Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The Commission's Forfeiture	)	CI Docket No. 95-6
Policy Statement and	)	
Amendment of Section 1.80	)	
of the Rules to Incorporate	)	
the Forfeiture Guidelines	)	

REPORT AND ORDER

Adopted: June 19, 1997 **Released: July 28, 1997**

By the Commission:

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I. INTRODUCTION

1. This Report and Order adopts an amendment to Section 1.80 of the Commission's Rules to add a note to this rule that incorporates guidelines for assessing forfeitures. By this rule making proceeding, we adopt, with revisions, the Forfeiture Policy Statement and guidelines that were vacated by the court's decision in United States Telephone Association v. FCC, 28 F.3d 1232 (D.C. Cir. 1994) (USTA).[1]

II. BACKGROUND

2. In 1989, Congress amended the Communications Act of 1934 (the Act) to increase substantially the maximum dollar amounts for forfeitures that the Commission could impose under Section 503(b) and under other sections of the Act.[2] Specifically, Section 503 of the Act sets forth maximum forfeiture amounts for violations by licensees or regulatees in three categories: broadcasters and cable operators ("broadcast"), common carriers ("common carrier"), and other licensees, entities and members of the public that do not belong to the previous two categories ("other").[3] On August 1, 1991, the Commission released the Policy Statement, Standards for

[1] *Policy Statement, Standards For Assessing Forfeitures*, 6 FCC Rcd 4694 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993), *vacated*, *United States Telephone Association v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994) (*Forfeiture Policy Statement*). The *Forfeiture Policy Statement* as ultimately revised did not address forfeitures assessed against broadcast licensees for violation of the Commission's Equal Employment Opportunity (EEO) rules. Violations of the Commission's EEO rules were addressed in a subsequent Commission Policy Statement. *See In the Matter of Implementation of Commission's Equal Employment Opportunity Rules*, 9 FCC Rcd 6276 (1994) (*EEO Policy Statement)*. We note, however, that the guidelines for EEO forfeitures were also affected by the court's decision in *USTA*, and we subsequently vacated the *EEO Policy Statement*. We are addressing our EEO guidelines in a separate proceeding. *Streamlining Broadcast EEO Rules and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules To Include EEO Forfeiture Guidelines, Order and Notice of Proposed Rule Making*, 11 FCC Rcd 5154 (1996).

[2] Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989) (amending 47 U.S.C. §§ 202(c), 203(e), 205(b), 214(d), 219(b), 220(d), 362, 386, 503(b)).

[3] Specifically, Section 503(b)(2)(A) provides for forfeitures up to $25,000 for each violation or a maximum of $250,000 for each continuing violation by any broadcast station licensee or permittee, cable television operator or applicant for any broadcast or cable television operator license, permit, certificate, or similar instrument; Section 503(b)(2)(B) provides for forfeitures up to $100,000 for each violation or a maximum of $1,000,000 for each continuing violation by common carriers or an applicant for any common carrier license, permit, certificate or similar instrument; and Section 503(b)(2)(C) provides for forfeiture penalties up to $10,000 for each violation or a maximum of $75,000 for each continuing violation by any subject violator not covered in subparagraph (A) or (B). 47 U.S.C. § 503(b)(2)(A)-(C). We note that the Debt Collection Improvement Act of 1996 (DCIA), Pub. L. No. 104-134, § 31001, 110 Stat. 1321 (1996), requires that civil monetary penalties assessed by the federal government, whether set by statutory maxima or specific dollar amounts as provided by federal law, be adjusted for inflation based on the formula outlined in the DCIA. Thus, the statutory maxima pursuant to Section 503(b)(2)(A) increase from $25,000 to $27,000 and from $250,000 to $275,000. The statutory maxima pursuant to Section 503(b)(2)(B) increase from $100,000 and $1,000,000 to $110,000 and $1,100,000 respectively. Lastly, the statutory maxima pursuant to Section 503(b)(2)(C) increase from $10,000 and $75,000 to $11,000 and $82,500, respectively. The

Assessing Forfeitures, 6 FCC Rcd 4695 (1991) (Policy Statement), to assist both the Commission and licensees in adjusting to the statutory increases. Prior to the statutory increases, the Commission determined forfeiture amounts on a case-by-case basis using relevant precedent. The Policy Statement modified this approach by establishing base forfeiture amounts for a wide range of violations. The base forfeiture amount for each type of violation was calculated as a percentage of the statutory maximum for the service involved for each violation or each day of a continuing violation as set forth in Section 503(b). The guidelines further provided that the base forfeiture amount could be increased or decreased by the adjustment criteria that corresponded to the statutory factors that the Commission is required to consider in assessing a monetary forfeiture penalty. 47 U.S.C. § 503(b)(2)(D).[4] To determine the degree of the upward or downward adjustment, the guidelines recommended percentage ranges for each adjustment criterion.

3. On reconsideration, petitioners argued that the Policy Statement was invalid because it was a substantive rule adopted without notice and comment rule making procedures required by the Administrative Procedure Act and not a general statement of policy. See 5 U.S.C. § 553. The Commission disagreed, noting that the Policy Statement expressly stated that the Commission retained discretion in individual cases and did not consider the Policy Statement a binding rule. Policy Statement Reconsideration Order, 7 FCC Rcd 5339 (1992), denying reconsideration of 6 FCC Rcd 4695 (1991). In 1993, after reviewing how the Policy Statement functioned in practice, the Commission made several modifications to the Policy Statement to ensure both consistency and flexibility in applying the forfeiture amounts and adjustment criteria in individual cases. Again the Commission reiterated that it retained discretion to deviate from the guidelines in specific cases. 1993 Policy Statement, 8 FCC Rcd 6215 (1993), (1993 Policy Statement). In 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the Policy Statement (including the reconsideration order and 1993 Policy Statement), on the ground that it was a rule promulgated without notice and comment and therefore invalid. United States Telephone Association v. FCC, 28 F.3d 1232 (D.C. Cir. 1994). Following the court's decision, the Commission and its staff returned to determining forfeiture amounts on a case-by-case basis, using the statutory factors set forth in Section 503(b) of the Act.

4. In the Notice of Proposed Rule Making (NPRM),[5] we followed the court's requirement that the Commission's forfeiture policy statement be put out for notice and comment. We proposed to adopt the same forfeiture guidelines set out in the original Policy Statement, but requested comments on all aspects of that proposal. In addition, we requested specific comment on the following issues:

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increased statutory maxima became effective on March 5, 1997.

[4] Section 503(b)(2)(D) requires the Commission to "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. §503 (b)(2)(D).

[5] *In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 10 FCC Rcd 2945 (1995).*

A. Whether the Commission should use guidelines to assess forfeitures instead of the traditional case-by-case approach;

B. Whether the guidelines proposed in the notice of proposed rule making should be modified;

C. Whether adjustment factor ranges should be adopted.

Additionally, we sought comment on our proposal to apply any newly adopted Forfeiture Policy Statement and guidelines to all pending forfeiture proceedings which were initiated after the effective date of the Forfeiture Policy Statement. We received a total of 17 comments, 1 informal comment, and 8 reply comments in response to the NPRM.[6]

III. DISCUSSION

A. Forfeiture versus the traditional case-by-case approach

5. In general, most commenters supported the concept of a guideline-based forfeiture system rather than a case-by-case approach in assessing forfeitures. Ten commenters and one reply commenter explicitly or generally supported the concept of a guideline-based forfeiture system: ARRL at 9-11; Bell Atlantic at 4; MCI at 1; USTA at 1; Infinity at 2; MariTEL at 5; PageNet at 7-10; AMTA at 3; PCIA at 1; Southwestern Bell at 2; Motorola at 1. In particular, MCI Telecommunications Corporation (MCI) noted that a schedule of fines with discretionary adjustment ranges should translate into public benefit through fair and prompt resolutions of violations. MCI Comments, 1. The United States Telephone Association (USTA) also indicated that forfeiture guidelines can contain information that may deter violations of important rules and assist the Commission in developing priorities among different violations. USTA Comments, 2. One commenter supported the case-by-case approach simply because it believed the Commission could not oversee a procedure that encompassed both flexible guidelines and staff discretion. Brown and Schwaninger Comments, 2. Three commenters raised specific concerns about the potential adverse

[6] Comments were filed by: American Mobile Telecommunications Association, Incorporated (AMTA); American Radio Relay League (ARRL); Bell Atlantic Telephone Companies (including Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.)(Bell Atlantic); Brown and Schwaninger; Emery Telephone, Harrisonville Telephone Company, and Mobile Phone of Texas, Incorporated (jointly referred to herein as Emery *et al*); Infinity Broadcasting Corporation (Infinity); MCI Telecommunications Corporation (MCI); MobileMedia Communications, Incorporated (MobileMedia); National Association of Broadcasters (NAB); Paging Network, Incorporated (PageNet); Personal Communications Industry Association (PCIA); San Bernardino Coalition of Low Power FM Broadcasting (San Bernardino); Southwestern Bell Telephone Company (Southwestern Bell); United States Telephone Association (USTA); and WGJMariTEL Corporation (MariTEL). A late filed letter was received from William Dougan (Dougan), and we have treated Mr. Dougan's views as an informal comment. Reply comments were filed by: AMTA; MCI; Motorola Incorporated (Motorola); National Telephone Cooperative Association (NTCA); PCIA; San Bernardino; Southwestern Bell; and USTA.

effect that the guidelines may have on businesses and their goal to provide universal services, and claimed that forfeiture guidelines would thus be inconsistent with Section 303(r) of the Act, 47 U.S.C. § 303(r), which provides the Commission with broad rule making authority to further the public interest, convenience and necessity. Emery et al.[7] at 6. Emery et al. suggest that the Commission not proceed with this rule making because the Republican Party's "Contract with America" imposes a moratorium on all rule making. Thus, Emery et al. contend that the issuance of any rules would be invalid and contrary to the express wishes of Congress. See Emery Comments, 9. An informal commenter, Mr. William L. Dougan, stated that the guidelines and forfeitures violate the United States Constitution because he cannot get a license for low power operation on FM frequencies. Letter from William Dougan to Secretary, FCC, April 4, 1995, at 1- 2. San Bernardino Coalition of Low Power FM Broadcasting (San Bernardino), which also favors a registration program. See San Bernardino Reply Comments, para. 14.

6. We have considered the specific concerns raised by some of the commenters regarding the Commission's exercise of its discretion under a guideline-based system. We are satisfied that our procedures, as set out in paragraphs 25 and 26, will allow the Commission to apply its guidelines in a consistent and fairly uniform manner, while retaining discretion to look at the individual facts and circumstances surrounding a particular violation. We have also addressed the concerns raised by Emery et al. regarding the effects of the proposed base forfeiture amounts on the provision of universal services. We have devised a forfeiture policy that does not make any distinctions among the various common carriers (see discussion in paragraphs 13, 14 and 15). Specifically, the procedures set out in paragraph 25 are sufficient to provide the subject of an NAL with consideration of any mitigating factors that should be considered prior to imposition of a final forfeiture. We also do not believe our forfeiture guidelines will undercut universal service objectives of the Act. We also note that the moratorium mentioned by Emery et al. was not enacted into law. With respect to the concerns raised by Emery et al. however, we note that Congress enacted legislation that provides an opportunity for Congressional review of all major rules promulgated by agencies. The Contract with America Advancement Act of 1996, Pub. L. No. 104-121 § 110 Stat. 847 (1996).

7. We reject the constitutional objections to the guidelines or to the adoption of any policy statement as raised by Mr. Dougan or San Bernardino. The Commission may, consistent with the First Amendment, impose forfeiture penalties for violations of its licensing rules, even when its licensing scheme does not provide for certain types of transmissions. See National Broadcasting Co. v. United States, 319 U.S. 190, 209-217 (1943).

