial matter, the Commission rejects the contention that it failed to consider the needs of small business customers of competitive LECs in fashioning the analysis set forth in this Order. It has grappled, throughout this proceeding and throughout this Order, with the consequences our determinations will have on all market participants, including small business providers and the small business end users about which TeleTruth, NFIB, SBA Advocacy, and Senator Talent express concern. The Commission has also considered various alternatives to the rules it adopts, and has stated the reasons for rejecting these alternative rules, as commenters have urged. A summary of our analysis regarding small business concerns, and of alternative rules that we considered in light of those concerns, is presented in subsection 5 of the FRFA, *infra*.

73. Many of the complaints raised regarding the Commission's IRFA hinge on the argument that in performing the analysis mandated by the RFA, an agency must analyze the effects its proposed rules will have on "customers" of the entities it regulates. But as the courts have made clear time and again, this is not the case. Indeed, the D.C. Circuit "has consistently held that the RFA imposes no obligation to conduct a small entity impact analysis of effects on entities which [the agency conducting the analysis] does not regulate." Thus, the RFA imposes no independent obligation to examine the

effects an agency's action will have on the customers of the companies it regulates unless those customers are, themselves, subject to regulation by the agency. In any event, as noted above, we have considered the needs of small business customers of competitive (and incumbent) LECs throughout this Order. Our analysis of small business concerns is summarized in Part X.A.5, below.

74. TeleTruth argues that the Commission has taken inadequate steps to notify small businesses of this and other proceedings, in violation of the RFA. The Commission disagrees. The RFA requires the Commission to "assure that small entities have been given an opportunity to participate in the rulemaking," and proposes as example five "reasonable techniques" that an agency might employ to do so. In this proceeding, the Commission has employed several of these techniques: it has published a "notice of proposed rulemaking in publications likely to be obtained by small entities"; has "includ[ed] * * * a statement that the proposed rule may have a significant economic effect on a substantial number of small entities" in the *NPRM*; has solicited comments over its computer network; and has acted "to reduce the cost or complexity of participation in the rulemaking by small entities" by, among other things, facilitating electronic submission of comments. The Commission thus concludes that it has satisfied its RFA obligation to assure that small companies were able to participate in this proceeding.

75. TeleTruth further contends that the Commission's IRFA was flawed by its use of "boilerplate" language that differed little from the language used in the IRFAs prepared for other proceedings. However, the only language it cites does not even appear in the IRFA prepared for this proceeding. Moreover, TeleTruth has suggested no reason why the use of similar language in several proceedings is at all problematic. Indeed, the particular language about which it complains merely describes the "number of telephone companies affected" by a given proceeding—a class that is likely to differ little, if at all, among industry-wide rulemakings such as this.

76. TeleTruth next complains that the IRFA used outdated census data from 1992 in estimating the number of small businesses that might be affected by the Commission's decisions here. While certain 1997 census data became available in late 2000 and were not incorporated into the previous *NPRM*, this updating would not, we believe, have affected a small entity's decisions

concerning IRFA. This more recent data are reflected in subsection 3 of the FRFA, *infra*.

77. TeleTruth also contends that "[a] true IRFA analysis about small business telecom competitors would conclude that the current FCC is in violation of the Telecom Act and all of its provisions" because the Commission purportedly has failed to enforce its local competition rules. Such an assertion falls outside the scope of this rulemaking proceeding and our analysis herein. Complaints regarding carriers' compliance with the Commission's Rules are properly addressed in other venues. For example, section 208 of the Communications Act specifically permits small businesses and other entities to lodge complaints regarding other carriers' activities, and to seek enforcement of Commission regulations. Also, to the extent an incumbent LEC's obligations under section 251 are implemented through interconnection agreements, those obligations are enforceable as a matter of contract law through the courts.

78. TeleTruth next argues the RFA requires "an impact study on how [an agency's regulations] will harm small businesses," and that "the FCC has not done anything of the sort for this proceeding." The Commission disagrees: the RFA requires us to provide precisely the information contained in this FRFA, but does not mandate a separate "impact study." The Commission has therefore satisfied its RFA obligations.

79. In a letter challenging the *UNE Remand Order*, Senator Talent argued that that Order violated section 3(a)(2)(C) of the Small Business Act. Specifically, Senator Talent noted that the *UNE Remand Order* differentiated between businesses that used fewer than four access lines and those that used four or more lines, in contravention of the Small Business Act's directive that "unless specifically authorized by statute, no Federal department or agency may prescribe a size standard for categorizing a business concern as a small business concern," unless certain procedural requirements are satisfied. In the present Order, our action does not establish any special small business size standard.

80. TeleTruth and Senator Talent suggest that section 257 of the Act dictates a particular substantive result in this matter. Specifically, TeleTruth claims that this "Triennial Review is mandated in Section [257(c)]," and requires an outcome favorable to entrepreneurs and small businesses. Senator Talent argued that in limiting the class of elements subject to section