8. We therefore agree with the commenters that adoption of forfeiture guidelines is warranted. Guidelines will provide the needed measure of predictability to the process and uniformity to our administrative sanctions while retaining flexibility for the Commission to act appropriately in particular cases. For this purpose, we hereby adopt a base forfeiture amount

[7] Inasmuch as the text of the comments submitted individually by Emery Telephone, Harrisonville Telephone, and Mobile Phone of Texas are identical, we will hereafter refer to these comments as the comments of Emery *et al.*

structure that will serve as a guideline for determining forfeiture liability amounts for specific violations of the Act and the Commission's Rules. As was our intent with the prior Policy Statement, these guidelines will not be binding on the Commission, the staff or the public. We retain discretion to take action in specific cases as warranted.

B. Proposal Modifications

9. Many commenters concluded that, although guidelines are beneficial to the forfeiture process, the guidelines as proposed were not rational and equitable.[8] The National Association of Broadcasters (NAB) along with several common carriers, both wireline and wireless, including MCI, Southwestern Bell Telephone Company (Southwestern Bell), MobileMedia Communications Incorporated (MobileMedia), USTA, Personal Communications Industries Association (PCIA), WJGMariTEL Corporation (MariTEL), and Paging Network (PageNet), urged the Commission to consider modification of the vacated schedule of forfeitures.[9] Commenters further contended that many of the assumptions underlying the forfeiture guidelines are outdated. For example, MobileMedia stated that a Further NPRM was needed because Commercial Mobile Radio Service (CMRS) licensees and Personal Communication Service (PCS) licensees were not in existence when Congress increased the statutory forfeiture amounts and were not mentioned by the Commission in the instant NPRM. MobileMedia Comments, 2-3.

10. American Mobile Telecommunications Association, Incorporated (AMTA), echoing comments submitted by Southwestern Bell, noted that as "service offerings merge among various classes of licensees, these widely-differing base amounts no longer make regulatory sense, nor do they reflect the Commission's goal of regulatory parity."[10] In the face of convergence of the cable TV and telephone industries,[11] Bell Atlantic contended that "[a]s competition among the various industries accelerates, the legal requirements of providing balanced incentives coincide to dictate that the penalties be set based on the nature of the offense, and not the identity of the transgressor." Bell Atlantic Comments, 3-4. In addition, commenters urged the Commission to consider new ways to implement a policy rather than merely proposing the same guidelines that the court rejected. In implementing any guidelines, commenters asked the Commission to address or clarify how the

[8] USTA Comments, 1; San Bernardino Comments, 1; Emery Comments, 2; MobileMedia Comments, 5; PageNet Comments, 2-3; NTCA Reply Comments, 3.

[9] NAB Comments, 5; MobileMedia Comments, 3-4; MCI Reply Comments, 1; MariTEL Comments, 4; Southwestern Bell Comments (generally); USTA Comments (generally); PCIA Comments (generally).

[10] AMTA Reply Comments, 4. Southwestern Bell argued that the Commission has no reasonable basis for the disparate treatment it proposes "in the face of rapidly converging industries, e.g. cable and telephone." *See* Southwestern Bell Comments, 3.

[11] In support, Bell Atlantic cites *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992-Rate Regulation*, 9 FCC Rcd 4119, para. 24 (1994).

guidelines affect issues such as the use of different base amounts for similar violations in different services,[12] the use of different statutory maxima to justify different base amounts,[13] the use of upward and downward adjustment factors,[14] the method for ascertaining ability to pay a forfeiture, and the weight to be given to a previous violation in subsequent enforcement or transactional proceedings involving the same licensee. [15]

11. Inasmuch as the NPRM in this proceeding asked for comments on all aspects of the Commission's forfeiture policy, including the "other" category, and given that CMRS and PCS are both common carrier services, we believe that a Further NPRM concerning the need to include new services is unnecessary.[16] Upon review, however, we are persuaded that the guidelines should be revised. The following paragraphs discuss the two main revisions that we have made to the proposed guidelines and the reasons for these revisions.

i. Use of the same base forfeiture amount for similar violations in different services.

12. Most commenters objected to the proposed system of imposing different base forfeiture amounts for similar violations depending upon the service provided by the violator.[17] They argued this structure was arbitrary because the Forfeiture Policy Statement failed to provide an explanation for the different base forfeiture amounts.[18] USTA pointed out that the court found that the Commission did not provide any rationale for this action.[19] Other commenters pointed out that the availability of mitigating factors did not remedy the Commission's error in not providing a

[12] *See e.g.*, Bell Atlantic Comments, 2-3; Emery Comments, 18; PCIA Comments, 4-5.

[13] *E.g.*, Bell Atlantic Comments, 2-3; USTA Comments, 2; Emery Comments, 13-15, 20.

[14] *E.g.*, NAB Comments, 7-9; PageNet Comments, 8.

[15] Infinity Comments, 2-8.

[16] *See e.g., Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (1996).

[17] *See* MobileMedia Comments, 4; MCI Reply Comments, 2; USTA Comments, 2; Bell Atlantic Comments, 2-3; Infinity Comments, 2; Emery Comments, 18; PCIA Comments, 1; NTCA Reply Comments, 4; PageNet Comments, 2; Southwestern Bell Comments, 3.

[18] MCI Reply Comments, 1; USTA Comments, 1-2; Infinity Comments, 2; Bell Atlantic Comments, 2; MobileMedia Comments, 4-5; Southwestern Bell Comments, 2; NTCA Reply Comments, 3. Entities such as the PCIA Reply Comments, 3, agreed with Emery Comments, 16.

[19] USTA Comments at 5.

reasoned analysis for the different base forfeiture amounts among services. See, e.g., Emery Comments, 17; USTA Comments, 4, n. 3. They also argued that neither the language of the 1989 statutory amendment nor its legislative history provided support for the Commission's action establishing different base forfeiture amounts for each service, or higher base forfeiture amounts when the violation occurs in a service that has a higher maximum. Commenters argued that in setting different forfeiture amounts based on the identity of the violator rather than the nature of the violation, the Commission violated basic and fundamental principles of regulatory parity. See e.g., MCI Comments, 3. Several commenters also pointed out that, with upcoming changes in ownership rules and the technical and legal ability of different licensees to provide the same type of communication service, implementing different base amounts as proposed would result in dissimilar forfeiture amounts for similar violations based solely on the identity of the licensee providing the service. PageNet Comments, 2-3; Southwestern Bell Telephone Company (Southwestern Bell) Comments, 3; Bell Atlantic Comments, 3-4. Bell Atlantic argued that, contrary to the Commission's assertions in the NPRM, adoption of the forfeiture schedule as proposed would not "allow for comparable treatment of similarly situated offenders," but would levy forfeitures against common carriers that are four times the amount levied against broadcast or cable TV companies for the same or similar violations. Bell Atlantic Comments, 2-3.

13. Some common carriers, including commercial mobile radio service providers argued that the Commission has no basis for imposing higher forfeitures for common carrier violations.[20] Emery et al. argued that the 1989 statutory change only creates a higher statutory maximum for common carriers, and no legislative history or language in the statute supports the Commission's proposal that common carriers be treated more severely than broadcasters. They also contended that adoption of a forfeiture policy which made no distinctions between large and small common carriers would also violate the Commission's mandate and fundamental purpose as stated in Section 1 of the Act: to promote communications services and competition.[21]

14. In light of the problems outlined, most of the commenters suggested that the Commission implement a uniform forfeiture system, imposing fines according to the nature of the violation rather than the type of violator. In the alternative, if the guidelines must be based on the type of violator as well as the nature of the violation, several commenters propose that the Commission make distinctions among the types of violators (e.g., large common carriers versus small CMRS) within a group of licensees that provides the same type of communication service.[22] Some commenters suggested that the guidelines be based on the degree of injury or harm rather than

[20] PCIA Comments, 5, and Reply Comments, 2; Emery Comments, 13-15, 20.

[21] Emery *et al.* contend that the only logical explanation for approving a higher statutory maximum may have been to deter "those very few common carriers (such as AT&T and MCI) that have such high earnings." These commenters, however, stated that even the largest carriers should not be fined at the high percentages unless aggravating circumstances exist. Emery Comments, 20.

[22] *See e.g.*, PCIA Reply Comments, 3; PageNet Comments, 4-5; and AMTA Comments, 4-5.

a percentage of the maximum amount. Emery et al., for example, urged the Commission to look at the various approaches it took prior to implementing the Forfeiture Policy Statement. It argued that the amounts imposed were more reasonable because less serious violations were assessed on a flat-rate approach and serious violations involving aggravating circumstances were assessed the per diem statutory maximum, which was then no more than $2,000. [23] Two commenters even suggested that one base amount be used for all violations, as was done with tower lighting and marking violations. [24]

15. While we continue to believe that our prior approach was lawful, we have determined that it would be a fairer approach for the forfeiture guidelines to adopt uniform base forfeiture amounts for similar violations regardless of the nature of the service involved. We believe that this decision is fully supported by the record established by the commenters, and will result in a generally fairer approach to forfeiture proceedings in most cases.

16. Our decision reflects consideration of the issues of fair treatment raised by several commenters. First, we reviewed the recommendation made by several commenters that CMRS and other services not mentioned in the original Policy Statement be treated in the "other" category rather than in the "common carrier" category.[25] Although Section 332 provides that CMRS licensees are common carriers under the Act,[26] these commenters argued that it is unfair to now impose higher base forfeiture amounts when these entities would receive smaller fines under the earlier Policy Statement as private carriers that were in the "other" category. MariTEL Comments, 3. Alternatively, if the Commission does not treat them as belonging to the "other" category, CMRS commenters argued that a new category should be created for these services. We find this argument unpersuasive. Section 332(c)(1) requires that CMRS providers will be treated as common carriers for purposes of the Act.[27] Accordingly, CMRS providers will be treated as common carriers for purposes of Section 503 of the Act and our forfeiture guidelines. As a second issue of fair treatment raised in this proceeding, PageNet contends that the proposed forfeitures did not address the discriminatory effect that would result against Radio Common Carrier (RCC) paging carriers because they are licensed on a transmitter basis rather than a market basis as are Personal Communications Service (PCS) licensees. PageNet Comments, 2. We believe, however, that this concern relates to licensing procedures that are not within the scope of this rule making proceeding.

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[23] Emery Comments, 10-11.

[24] *See* USTA Comments, 6; MCI Reply Comments, 2.

[25] MobileMedia Comments, 3; MariTEL Comments, 4; Emery Comments, 20, 24.

[26] See 47 U.S.C. § 332.

[27] 47 U.S.C. § 332(c)(1).

17. We recognize that Congress established different statutory maxima for broadcasters and for common carriers than for other persons who violate our rules. We believe this permits, but does not require, a forfeiture schedule that distinguishes among these categories of entities. As discussed below (see para. 24), however, we believe that there are better ways to achieve Congress's explicit intention that forfeitures serve as "a meaningful sanction to the wrongdoers and an effective deterrent to others." see Omnibus Budget Reconciliation Act of 1989, H.R. Conf. Rep. 386, 101st Cong., 1st Sess., 434 (1989).

ii. Revisions to the proposed base forfeiture amounts.

18. The majority of commenters took issue with the base forfeiture amounts. Some commenters suggested that the amounts proposed for each violation were unreasonably high, did not deter violations, evidenced a punitive rather than a remedial purpose, and only served to hinder entities who were often unaware of the regulatory requirements.[28] In particular, Emery et. al. argued that the proposed base forfeiture amounts of 40-80 percent of the statutory maxima were contrary to the Commission's history of assessing reasonable forfeitures to ensure substantial compliance by licensees and therefore, the amounts should be reduced. In support, they noted that common carrier forfeitures issued before the statutory increase were seldom more than 25 percent of the maximum, and that forfeitures assessed after the statutory increase but before the implementation of the prior policy statement were no more than 0.5 percent of the new one million dollar maximum. Emery Comments, 11-12. NAB and MCI also agreed that the base amounts suggested in the proposed forfeiture guidelines were too high and should be reduced by 50 percent with the exception of tower safety violations. NAB Comments, 5; MCI Reply Comments, 3.

19. The legislative history of Section 503 of the Act demonstrates that, Congress recognized the need to authorize the Commission to impose forfeitures sufficiently high to deter violations and constitute a meaningful sanction when violations occur. Specifically, in 1978, Congress increased the Commission's forfeiture authority, stating:

> The maximum amount of forfeitures permitted for single and multiple violations is unrealistically low to be an effective deterrent for highly profitable communications entities or to provide sufficient penalty to warrant the Attorney General's or the various U.S. district attorneys' attention for prosecuting forfeitures within the Federal district courts.

Sen. Rep. No. 580, 95th Cong. 1st Sess. 3 (1978), reprinted in 1978 U.S.C.C.A.N. 109, 111. Similarly, in 1989, Congress further increased the Commission's forfeiture authority stating its intent that forfeitures "serve as both a meaningful sanction to the wrongdoers and a deterrent to others." See H.R. Conf. Rep. 386, at 434 (1989). We believe that the increases in our forfeiture authority as

[28] MCI Comments, 1-2; Reply Comments, 3 (agreeing with Emery *et al* that the forfeiture amounts are too high, Emery Comments, 10-14, 16-17); Emery Comments, 10 (should be remedial and not punitive); NAB Comments, 6; USTA Comments, 3, 5; AMTA Reply Comments, 4-5.

well as the accompanying legislative history of our forfeiture authority support our determination that forfeiture amounts should be set high enough to serve as a deterrent and foster compliance with our rules.

20. As noted before, however, we have also determined that the guidelines for base forfeitures adopted here will not reflect distinctions based on the traditional classification of broadcast, common carrier, and other services. Consistent with our policy of protecting the public and ensuring the availability of reliable, affordable communications, we based the guidelines on the degree of harm or potential for harm that may arise from the violation. Thus, the dollar amount for the violation, regardless of service, generally starts at the same amount. Our experience in assessing forfeitures, however, has shown that although the type of violation is the same, each case will present its own unique facts. In particular, the identity of the licensee or the nature of the service are not wholly irrelevant to a determination of the seriousness of the harm. We cannot, for example, say that the degree of harm resulting from a violation of operating power limits committed by a full power broadcast station is identical to the degree of harm resulting from the same violation by an amateur radio operator. Nor can we conclude that the prospect of a $10,000 forfeiture for a particular offense will have the same deterrent effect on a small computer vendor, a moderately-sized radio common carrier, and a $10 billion per year local telephone company or interexchange carrier. Accordingly, as discussed below, we will use the adjustment factors to assess the forfeiture amount in light of all relevant facts.

21. In order to develop base amounts that could apply to all services, we concluded that the uniform base amounts could not be higher than the statutory maxima for any service. Inasmuch as the statutory maxima for broadcast, cable and common carrier are higher than for the remaining services, the statutory maxima for services other than broadcast, cable and common carrier was used as the common denominator. Thus, the uniform base forfeiture amounts generally adhere to the higher end of the statutory maximum of $10,000, which is the maximum forfeiture amount per violation that may be assessed against entities that are not classified as broadcasters, cable operators, or common carriers.[29] Consistent with these parameters, the uniform base forfeiture amounts adopted here and set forth in Appendix A reflect reductions in most of the forfeiture amounts that were proposed in the NPRM. We have made, however, two exceptions to our determination to use the $10,000 statutory maximum as a basis for establishing uniform base forfeiture amounts. First, we have set the base forfeiture amount for misrepresentation at the statutory maximum for the particular type of service provided by the violator. Regardless of the factual circumstances of each case, misrepresentation to the Commission always is an egregious violation. Any entity or individual that engages in this type of behavior should expect to pay the highest forfeiture applicable to the service at issue. Indeed, the revocation of the license may well also result from misrepresentation. 47 U.S.C. § 312(a)(1). Second, we have made an exception for violations that are unique to a particular service. In establishing guidelines for base forfeiture amounts for these violations, we have used case precedent developed by the Commission since the Court vacated the

[29] We note that the statutory maxima for monetary forfeiture penalties were upwardly adjusted for inflation, effective March 5, 1997. *See* note 3, *infra.*

Policy Statement and, where no precedent exists, we have determined base amounts that reflect the level of egregiousness, based on the degree of harm, that we attach to the particular violation.

22. We believe it is important to make the following general observations about the base forfeiture amounts adopted here. First, any omission of a specific rule violation from the list set forth in Appendix A should not signal that the Commission considers any unlisted violation as nonexistent or unimportant. The Commission expects, and it is each licensee's obligation, to know and comply with all of the Commission's rules. Indeed, we believe that the rigorous enforcement of the minimum regulatory requirements resulting from the recent amendments to the Communications Act will become critical to the preservation of the open competitive markets that the recent amendments seek to create. [30] Although we have adopted the base forfeiture amounts as guidelines to provide a measure of predictability to the forfeiture process, we retain our discretion to depart from the guidelines and issue forfeitures on a case-by-case basis, under our general forfeiture authority contained in Section 503 of the Act. See para. 24 infra.

23. Second, we note that the base forfeiture amounts set forth in Appendix A may appear high for entities that fall within the statutory classification of "other," for whom the statutory maximum is $10,000 per violation. In other words, base forfeiture amounts are indeed very close to the maximum forfeiture that may be assessed against these entities. We believe, however, that the system of uniform base forfeiture amounts can be applied in a fair and equitable manner, with respect to all licensees, permittees, regulatees, and members of the public. Under the Act, many of the services in the "other" category, e.g., citizen band (CB) radio, domestic ship radios and aircraft radios are licensed by rule. See Section 307(e)(1) of the Communications Act of 1934, 47 U.S.C. § 307(e)(1). See also Section 403 of the Telecommunications Act of 1996, Pub. L. No. 104 -104, 110 Stat. 56 (1996). Except for egregious violations, it has been our general practice to issue warnings to first time violators who are not licensed on an individual basis. Thus, this type of violator would receive a forfeiture only after it has violated the Act or rules despite the prior warning. We believe that the continuation of this practice of warnings to entities licensed by rule, except in egregious cases involving harm to others or safety of life issues, decreases any adverse impact that the adopted base forfeiture amounts may have on these entities.

24. Third, on the other end of the spectrum of potential violators, we recognize that for large or highly profitable communications entities, the base forfeiture amounts set forth in Appendix A are generally low. In this regard, we are mindful that, as Congress has stated, for a forfeiture to be an effective deterrent against these entities, the forfeiture must be issued at a high level. See para. 19, supra. For this reason, we caution all entities and individuals that, independent from the uniform base forfeiture amounts set forth in Appendix A, and pursuant to Section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), we intend to take into account the subject violator's ability to pay in determining the amount of a forfeiture to guarantee that forfeitures issued against large or highly

[30] *See generally*, Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 Yale J. on Reg. 325, 329-30 (1990) (explaining that, as direct economic regulation is abolished, the government's role in preserving competition will necessarily increase).

profitable entities are not considered merely an affordable cost of doing business. Such large or highly profitable entities should expect in this regard that the forfeiture amount set out in a Notice of Apparent Liability against them may in many cases be above, or even well above, the relevant base amount.

C. Adjustment Factors Percentage Ranges

25. Several commenters[31] also took issue with the Commission's guidelines for applying upward and downward adjustment factors in determining a reasonable forfeiture amount. They contended that under the vacated guidelines, violations were seldom considered "minor violations" that would require reductions of 50 percent to 90 percent of the base amount and reductions were, therefore, illusory. For example, NAB indicated that a downward adjustment for a minor violation should apply when a rule encompasses multiple requirements, for example, maintaining all necessary records in the "public files", 47 C.F.R. § 73.1212. NAB Comments, 6-7. Additionally, some commenters contended that forfeitures should be upwardly adjusted only when the violator knows that it has deliberately violated the Commission's rules. See e.g., PageNet Comments, 8.

26. We agree with the commenters that there were difficulties associated with applying the adjustment factor ranges. Although the percentage ranges were designed as guidelines for adjusting the forfeiture based on the statutory criteria, the ranges still afforded the Commission and its Bureaus and Offices wide discretion to apply a specific percentage within the particular range at issue. To reflect more clearly the Commission's discretion to increase or reduce a forfeiture penalty as much as warranted based on the unique facts of each case, we have determined that the percentage ranges for the upward and downward adjustment factors should be eliminated. Thus, the Forfeiture Policy Statement and forfeiture guidelines that we adopt herein no longer provide percentage ranges for the adjustment factors outlined in Section 503 of the Act. (We are also eliminating the percentage ranges for the statutory forfeitures that are not assessed pursuant to Section 503 of the Act, see 47 U.S.C. §§ 202(c), 203(e), 205(b), 214(d), 219(b), 220(d), 223, 364, 386, 506, 554. This means that the Commission will initially assess these violations at the statutory amount, but can adjust downward based on the adjustment factors set out in Section 503 and the facts of the case.)

27. Although we are eliminating the percentage ranges, we are required by statute to consider various adjustment criteria before determining a forfeiture amount in each case. The adjustment criteria listed in Appendix A of the guidelines reflect the factors outlined in the statute. For example, the statute requires that we consider the "nature, circumstances, extent and gravity of the violation". Thus, the adjustment factors regarding the severity of the violation that may increase or decrease the forfeiture are: substantial harm, repeated or continuous violation, or substantial or economic gain derived from the violation, and the minor nature of the violation. The statute also requires that "with respect to the violator," we consider factors such as "the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."

[31] Emery Comments, 17-18; NAB Comments, 6-8; PageNet Comments, 8; MCI Reply Comments, 3-4.

Accordingly, the adjustment factors we evaluate in considering the actions of the violator include egregious misconduct, ability or inability to pay, intentional violation, prior violation of same or other requirements, good faith or voluntary disclosure, and history of overall compliance. 47 U.S.C. § 503(b)(2)(D). In sum, although the base amount is the starting point in assessing a forfeiture, the forfeiture may be decreased below the base amount or increased to the statutory maximum when the adjustment criteria are considered based on the facts of the case.

D. Other Issues

28. Discretion to depart from forfeiture guidelines. We sought comment on whether the Commission should retain discretion to depart from the guidelines in appropriate circumstances or, in the alternative, adopt the guidelines as a binding rule. Both USTA and Brown and Schwaninger indicated that guidelines could not provide effective notice to licensees or result in administrative efficiency as stated in the NPRM if the Commission is free to exercise its discretion and deviate from those guidelines. USTA Comments, 6; Brown and Schwaninger Comments, 2. Brown and Schwaninger contended that the guideline system would, in effect, become a case-by-case system, by prompting violators to seek exemptions from the guidelines for lesser forfeiture penalties and would invite litigation in forfeitures assessed by staff discretion. Brown and Schwaninger Comments, 2.

29. We agree that the predictability in the forfeiture process[32] is an important objective and adherence to the guidelines is a method to achieve this goal. Because this is only a guideline and not a binding rule, however, the Commission retains its discretion to depart from the guidelines where appropriate. As for the concerns expressed by the Commenters that the Commission's exercise of discretion will invite litigation, we note that regardless of which method is used to assess the forfeiture, parties who are dissatisfied with the process have always had the right to seek reconsideration of a forfeiture penalty before the Commission. Moreover, in a case initiated by a Notice of Apparent Liability, the party ultimately may be heard in a trial de novo in a district court of appropriate jurisdiction.

30. Use of warnings for first time violations. Some commenters suggested that the Commission adopt new enforcement methods, including an increased use of warnings for first time or minor violations prior to issuance of forfeitures.[33] NAB, in particular, suggested that the

[32] In accord with its discretion, the Commission may initiate a forfeiture action by either issuing a Notice of Apparent Liability or a Notice of an Opportunity for Hearing, 47 C.F.R. § 1.80 (e). The Notice of Apparent Liability commences a hearing on the record in which the Commission's final order may be subject to a trial *de novo* in District Court, and handled by the Department of Justice. If a forfeiture, however, is initiated by a Notice of an Opportunity for Hearing, the decision of the administrative law judge (ALJ) or any Commission order affirming the ALJ decision that is not challenged by the appellate court constitutes a final Commission order enforced by the Department of Justice in an action in which the validity and appropriateness of the forfeiture is not subject to review. 47 C.F.R. § 1.80 (g)(2); *see 47 U.S.C. § 503(b)(3)(B).*

[33] NAB Comments, 9-11; MCI Reply Comments, 3- 4.

Commission's rule making proceeding should look into more effective methods to obtain compliance rather than "better ways to accomplish the goals of developing guidelines for determining forfeiture amounts." NAB Comments, 9.

31. As the NPRM noted, it was never our intention that the guidelines be read to require that a forfeiture be issued in every case or in any particular case. NPRM, at 2945. We agree that warnings can be an effective compliance tool in some cases involving minor or first time violations. The Commission has broad discretion to issue warnings in lieu of forfeitures. See 47 C.F.R. § 1.89. Nonetheless, an approach whereby, except in cases of harm to others or safety of life, we would always issue a warning to first-time violators would greatly undermine the credibility and effectiveness of our overall compliance efforts. Licensees must strive to comply with rules. Such an approach could invite some licensees to commit first-time violations with impunity. Thus, we will continue to determine whether to issue a warning or assess a forfeiture based on the nature and circumstances of the specific violation.

32. Use of the issuance of an unpaid NAL in subsequent proceedings. Several commenters stated that the Commission's proposed forfeiture guidelines did not indicate the purpose for which the Commission uses pending forfeitures against a violator in subsequent proceedings. Infinity Broadcasting Inc. (Infinity) argued that the use of a Notice of Apparent Liability (NAL) or an unpaid Notice of Forfeiture in a subsequent proceeding appeared to contravene Section 504(c), which prohibits the use of a non-final, non-adjudicated forfeiture proceeding in any other proceeding before the Commission, and also prohibits the use of the underlying facts of the violations to increase the amount of subsequent forfeitures. Infinity Comments, 5-7.[34] Comments from NAB and ARRL also raised this issue.

33. Section 504 of the Act provides, inter alia that:

> In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this Act, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order becomes final.
>
> 47 U.S.C. § 504 (c).

The legislative history of Section 504(c), however, indicates that the Commission may use the facts underlying a violation in a subsequent proceeding. Although the Senate Commerce Committee

[34] Specifically, Infinity says that, "[o]n its face, Section 504(c) precludes any Commission purported finding of, and reliance on, 'patterns' of *unadjudicated misconduct in the forfeiture context." Infinity Comments, 4 (quotations and emphasis in original). The plain statutory language, however, does not contain the words "patterns" or "misconduct."*

Report noted that the Commission could not use the pendency of a forfeiture action prior to final adjudication against a licensee, the report went on to say:

> [S]ubsection (c) . . . is not intended to mean that the facts upon which a notice of forfeiture liability against a licensee is based cannot be considered by the Commission in connection with an application for renewal of a license, for example, or with respect to the imposition of other sanctions authorized by the Communications Act of 1934 . . . . [F]acts going to the fitness of the licensee could be introduced in evidence against such licensee notwithstanding that such facts are the basis of an order of forfeiture.
>
> S. Rep. No. 1857, 86th Cong., 2d Sess. 11 (1960).

34. We believe that we have faithfully implemented congressional intent in this area. Consistent with Section 504 of the Act, the Commission does not use the mere issuance or failure to pay an NAL to the prejudice of the subject. We reiterate here that we will not do so in the future unless the forfeiture penalty constitutes a final action: in other words, unless the forfeiture has been paid or finally adjudicated as stated in Section 504 of the Act. What the Commission has done in the past, and what we will continue to do where appropriate, is to use the facts underlying the prior violations that may have been the subject of an NAL. We are persuaded that using the underlying facts of a prior violation that shows a pattern of non-compliant behavior against a licensee in a subsequent renewal, forfeiture, transfer, or other proceeding does not cause the prejudice that Congress sought to avoid in Section 504(c).

35. The following example should provide guidance as to our use of facts underlying the issuance of an NAL. Assume that the Commission determined that a licensee violated the Commission's rules regarding permissible power on March 1, 1996, again on June 1, 1996, and again on October 1, 1996. Assume further that we then issue a $5,000 NAL for the March 1 violation and a second $5,000 NAL for the June 1 violation. In issuing an NAL for the October 1 violation, the Commission may well view the October 1 violation as repeated or part of a pattern of violations, in light of the earlier March 1 and June 1 violations. Thus, we may issue an NAL for $7,500 for the October 1 violation, citing the apparent March 1 and June 1 violations as a basis for a higher forfeiture. The NAL for the October 1 violation is not higher because of the two prior NALs or because the licensee has not paid the prior forfeitures, but rather because the underlying facts of the two prior apparent violations suggest egregious misbehavior by the licensee. The licensee will not be required to pay the $7,500 forfeiture without having an opportunity to present evidence before the Commission or in court that it did not commit the earlier violations. Obviously, if it were to convince the Commission or a court that it had not committed violations on March 1 and June 1, the licensee's forfeiture would be reduced by the Commission or the court for the October 1 violation (assuming it was proven to be a first time violation) to reflect the fact that it was not a repeated violation or part of a pattern of violations. The Commission would have complied with Section 504(c) because it would have used only the underlying facts, not the existence of prior NALs, against the licensee, and the licensee would have had the full opportunity to present appropriate evidence before having to pay any forfeiture.

36. Under this approach, the licensee is not being hurt in any way for its failure to pay the NAL. Moreover, the licensee will always have the opportunity to present evidence that the underlying facts relied on by the Commission did not constitute a violation, either by introducing evidence to that effect in a Commission hearing (e.g., renewal or transfer hearing) or in a court action to collect a subsequent forfeiture that is for a higher amount because of the earlier violations. See S. Rep. No. 1857. ("The licensee could not, therefore, complain of the introduction of such evidence so long as he has the right to cross-examine the witnesses introducing it and the further right to offer evidence to rebut it").

37. Specific rule violations. Several commenters raised concerns about the amounts proposed for specific violations. MCI, for example, urged that the amount of forfeitures charged for unauthorized conversions, known as "slamming" violations, should be reduced from the $75,000 proposed in the NPRM. MCI suggested that because these violations can easily result from human error, there should be a separate category of violations for "Failure to verify order to change long distance carrier." MCI argued that, although it is critical to deter fraudulent conversions, "it is important that the Commission not deter telemarketing invitations altogether." See MCI Comments, 1-2. NAB urged reductions in the amounts assessed for violations that involve multiple compliance factors (e.g., broadcast files where only a few documents may be missing). NAB proposed a provision that if a licensee violates only a portion of a rule, e.g., omits one document from the public file, the Commission will assess only a portion of the base forfeiture amount. NAB also sought "amnesty" from complying with the operator on duty and lottery broadcast requirements inasmuch as the Commission has initiated rule makings or made recommendations to Congress to eliminate these requirements. NAB also requested amnesty for Emergency Broadcast System/Emergency Alert System (EBS/EAS) violations during the transition period until all equipment has been converted. NAB Comments, 13-15. In addition, NAB urged that amnesty be offered for violations such as exceeding authorized antenna height, operation at an unauthorized location, and other tower related violations that do not pose safety threats. See NAB Comments, 11-12. Motorola agreed with NAB's amnesty proposal, and urged that the ultimate or primary burden for tower rules violations be placed on tower owners. Motorola Reply Comments, 2-3.

38. We agree with MCI that the forfeiture penalty amount proposed for unauthorized conversion of a consumer's primary interexchange carrier should be reduced. A review of the forfeitures issued for slamming violations since the USTA decision indicates that the Commission has generally assessed forfeitures at $40,000 for violations such as those in which fraud is an issue, or in cases where the carrier's deliberate failure to ensure that letters of authorization are valid and properly authorized rise to the level of gross negligence. See e.g., Excel Telecommunications, Inc., 11 FCC Rcd 19765 (1996), Long Distance Services, Inc., _ FCC Rcd __ (1997) DA 97-956 (released May 8, 1997). Accordingly, we are reducing the base amount for slamming to $40,000 rather than the $75,000 originally proposed in the NPRM.

39. Regarding NAB's contention that a violation should be reduced as minor when it is a partial violation of the rule, we note that the forfeiture guidelines we adopt today provide sufficient flexibility to allow for a forfeiture less than the base amount. In this regard, we disagree with NAB's

characterization that omission of the issue/program list from the public file is a minor violation; such a violation is serious in that it diminishes the public's ability to determine and comment at renewal time on whether the station is serving its community.[35] Nonetheless, even in these circumstances, we would always look to the facts surrounding any partial violation to determine if it warranted the base forfeiture amount or less. We reject NAB's proposal that we decline to issue forfeitures for violations of our operator on duty and lottery broadcast requirements. Unless Congress amends the Communications Act to deregulate the action in question, we will continue to issue forfeitures for this violation, as warranted in each case.[36] We note that NAB's arguments with respect to antenna tower violations have been largely rendered moot by the Commission's adoption of the Report and Order, Streamlining the Antenna Structure Clearance Procedure and Revision of the Rules Concerning Construction, Marking and Lighting of Antenna Structures, 11 FCC Rcd 4272 (1995). Under the new tower registration procedures adopted by the Commission, it is tower owners rather than licensees who will be primarily responsible for registering towers requiring marking and lighting under the Federal Aviation Administration guidelines. Further, in the antenna proceeding, the Commission also granted an amnesty period during which no forfeitures will be issued to licensees seeking to correct existing tower records.

40. With respect to violations for technical and equipment deficiencies resulting from changes from the EBS to the EAS, the request for amnesty is moot for broadcasters.[37] The issue of violation of the operator on duty rule is moot because the rule was eliminated by order released October 23, 1995. Amendment of Parts 73 and 74 of the Commission's Rules to Permit Unattended Operation of Broadcast Stations and to Update Broadcast Station Transmitter Control and Monitoring Requirements, 10 FCC Rcd 11479 (1995). As to other violations for which NAB seeks amnesty for licensees (e.g. operation at unauthorized location) we see no public interest basis for such action.

41. Clarification of certain terms. A few commenters urged clarification of the term "ability to pay" as an adjustment factor. Some commenters, echoing small carriers who argued that they should be guided by a different forfeiture scheme, noted that the Commission's apparent

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[35] In fact, in recent changes to the Telecommunications Act, Congress increased the maximum permissible term of broadcast licenses and expedited license renewal procedures by limiting comparative renewal challenges. *See* Section 204, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[36] As part of the Commission's 1995 legislative package submitted to Congress in May 1995, the Commission recommended, *inter alia*, that Congress eliminate the prohibition against broadcasting lottery information. Congress took no action on this recommendation and no legislation on this issue is currently pending.

[37] NAB filed its comments on March 28, 1995, and the EBS/EAS deadline for broadcasters was July 1, 1995. The deadline for modification of all EBS decoding gear for broadcasters was extended by the Commission to January 1, 1997. *See Report and Order and Further Notice of Proposed Rule Making, Amendment of Part 73 Subpart G of the Commission's Rules Regarding the Emergency Broadcast System*, 10 FCC Rcd 1786 (1994), *aff'd Memorandum Opinion and Order*, 10 FCC Rcd 11494 (1995).

definition of "ability to pay" is limited to "gross revenues" and does not adequately consider that many carriers provide high-cost, high-maintenance, low-profit services to rural communities as "an adjunct" to other operations. For this reason, they note, the revenues from more profitable operations should not be considered when evaluating the carrier's ability to pay.[38]

42. These commenters also argued that the large forfeitures in some cases could be the equivalent of a license revocation. They argue that "ability to pay" is based on gross revenues and no consideration is given to operating or maintenance expenses. A company, they argue, may be considered profitable when in fact it is operating on the margin. The commenters contend that this approach to determining "ability to pay" contravenes the "universal service" mandate of Section 1 of the Act because it disproportionately injures businesses who provide service to rural or less profitable areas, and discourages diversity. In addition, the commenters argue that this approach to "ability to pay" erodes the protections otherwise given to small businesses in the Paperwork Reduction Act and the Regulatory Flexibility Act. They argued that smaller carriers that now provide high-cost, high-maintenance, low-profit services to rural communities, e.g., improved mobile telephone services (IMTS) or Basic Exchange Telecommunications Radio Service (BETRS), will be driven out of business if they must pay higher forfeitures than other licensees for similar violations. [39] Because these services are provided by carriers as "an adjunct" to its other operations, they argue that the Commission would consider the higher profits from their other operations and the forfeitures would not be reduced based on the subsidiary's ability to pay.

43. As the commenters noted, Commission cases point to gross revenues as the starting point for determining a party's ability to pay. In PJB Communications of Virginia, Inc., 7 FCC Rcd 2088 (1992) (PJB Communications), we stated:

> [i]n general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture. Nevertheless, we recognize that in some cases, other financial indicators, such as net losses, may also be relevant. If gross revenues are sufficiently great, however, the mere fact that a business is operating at a loss does not itself mean that it cannot afford to pay a forfeiture.

PJB Communications, At 2089. Thus, PJB Communications indicates that factors other than gross revenues may also be considered. Indeed, the Commission does not use a strict "gross revenues" standard. For example, the Commission has reduced a forfeiture to an amount adequate to deter future misconduct after consideration of the violators' unprofitable history, and the relative lower value of the licensed operation at issue. See e.g., First Greenville Corporation, 11 FCC Rcd 7399 (1996); Benito Rish, 10 FCC Rcd 2861 (1995) (profit and loss statement submitted to reflect inability to pay a forfeiture); see also Pinnacle Communications, Inc., 11 FCC Rcd 15496 (1996) (analysis of the balance sheet and the profit and loss statement accompanied by the licensee's

[38] See Brown and Schwaninger Comments, 3; AMTA Comments, 4-6.

[39] PCIA Comments, 3-5; Emery Comments, 4-6, 12-13.

certification focused on net liabilities in light of default of loan payment). Although forfeiture amounts will be initially assessed according to the violation, the Commission's staff reviews all responses to NALs that claim inability to pay a forfeiture on a case-by-case basis in accordance with Section 503(b)(2)(D) of the Act. In this respect, we do not believe that focusing on the payment of forfeiture will deter service to rural or less profitable areas, discourage diversity or otherwise operate inconsistently with the universal service goals of the Communications Act.

44. We are cognizant of the concerns raised by small entities as to the burden and expense of documenting inability to pay a forfeiture by means of audited financial statements. In this regard, we note that the Commission has the flexibility to consider any documentation, not just audited financial statements, that it considers probative, objective evidence of the violator's ability to pay a forfeiture. See 47 C.F.R. § 1.80 (f)(3)[40]. The Commission intends to continue its policy of being sensitive to concerns of small entities who may not have the ability to pay a particular forfeiture amount or the ability to submit the same kind of documentation to corroborate the inability to pay. This is consistent with section 503(b)(2)(D) of the Communications Act and section 1.80(b)(4) of our rules, which provides that the Commission will take into account ability to pay in assessing forfeitures, and with our longstanding case law.

45. American Mobile Telecommunications Association (AMTA) sought clarification of various violations listed in the proposed Forfeiture Policy Statement. AMTA contended that several of the listed violations overlap or are duplicative such as construction or operation without a license, using an unauthorized frequency, and construction or operation at an unauthorized location, and recommended that the Commission simplify the proposed types of violations relating to the actual operation of a station. In addition, AMTA indicated that, because the Commission's overall regulatory scheme is generally designed to prevent interference among entities, the Commission has failed to explain why operating without any license would be considered four times as egregious as operating at a location not covered by the authorization. Similarly, AMTA questioned why forfeitures for using unauthorized frequencies are lower than forfeitures for operating without a license, but higher than forfeitures for operating at the wrong location. AMTA noted that it is unclear which violations would be applicable to a specialized mobile radio (SMR) licensee authorized to operate in the Washington, D.C. area that initiated service in Annapolis, MD on different frequencies prior to the grant of an FCC authorization to do so. AMTA asserted that the severity of the forfeiture should be based on likelihood or actuality of causing interference to another licensee. AMTA believed that the Commission needs to distinguish clearly between essentially ministerial/administrative violations and those with the potential for disturbing or disabling the operations of other facilities (interference potential). AMTA Comments, 7-8.

46. As AMTA noted, one of the principal reasons for requiring an FCC license to broadcast is to prevent interference with broadcast signals so that such signals can be received by the public. In the absence of a scheme requiring a license before transmitting can commence, it is not

[40] Section 1.80 of the Commission's rules states "[a]ny showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent. 47 C.F.R. § 1.80(f)(3).

clear how interference conflicts would be resolved. Such an approach would be costly, disruptive, inefficient, and directly contrary to the express will of Congress. See Turner Broadcasting System Inc. v. FCC, 114 S. Ct. 2445, 2456-57 (1994). Thus, ensuring that parties operate in accord with the license authorization is fundamental to successful implementation of our spectrum management objectives. Failure to receive authorization to transmit prior to transmission is not a mere ministerial oversight; it is an intentional disregard of the Commission's efforts to prevent interference. Thus, in AMTA's example about the SMR licensee, the party has engaged in unlicensed operation because, regardless of where it may properly transmit, it is transmitting from a location on a frequency prior to any Commission approval for that operation.

47. With respect to operating on an unauthorized frequency or unauthorized location, we note that frequency and location are very important to our spectrum management and interference prevention functions. These types of violations arise when a party seeks and receives an FCC license, but does not operate in full compliance with the authorization of license. Both scenarios involve operation under color of a license that creates a potential for interference or disruption of communications between licensed entities. Therefore, we agree with AMTA that the base forfeiture amount for each of these types of violations should be the same. We reiterate, however, that although we are using the same base forfeiture amount for these violations, the forfeiture amount may be affected by the severity of the interference and intentional nature of the violation, as well as all other adjustment factors.

48. Treatment of pending cases. NAB stated that the Commission should rescind any forfeiture imposed under the 1991 Policy Statement or 1993 Policy Statement that has not been paid. NAB Comments, 8. Infinity argued that forfeitures for violations prior to the effective date of any new policy statement should be based on case law decided under the statutory maximum in effect prior to changes in the statute in 1989.[41] Infinity Comments, 9 n. 8.

49. We reject these suggestions. Pursuant to Section 503 of the Act, the Commission has full authority to apply the increased statutory maximum in effect since 1989 and to adjust its policies and decisions in specific cases on an ongoing basis to take account of increased statutory amounts or changes in Commission enforcement priorities, regardless of the existence or non-existence of a forfeiture policy statement. All forfeitures assessed under the 1991 and 1993 Policy Statements conformed to the standards set out in Section 503 of the Act and, therefore, constitute the Commission's findings of liability for those violations. For these reasons, we will include recent case law in our analysis of pending cases. With respect to these pending proceedings, we will evaluate them under the case-by-case approach in effect when the violation occurred. We will also use the case-by-case approach for violations arising from facts that occurred before the effective date of this order but where the Commission will commence forfeiture action after the effective date.

[41] Infinity cites to the now abolished Section 503(b)(E) of the Act for the proposition that the Communications Act limited indecency forfeitures to $1,000 per day. The $1,000 per day limit on forfeitures was raised to $2,000 in 1978 and, for broadcasters, to $25,000 in 1989.

E. Other Matters

50. In cases where the Commission designates forfeiture matters for hearing (e.g., as part of a license application, license revocation or license renewal proceeding), the Commission's typically indicates that the forfeiture liability amount may be assessed up to the relevant statutory maximum. See Ellwood Beach Broadcasting, Ltd., 8 FCC Rcd 453, 454 n. 5 (1993). In light of recent amendments to the Equal Access to Justice Act made as part of the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996), we will discontinue this practice. Instead, we will indicate an appropriate maximum forfeiture amount in light of the specific facts at issue when initiating such hearing cases effective immediately.

51. We note that Section 223 of the recently enacted Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), enacted as part of the Contract with American Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996), requires agencies to establish a policy providing for the reduction and, under appropriate circumstances, the waiver of civil penalties imposed on small entities. As part of this policy, under appropriate circumstances, the agency may consider ability to pay in determining penalty assessments on small entities. Such circumstances may include, among others, violations discovered because the small entity participated in a compliance assistance or audit program, and good faith efforts demonstrated by the entity to comply with the law. Circumstances that may be excluded from the policy's applicability cover small entities that have been subject to multiple enforcement actions, willful or criminal violations, and violations that pose serious health, safety or environmental threats.

52. Our existing policies, as reflected in our precedent, and as retained here, comply with Section 223 of SBREFA. Warnings, rather than forfeitures, may continue to be appropriate in particular cases involving small businesses or others. See par. 31, supra. Under Section 503(b)(2)(D) of the Communications Act and section 1.80(b)(4) of our rules, we will continue to consider inability to pay a relevant factor in assessing forfeitures. See par. 44, supra. See also Appendix A, Section II, downward adjustment criterion (4). Our other upward and downward adjustment factors, which are reflective of existing policy, encompass many of the conditions and exclusions listed and Section 223 of SBREFA. See Appendix A, Section II. These factors will continue to be applied in cases of violations involving small entities (as well as others) to determine whether a waiver or reduction of a forfeiture is warranted.

IV. CONCLUSION

53. The forfeiture guidelines are intended as a guide for frequently recurring violations. They are not intended to be a complete or exhaustive list of violations. Moreover, the guidelines do not apply to violations for which the forfeiture amounts are statutorily established. See para. 23, supra. The mitigating factors of Section 503(b)(2) (D) will, however, be used to make adjustments in all appropriate cases, as warranted. In addition, the fact that a particular violation is not listed on the forfeiture guidelines schedule should also not be taken to mean that the violation is unimportant

or nonexistent. The Commission retains the discretion to impose forfeitures for other violations, including new violations of existing laws or regulations, or violations that arise from the use of new technologies or services.

V. ADMINISTRATIVE MATTERS

A. Final Regulatory Flexibility Analysis

54. Final Regulatory Flexibility Analysis: As required by Section 604 of the Regulatory Flexibility Act (RFA), the Commission prepared an Initial Regulatory Flexibility Analysis (IRFA) that was incorporated in the Notice of Proposed Rulemaking (NPRM).[42] The Commission sought written public comments on all the proposals in the NPRM, including the IRFA. Based on the analysis of the public comments, the Commission has prepared a final Regulatory Flexibility Analysis of the expected impact on small entities of the rule changes adopted in this Report and Order. The Final Regulatory Flexibility Analysis is discussed fully in Appendix C of this Report and Order.

B. Ex Parte Rules -- Permit-But-Disclose Proceeding

55. This is a permit-but-disclose notice and comment rule making proceeding. Ex parte presentations are permitted except during the Sunshine Agenda period, provided, they are disclosed as outlined in the Commission's rules. See generally 47 C.F.R.
§§ 1.1202, 1.1203, and 1.1206(a).

VI. ORDERING CLAUSES

56. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in Sections 4(i), 303(r) and 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 503(b), Part 1, Subpart A, Section 1.80(b), 47 C.F.R. § 1.80(b), is amended to incorporate as a note the Commission's Forfeiture Policy Statement, and the Guidelines for Assessing Forfeitures set forth in Appendix A.

57. IT IS FURTHER ORDERED, that this Report and Order will be effective sixty (60) days after publication of a summary thereof in the Federal Register.

[42] *In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to incorporate the Forfeiture Guidelines, 10 FCC Rcd 2945 (1995).*

58. IT IS FURTHER ORDERED, that a copy of the Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A

Chapter I of Title 47 of the Code of Federal Regulations is amended by adding a footnote to Part 1, Subpart A-Practice and Procedure, as follows:

I. Part 1--PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154, 303, and 309(j) unless otherwise noted.

2. Section 1.80 is amended by revising subsection (b) to read as follows:

§ 1.80 Forfeiture Proceedings.

(b) * * * * *

(4) * * *

NOTE:

GUIDELINES FOR ASSESSING FORFEITURES

The Commission and its staff may use these guidelines in particular cases. The Commission and its staff retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute. The forfeiture ceiling per violation or per day for a continuing violation stated in Section 503 of the Communications Act and the Commission's Rules are $25,000 for broadcasters and cable operators or applicants, $100,000 for common carriers or applicants, and $10,000 for all others. These base amounts listed are for a single violation or single day of a continuing violation. 47 U.S.C. § 503(b)(2); 47 C.F.R. § 1.80. For continuing violations involving a single act or failure to act, the statute limits the forfeiture to $250,000 for broadcasters and cable operators or applicants, $1,000,000 for common carriers or applicants, and $75,000 for all others. Id. Pursuant to the Debt Collection Improvement Act of 1996 (DCIA), Pub. L. No. 104-134, § 31001, 110 Stat. 1321 (1996), civil monetary penalties assessed by the federal government, whether set by statutory maxima or specific dollar amounts as provided by federal law, must be adjusted for inflation at least every four years based on the formula outlined in the DCIA. Thus, the statutory maxima increased to $27,000 for broadcasters and cable operators or applicants; $110,000 for common carriers or applicants, and $11,000 for others. For continuing violations, the statutory maxima increased to $275,000 for broadcasters, cable operators, or applicants; $1,100,000 for common carriers or applicants; and $82,500 for others. The increased statutory maxima became effective March 5, 1997. There is an upward adjustment factor for repeated or continuous violations, see Section II, infra. That upward adjustment is not necessarily applied on a per violation or per day basis. Id. Unless Commission authorization is required for the behavior involved, a Section 503 forfeiture proceeding against a non-licensee or non-applicant who is not a cable operator or common carrier can only be initiated for a second violation, after issuance of a citation in connection with a first violation. 47 U.S.C. § 503(b) (5). A citation is not required, however, for non-licensee tower owners who have previously received notice of the obligations imposed by Section 303(q) and Part 17 of the Commission's rules from the Commission. See Streamlining the Commission's Antenna Structure Clearance Procedure and Revision of Part 17 of the Commission's Rules concerning Construction, Marking, and lighting of Antenna Structures, 61 Fed. Reg. 04359 (Feb. 2, 1995). Forfeitures issued under other sections of the Act are dealt with separately in Section III below.

Section I. BASE AMOUNTS FOR SECTION 503 FORFEITURES

VIOLATION	AMOUNT
Misrepresentation/lack of candor	Statutory Maximum for each Service
Construction and/or operation without an instrument of authorization for the service	$10,000
Failure to comply with prescribed lighting and/or marking	$10,000
Violation of public file rules	$10,000
Violation of political rules: reasonable access, lowest unit charge, equal opportunity, and discrimination	$9,000
Unauthorized substantial transfer of control	$8,000
Violation of children's television commercialization or programming requirements	$8,000
Violations of rules relating to distress & safety frequencies	$8,000
False distress communications	$8,000
EAS equipment not installed or operational	$8,000
Alien ownership violation	$8,000
Failure to permit inspection	$7,000
Transmission of indecent/ obscene materials	$7,000
Interference	$7,000
Importation or marketing of unauthorized equipment	$7,000
Exceeding of authorized antenna height	$5,000

VIOLATION	AMOUNT
Fraud by wire, radio or television	$5,000
Unauthorized discontinuance of service	$5,000
Use of unauthorized equipment	$5,000
Exceeding power limits	$4,000
Failure to respond to Commission communications	$4,000
Violation of sponsorship ID requirements	$4,000
Unauthorized emissions	$4,000
Using unauthorized frequency	$4,000
Failure to engage in required frequency coordination	$4,000
Construction or operation at unauthorized location	$4,000
Violation of requirements pertaining to broadcasting of lotteries or contests	$4,000
Violation of transmitter control and metering requirements	$3,000
Failure to file required forms or information	$3,000
Failure to make required measurements or conduct required monitoring	$2,000
Failure to provide station ID	$1,000
Unauthorized pro forma transfer of control	$1,000
Failure to maintain required records	$1,000

Violations Unique to the Service

VIOLATION	SERVICES AFFECTED	AMOUNT
Unauthorized conversion of long distance telephone service	Common Carrier	$40,000
Violation of operator services requirements	Common Carrier	$7,000
Violation of pay-per-call requirements	Common Carrier	$7,000
Failure to implement rate reduction or refund order	Cable	$7,500
Violation of cable program access rules	Cable	$7,500
Violation of cable leased access rules	Cable	$7,500
Violation of cable cross-ownership rules	Cable	$7,500
Violation of cable broadcast carriage rules	Cable	$7,500
Violation of pole attachment rules	Cable	$7,500
Failure to maintain directional pattern within prescribed parameters	Broadcast	$7,000
Violation of main studio rule	Broadcast	$7,000
Violation of broadcast hoax rule	Broadcast	$7,000
AM tower fencing	Broadcast	$7,000
Broadcasting telephone conversations without authorization	Broadcast	$4,000
Violation of enhanced underwriting requirements	Broadcast	$2,000

Section II. ADJUSTMENT CRITERIA FOR SECTION 503 FORFEITURES

Upward Adjustment Criteria

(1) Egregious misconduct
(2) Ability to pay/relative disincentive
(3) Intentional violation
(4) Substantial harm
(5) Prior violations of any FCC requirements
(6) Substantial economic gain
(7) Repeated or continuous violation

Downward Adjustment Criteria

(1) Minor violation
(2) Good faith or voluntary disclosure
(3) History of overall compliance
(4) Inability to pay

Section III. NON-SECTION 503 FORFEITURES THAT ARE AFFECTED BY THE DOWNWARD ADJUSTMENT FACTORS

Unlike Section 503 of the Act, which establishes maximum forfeiture amounts, other sections of the Act, with one exception, state prescribed amounts of forfeitures for violations of the relevant section. These amounts are then subject to mitigation or remission under Section 504 of the Act. The one exception is Section 223 of the Act, which provides a maximum of $50,000 per day. For convenience, the Commission will treat the $50,000 set forth in Section 223 as if it were a prescribed base amount, subject to downward adjustments. The amounts listed below were adjusted for inflation pursuant to the Debt Collection Improvement Act of 1996 (DCIA) (Pub. L. No. 104-134, § 31001, 110 Stat 1321 (1996). The new amounts became effective on March 5, 1997. These non-Section 503 forfeitures may be adjusted downward using the "Downward Adjustment Criteria" shown for Section 503 forfeitures in Section II above.

Violation	Statutory Amount
Sec. 202 (c) Common Carrier Discrimination	$6,600 $330/day
Sec. 203 (e) Common Carrier Tariffs	$6,600 $330/day
Sec. 205 (b) Common Carrier Prescriptions	$13,200
Sec. 214 (d) Common Carrier Line Extensions	$1,200/day
Sec. 219 (b) Common Carrier Reports	$1,200
Sec. 220 (d) Common Carrier Records & Accounts	$6,600/day
Sec. 223 (b) Dial-a-Porn	$55,000 maximum/day
Sec. 364(a) Ship Station Inspection	$5,00 (owner)
Sec. 364(b) Ship Station Inspection	$1,100 (vessel master)
Sec. 386(a) Forfeitures	$5,500/day (owner)
Sec. 386(b) Forfeitures	$1,100 (vessel master)
Sec. 634 Cable EEO	$500/day

APPENDIX B

A. Comments

1. American Mobile Telecommunications Association, Inc.
2. American Radio Relay League
3. Bell Atlantic Telephone Company
4. Brown and Schwaninger
5. Emery Telephone
6. Harrisonville Telephone Company
7. Infinity Broadcasting Corporation
8. MCI Telecommunications Corporation
9. MobileMedia Communications, Inc.
10. Mobile Phone of Texas, Inc.
11. National Association of Broadcasters
12. Paging Network, Inc.
13. Personal Communications Industry Association
14. San Bernardino Coalition of Low Power FM Broadcasting
15. Southwestern Bell Telephone Company
16. United States Telephone Association
17. WJGMariTEL Corporation

B. Informal Comment

1. William Dougan

C. Reply Comments

1. American Mobile Telecommunications Association, Inc.
2. MCI Telecommunications Corporation
3. Motorola, Inc.
4. National Telephone Cooperative Association
5. Personal Communications Industry Association
6. San Bernardino Coalition of Low Power FM Broadcasting
7. Southwestern Bell Telephone Company
8. United States Telephone Association

APPENDIX C

ADMINISTRATIVE MATTERS

Final Regulatory Flexibility Analysis

1. As required by Section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, the Commission prepared an Initial Regulatory Flexibility Analysis (IRFA) that was incorporated in the Notice of Proposed Rule Making (NPRM).[43] The Commission sought written public comments on all of the proposals in the NPRM, including the IRFA. Based on the analysis of the public comments, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the expected impact the Report and Order adopted today will have on small businesses and entities. The FRFA in this Report and Order conforms to the RFA, as amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996).[44]

a. Need for and Purpose of This Action

2. Section 503 of the Communications Act, as amended, 47 U.S.C. § 503 (the Act) provides the statutory authority for the Commission to assess forfeitures for violations of the Act and the Commission's rules. This Report and Order amends Section 1.80 of the Commission's rules to incorporate by reference the Commission's forfeiture policy statement (Policy Statement) and the schedule of forfeitures as a note to the rule. Forfeitures are one of the tools available to the Commission to enhance and ensure compliance by serving as a sanction to a violator and a deterrent to other potential violators that are similarly situated. By adopting the forfeiture guidelines as a note to the rule, the Commission will provide guidance and clarity to all potential violators, including small businesses, as to base forfeiture amounts that can be expected for a violation of the Communications Act and the Commission's rules. The guidelines will also provide an increased level of predictability and uniformity in the forfeiture process. We believe that the footnote adopted here today has no substantial impact on small businesses. The footnote does not create a new substantive Commission rule with which small businesses must comply. The forfeiture policy adopted here today merely provides guidance as to the general forfeiture amount that any violator may expect the Commission to assess for a violation of the Act and rules. To ensure, however, that the forfeiture guidelines adopted today reflect the Commission's understanding of the impact of its regulations on small businesses as well as our efforts to analyze what, if any, regulatory relief can be provided to small businesses in light of this Report and Order, we will explain the steps taken to minimize any significant economic impact on small entities.

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[43] *In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 10 FCC Rcd 2945 (1995).

[44] Subtitle II of the CWAAA is the "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), codified at 5 U.S.C. §601 *et seq.*

b. Summary of Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

3. In responding to the IRFA in the NPRM, several commenters, such as improved mobile telephone services (IMTS) or basic exchange telecommunications radio services (BETRS) contend that the Commission's determination of an entity's inability to pay a forfeiture based on its gross revenues erodes the protections otherwise given to small businesses in the Paperwork Reduction Act and the Regulatory Flexibility Act. They contend that these rural services will pay higher forfeitures than other licensees for similar violations because they are run by common carriers as an adjunct to the main operations whose gross revenue would be considered in determining the issue of inability to pay.[45] These arguments were considered and rejected as discussed below.

4. At the outset, we note that forfeitures are imposed only against those who fail to comply with our rules. Thus, the issue of inability to pay a forfeiture or maintaining additional paperwork is moot as to small businesses that comply with the rules. As to those that violate the Act and rules, Commission precedent states that gross revenues is a starting point for determining a party's ability to pay. Commission cases, however, also indicate that factors other than gross revenues may be considered. Under Section 503 of the Act, the Commission must look at the inability to pay in light of the totality of the circumstances affecting the particular entity's ability to pay.[46] This includes whether the company is a small business as defined by the Commission and/or the Small Business Administration (SBA) or whether the business is an adjunct of a larger corporation from which it can draw resources. Moreover, although the Commission has accepted audited financial statements as a method to assess a company's inability to pay a forfeiture, the Commission has flexibility to consider any documentation (e.g. balance sheet, profit and loss statement accompanied by licensee's certification) that it considers probative and objective evidence of the violator's ability or inability to pay a forfeiture. This also comports with the requirements of SBREFA.[47]

5. In the general comments to the NPRM, a number of commenters raised issues that might affect small entities. Many commenters oppose the system proposed in the NPRM that would impose differing base amounts based on the service rather than the violation involved. In particular, the commenters, including small commercial mobile radio services (CMRS), noted that the system proposed in the NPRM imposed larger forfeitures on common carriers without any regard for the common carrier's business size. Comments from CMRS entities also contend that, if the proposed fines are adopted, they should be treated in the "other" category as they were in the previous guidelines rather than the "common carrier" category which has higher base amounts and a higher

[45] *See* paragraphs 40-41 in the text of the instant *Policy Statement.*

[46] 47 U.S.C. § 503(b)(2)(D).

[47] 5 U.S.C. § 601(5).

statutory maximum.[48] As adopted, this Policy Statement would impose forfeitures based on the violation and not the service as originally proposed. Thus, CMRS providers who are small businesses will not be treated to higher forfeiture amounts simply because of their "common carrier" status. Moreover, the base forfeiture amount, i.e., the amount at which the Commission may initially assess a forfeiture, is calculated in light of the lowest statutory maximum imposed under Section 503 of the Act, rather than the higher statutory maxima for broadcasters and common carriers. Thus, small broadcast and common carrier businesses are not subject to base amounts higher than those imposed on small businesses in the remaining category, i.e., the "other " category. As to those small businesses in the "other" category, the Commission generally gives warnings to first time violators, who are licensed by rule rather than on an individual basis, based on the facts of each case unless the violation is egregious or a serious safety of life issue.[49] The adopted forfeiture policy statement also eliminated the proposed adjustment factor ranges, thus allowing the Commission to reduce a forfeiture to a minimum amount against a violator such as a small business if warranted by the facts of the case in light of the factors outlined in Section 503 of the Act.[50] Lastly, we note that, in light of recent changes to the Equal Access to Justice Act made as part of the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996), we will indicate an appropriate maximum forfeiture amount in cases where the Commission designates forfeiture matters for hearing. Because this maximum forfeiture amount will be based on the specific facts at issue rather than the statutory maximum for that service, small businesses in the "broadcast", "common carrier", and "other" services will not be subject to the statutory maxima in a hearing unless warranted by the facts in that case. [51]

c. Description and Estimate of Number of Small Businesses to Which Rules Will Apply:

6. The RFA generally defines "small entity" as having the same meaning as the terms "small business", "small organization", and "small governmental jurisdiction" and "the same meaning as the term 'small business concern' under the Small Business Act unless the Commission has developed one or more definitions that are appropriate for its activities. 15 U.S.C. § 632.[52] A

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[48] *See* paragraphs 13 and 14 in the text of the instant *Policy Statement.* Section 503 of the Act sets out statutory forfeiture maxima based on three categories: "broadcast" (which includes cable), "common carrier", and "other" (which includes any individual or entity that is not included in the broadcast or common carrier categories). 47 U.S.C. § 503(b). We note that the recently enacted Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001, 110 Stat. 1321 (1996), requires that civil monetary penalties assessed by the federal government, whether set by statutory maxima or specific dollar amounts as provided by federal law, be adjusted for inflation.

[49] *See* paragraphs 15 through 23 in the text of the instant *Policy Statement.*

[50] *See* paragraphs 24 through 26 in the text of the instant *Policy Statement.*

[51] See paragraph 50 in the text of the instant *Policy Statement.*

[52] Regulatory Flexibility Act (RFA), 5 U.S.C. § 601(3)(1980) (incorporating by reference the definition of "small

small business concern is one which: (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). [53] The Small Business Enforcement Fairness Act of 1996 (SBREFA) provision of the RFA also applies to nonprofit organizations and to governmental organizations such as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000.[54] There are 85,006 governmental entities in the United States. The forfeiture guidelines contained in the note adopted here today applies to Commission licensees and regulatees that are small businesses, small organizations, and small governmental jurisdictions as well as non-licensees that violate the Communications Act and the Commission's rules subsequent to receiving a warning.

7. It is difficult at this time to quantify precisely how many small business entities would be affected based on the radiotelephone data provided by the SBA. Inasmuch as we may assess forfeitures against companies and entities that are not radiotelephone companies, we must look beyond this category in order to develop our estimate. In addition to regulating the licensing of the electromagnetic spectrum, the Commission also authorizes and regulates the manufacturing and importation of radio transmitters and electronic equipment. Therefore, we will provide reasonable estimates by the services regulated by each Bureau or Office and ancillary entities affected by those services in light of the SBA and/or Commission definition of a small entity and other relevant defining factors. Where possible, we have also attempted to estimate the number of small businesses that may be assessed a forfeiture even though they are not regulatees but are subject to compliance with our rules, e.g., hotels that must comply with our regulations implementing the Hearing Aid Compatibility Act.[55] In our effort to discuss all services and small businesses that could be impacted, we note that our discussion of some services may overlap or our discussion of some small businesses may be duplicative.

CABLE SERVICES OR SYSTEMS

8. The SBA has developed a definition of small entities for cable and other pay

business concern" in 5 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), 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."

[53] Small Business Act, 15 U.S.C. § 632 (1996).

[54] Small Business Enforcement Fairness Act (SBREFA), 15 U.S.C. § 601(5). For example, there are 85,006 governmental entities in the United States of which 37,566 have populations of less than 50,000. United States Dept. of Commerce, Bureau of the Census, 1992 *Census of Governments* (*1992 Census*).

[55] *See Report and Order in CC Docket No.87-124,* 11 FCC Rcd 8249 (1996). *See also Erratum in CC Docket No. 97-124,* 11 FCC Rcd 9257 (1996).

television services, which includes all such companies generating less than $11 million in revenue annually. 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, there were 1,423 such cable and other pay television services generating less than $11 million in revenue that were in operation for at least one year at the end of 1992.[56]

9. 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.[57] 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.[58] 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 that may be affected by the forfeiture guidelines explained in the Report and Order adopted today.

10. 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."[59] The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 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.[60] Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450.[61] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we 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.

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[56] *1992 Census*, *supra*, at Firm Size 1-123.

[57] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995).

[58] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[59] 47 U.S.C. § 543(m)(2).

[60] 47 C.F.R. § 76.1403(b).

[61] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

11. The forfeiture guidelines in the Report and Order adopted today also applies to cable and MDS related entities.[62] The SBA has developed a definition of small entities for cable and other pay television services under Standard Industrial Classification 4841 (SIC 4841), which covers subscription television services, which includes all such companies with annual gross revenues of $11 million or less.[63] This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services (DBS), multipoint distribution systems (MDS), satellite master antenna systems (SMATV), and subscription television services. According to the Census Bureau, there were 1,323 such cable and other pay television services generating less than $11 million in revenue that were in operation for at least one year at the end of 1992.[64] This figure is overinclusive since it includes other pay television services, not only cable and MDS.

COMMON CARRIER SERVICES AND RELATED ENTITIES

12. According to the Telecommunications Industry Revenue: Telecommunications Relay Service Fund Worksheet Data (TRS Worksheet), there are 2,847 interstate carriers. These carriers are regulated in some form by the FCC, and are, therefore, subject to its forfeiture provisions. These carriers include, inter alia, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone toll service, providers of telephone exchange service, and resellers. To the extent that we can ascertain businesses that, due to their relationship to these common carriers, may receive forfeitures, e.g., hotels and motels that fail to provide service in compliance with the Hearing Aid Compatibility Act, these businesses are discussed herein.

13. 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 fewer than 1,500 employees.[65] 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.

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[62] Small Multipoint Distribution Services (MDS) businesses are discussed in depth with the mass media services at para. 53 *infra. See* Appendix C, para. 52.

[63] 13 C.F.R. §121.201.

[64] 1992 Census, *supra*, at Firm Size 1-123. *See Memorandum Opinion and Order and Notice of Proposed Rule Making* in MM Docket No. 92-266 and CS Docket No. 96-157, 11 FCC Rcd 9517, 9531 (1996).

[65] 13 C.F.R. § 121.201.

14. Consistent with our prior practice, we shall continue to exclude small incumbent LECs from the definition of a small entity for the purpose of this FRFA. Nevertheless, as mentioned above, we include small incumbent LECs in our analysis. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass "small incumbent LECs." We use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by the SBA as "small business concerns."[66]

15. ***Total Number of Telephone Companies Affected.*** The forfeiture guidelines in the Report and Order adopted herein may apply to the small telephone companies identified by the SBA. 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.[67] 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, personal communications services providers, covered specialized mobile radio providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."[68] 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 local exchange carriers that may be affected by the forfeiture guidelines adopted today.

16. ***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 that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[69] According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.[70] 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

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[66] *See* 13 C.F.R. § 121.210, SIC Code 4813.

[67] 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*).

[68] 15 U.S.C. § 632(a)(1).

[69] *1992 Census*, *supra*, at Firm Size 1-123.

[70] 13 C.F.R. § 121.201, SIC Code 4812.

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 there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the adopted forfeiture guidelines.

17. ***Local Exchange Carriers.*** Neither the Commission nor the SBA has developed a definition for small providers of local exchange services (LECs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[71] 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 TRS Worksheet. According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.[72] 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 SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent LECs that may be affected by the forfeiture guidelines.

18. ***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 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 the TRS Worksheet. According to our most recent data, 130 companies reported that they were engaged in the provision of interexchange services.[73] Although it seems certain that some of these carriers are not independently owned and operated, nor 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 130 small entity IXCs that may be affected by the forfeiture guidelines.

[71] 13 C.F.R. § 121.201, SIC Code 4813.

[72] Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Tbl. 1 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Dec. 1996) (*TRS Worksheet*).

[73] *Id*.

19. ***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 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 Worksheet. According to our most recent data, 57 companies reported that they were engaged in the provision of competitive access services.[74] Although it seems certain that some of these carriers are not independently owned and operated, nor 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 57 small entity CAPs that may be affected by the forfeiture guidelines.

20. ***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 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 Worksheet. According to our most recent data, 25 companies reported that they were engaged in the provision of operator services.[75] Although it seems certain that some of these companies are not independently owned and operated, nor have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 25 small entity operator service providers that may be affected by the forfeiture guidelines.

21. ***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 SBA 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 Worksheet. According to our most recent data, 271 companies reported that they were engaged in the provision of pay telephone services.[76] Although it seems certain that some of these carriers are not independently owned and operated, nor have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of pay

[74] *Id*.

[75] *Id*.

[76] *Id*.

telephone operators that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 271 small entity pay telephone operators that may be affected by the forfeiture guidelines.

22. ***Providers of Telephone Toll Service, Providers of Telephone Exchange Service***. Neither the Commission nor the SBA has developed a definition of small entities applicable to providers of telephone toll service and telephone exchange service. According to the 1992 Census, there were approximately 3,497 firms engaged in providing telephone services, as defined therein, for at least a year. This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, providers of telephone toll service, providers of telephone exchange service, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small businesses because they are not "independently owned and operated." It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are providers of telephone toll service or providers of telephone exchange service and are small entities that may be affected by the forfeiture guidelines.

23. ***Independent Operator Service Providers, Independent Directory Assistance Providers, Independent Directory Listing Providers, and Independent Directory Database Managers.*** We were unable to obtain reliable data regarding the number of entities that provide these telecommunications services or how many of these are small entities. The Commission has not developed a definition of small entities applicable to telecommunications service providers. Therefore, the closest applicable definition of a small entity providing telecommunications services is the definition under the SBA rules applicable to business services companies, SIC 7389, which defines a small entity to be a business services company with annual receipts of less than five million dollars. U.S. Census data provides that 46,289 firms providing business services had annual receipts of 5 million dollars or less. Because it seems unlikely that all of the business services firms would meet the other criteria, it seems reasonable to conclude that fewer than 46,289 firms may be small entities that might be affected by our forfeiture guidelines.

24. ***Resellers (including debit card providers).*** Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable SBA definition for a reseller is a telephone communications company, SIC category 4813. However, the most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that the Commission collects annually in connection with the TRS Worksheet. According to our most recent data, 260 companies reported that they were engaged in the resale of telephone service.[77] 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 resellers that would qualify as small entities or small incumbent LEC concerns under the SBA's definition. Consequently, we

[77] *Id.*

estimate that there are fewer than 260 small entity resellers that may be affected by the forfeiture policy contained in the Report and Order .

25. ***800 Subscribers.*** Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to 800 subscribers. The most reliable source of information regarding the number of 800-subscribers of which we are aware appears to be the data we collect on the number of 800-numbers in use.[78] According to our most recent data, at the end of 1995, the number of 800-numbers in use was 6,987,063. Although it seems certain that some of these subscribers are not independently owned and operated businesses, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of 800-subscribers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 6,987,063 small entity 800-subscribers that may be affected by the forfeiture guidelines adopted today.

26. ***Location Providers.*** Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to location providers. A location provider is the entity that is responsible for maintaining the premises upon which the payphone is physically located. Because location providers do not fall into any specific category of business entity, it is impossible to estimate with any accuracy the number of location providers. Using several sources, however, we have derived a figure of 1,850,000 payphones in existence.[79] Although it seems certain that some of these payphones are not located on property owned by location providers that are small business entities, nor does the figure take into account the possibility of multiple payphones at a single location, we are unable at this time to estimate with greater precision the number of location providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 1,850,000 small entity location providers that may be affected by the forfeiture guidelines adopted in this Report and Order.

27. In addition to these common carrier licensees, those who may be held liable for forfeitures include non-licensees who provide telephone services as a result of the Hearing Aid Compatibility (HAC) Act or who are operator service providers : (a) workplaces; (b) confined settings, such as hospitals and nursing homes; (c) hotels and motels; and (d) importers and manufacturers of telephones for use in the United States. There is little overlap among these categories because the Commission's workplace rules affect workplace noncommon areas, while the rules that apply to confined settings and hotels and motels affect other than the workplaces of those establishments. Telephone manufacturers would be affected as workplaces, but separately affected

[78] Federal Communications Commission, CCB, Industry Analysis Division, *FCC Releases, Study on Telephone Trends*, Tbl. 20 (May 16, 1996).

[79] There are approximately 1.5 million LEC payphones. Statistics of Communications Common Carrier, 1994/1995 edition, Common Carrier Bureau, FCC at 159, Table 2.10 (1995). There are approximately 350,000 competitively provided payphones. *See also Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* FCC 96-388 (released September 20, 1996), at note 996.

by the requirement to affix the letters "HAC" to telephones and by the volume control manufacturing requirement. The determination of whether or not an entity within these industry groups is small is made by the SBA. These standards also apply in determining whether an entity is a small business for purposes of the RFA.

28. ***Workplaces.*** Workplaces encompass establishments for profit and nonprofit, plus local, state and federal governmental entities. Establishments with fewer than fifteen employees generally would be excluded, because they are exempt from the Commission's new rules, except for the work station requirement. The SBA guidelines to the SBREFA state that about 99.7 percent of all firms are small and have fewer than 500 employees and less than $25 million in sales or assets. There are approximately 6.3 million establishments in the SBA database. We estimate that our rules would affect fewer than 6.3 million establishments, because our rules exclude establishments with fewer than fifteen employees. However, we have not been able to determine what portion of the 6.3 million establishments have fewer than fifteen employees. The SBA data base does include nonprofit establishments, but it does not include governmental entities. SBREFA requires us to estimate the number of such entities with populations of less than 50,000 that would be affected by our forfeiture guidelines.[80] There are 85,006 governmental entities in the nation. This number includes such entities as states, counties, cities, utility districts and school districts. Of the 85,006 governmental entities, 38,978 are counties, cities, and towns, and of those, 37,566, or 96 percent, have populations of fewer than 50,000.[81] The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 96 percent, or 81,600, are small entities that may be subject to a potential forfeiture.

29. ***Confined Settings.*** According to the SBA's regulations, nursing homes and hospitals must have annual gross receipts of $5 million or less in order to qualify as a small business concern. 13 C.F.R. §121.201. There are approximately 11,471 nursing care firms in the nation, of which 7,953 have annual gross receipts of $5 million or less.[82] There are approximately 3,856 hospital firms in the nation, of which 294 have gross receipts of $5 million or less. Thus, the approximate number of small confined setting entities to which the Commission's forfeiture guidelines may apply is 8,247.

30. ***Hotels and Motels.*** According to the SBA's regulations, hotels and motels must have annual gross receipts of $5 million or less in order to qualify as a small business concern. 13 C.F.R. §121.201. There are approximately 34,671 hotel and motel firms in the United States. Of

[80] 5 U.S.C. § 601(5).

[81] 1992 Census of Governments, *infra*.

[82] *See* Small Business Administration Tabulation File, SBA Size Standards Tbl 2C, January 23, 1996, SBA, Standard Industrial Code (SIC) categories 8050 (Nursing and Personal Care Facilities) and 8060 (Hospitals) (SBA Tabulation File).

those, approximately 31,382 have gross receipts of $5 million or less.[83] Thus, the approximate number of hotels and motels to which the Commission's forfeiture guidelines may apply is 31,382.

31. ***Telephone Manufacturers and Importers.*** According to the SBA's regulations, telephone apparatus firms must have 1,000 or fewer employees in order to qualify as a small business concern. 13 C.F.R. §121.201.[84] There are approximately 456 telephone apparatus firms in the nation.[85] Figures are not available on how many of these firms have 1,000 or fewer employees, but 401 of the firms have 500 or fewer employees.[86] It is probable that the great bulk of the 456 firms have 1,000 or fewer employees, and would be classified as small entities. In addition to telephone apparatus firms, there are approximately 12,654 wholesale electronic parts and equipment firms in the nation. Many of these firms serve as importers of telephones.[87] According to the SBA's regulations, wholesale electronic parts and equipment firms must have 100 or fewer employees in order to qualify as a small business entity. 13 C.F.R. §121.201. Of the 12,654 firms, 12,161 have fewer than 100 employees, and would be classified as small entities.[88]

INTERNATIONAL SERVICES

32. The Commission has not developed a definition of small entities applicable to licensees in the international services. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to Communications Services, Not Elsewhere Classified. This definition provides that a small entity is expressed as one with $11.0 million or less in annual receipts. [89]

33. Because the RFA amendments were not in effect until the comment period for this

[83] SBA Tabulation File, SIC category 7010.

[84] *See Report and Order in CC Docket 87-124 ,* 11 FCC Rcd 8249 (1996), at note 266 (explaining that no foreign entity submitted comments on the *NPRM* implementing access, nor have we been able to obtain data on foreign telephone equipment manufacturers from other sources. The SBA does not compile data on foreign manufacturers).

[85] U.S. Dept. of Commerce, *1992 Census of Transportation, Communications and Utilities* (issued May 1995), SIC Code 3661.

[86] *Id.*

[87] U.S. Dept. of Commerce, *1992 Census of Transportation, Communications and Utilities* (issued May 1995), SIC Code 5065.

[88] *Id.*

[89] 13 C.F.R. § 120.121, SIC Code 4899.

proceeding was closed, the Commission was unable to request information regarding the number of licensees in the international services discussed below that meet this definition of a small business. Thus, we are providing an estimate of licensees that constitute a small business.

34. ***International Broadcast Stations***. An international broadcast station employs frequencies allocated to the broadcasting service between 5,950 and 26,100 kHz. The transmissions of an international broadcast station, which are licensed to non-governmental entities only, are intended to be received directly by the general public in foreign countries. Commission records show that there are 20 international broadcast station licensees. Although we were unable to request the revenue information, we estimate that most of the international broadcast licensees would constitute a small business under the SBA definition.

35. ***International Fixed Public Radio (Public and Control Stations)***. International fixed public radio is a fixed service in which the stations are intended to provide radio communications between any one of the 50 states or any U. S. possession and any foreign point. In addition, radio communications within the contiguous 48 states in connection with the relaying of international traffic between stations which provide the above service are also deemed international fixed public radio. There are 15 licensees in this service. Although we were unable to request the revenue information, we estimate that some of the international broadcast licensees would constitute a small business under the SBA definition.

36. ***Recognized Private Operating Agency.*** The Commission's rules provide a procedure for companies to request a formal designation as a Recognized Private Operating Agency (RPOA). The term RPOA was used in the International Telecommunications Union (ITU) Convention in force at the time the rule was adopted. That convention provides that an RPOA is a "private operating agency" (a company that provides an international telecommunications service or operates a radio facility capable of causing harmful interference with the radio services of other countries) that is authorized by a country that is a member of the ITU. In 1992, the ITU changed the term to "recognized operating agency" (ROA) with essentially the same definition. All entities that the Commission has authorized as common carriers under the Communications Act, including those domestic common carriers for whom the Commission has waived the requirement to obtain Section 214 authorization, are ROAs for purposes of the ITU. Those entities that operate radio frequencies capable of causing harmful interference with radio operations in other countries are also ROAs. Additionally, the U.S. Department of State grants ROA status to enhanced service providers under the Commission's ROA-designation rules. The Department has designated approximately 20 such enhanced service providers ROAs.

37. ***Section 214 Applications.*** Section 214 of the Communications Act requires common carriers to obtain a certificate that the public convenience and necessity require**s** or will require construction and/or operation of a line of communication, or the discontinuance, reduction or impairment of service. There are more than 500 Section 214 license applications per year. Although we were unable to request the revenue information, we estimate that the majority of the licensees with this status would constitute a small business under the SBA definition.

38. ***Fixed Satellite Transmit/Receive Earth Stations.*** Fixed satellite transmit/receive earth stations include international and domestic earth stations operating in the 4/6 GHz and 11/12/14 GHz bands. There are approximately 4200 earth station authorizations, a portion of which are Fixed Satellite Transmit/Receive Earth Stations. Although we were unable to request the revenue information, we estimate that some of the earth stations would constitute a small business under the SBA definition.

39. ***Fixed Satellite Small Transmit/Receive Earth Stations.*** Small transmit/receive earth stations operate in the 4/6 GHz frequency bands with antennas that are two meters or less in diameter. There are 4200 earth station authorizations, a portion of which are Fixed Satellite Small Transmit/Receive Earth Stations. Although we were unable to request the revenue information, we estimate that some of the fixed satellite transmit/receive earth stations would constitute a small business under the SBA definition.

40. ***Receive Only Earth Stations.*** These stations are licensed only to receive transmissions from satellites. There are approximately 6,390 receive only earth station registrations on file. Although we were unable to request the revenue information, we estimate that most of the receive only earth stations would constitute a small business under the SBA definition.

41. ***Fixed Satellite Very Small Aperture Terminal (VSAT) Systems***. VSAT systems operate in the 12/14 GHz frequency bands. Although various size small earth stations may be used, all stations of a particular size must be technically identical. Because these stations operate on a primary basis, frequency coordination with terrestrial microwave systems is not required. Thus, a single "blanket" application may be filed for a specified number of small antennas and one or more hub stations. The Commission has processed 377 applications. At this time, we are unable to estimate of the number of small business licensees that are VSAT systems that could be impacted by the forfeiture guidelines.

42. ***Mobile Satellite Earth Stations.*** Mobile satellite earth stations are intended to be used while in motion or during halts at unspecified points. These stations operate as part of a network that includes a fixed hub station or stations. The network may provide a variety of land, maritime and aeronautical voice and data services. There are two licensees. At this time, we are unable to estimate of the number of small business licensees that are mobile satellite earth stations that could be impacted by the forfeiture guidelines.

43. ***Radio Determination Satellite Earth Stations.*** A radio determination satellite earth station is used in conjunction with a radio determination satellite service (rdss) system for the purpose of providing position location information. These stations operate as part of a network that includes a fixed hub station or stations that operate in the frequency bands (1610 -1626.5 MHz and 2483.5 - 2500 MHz) allocated to rdss. There are two licensees. At this time, we are unable to estimate the number of small business licensees that are radio determination satellite earth stations that could be impacted by the forfeiture guidelines.

44. ***Space Stations (Geostationary).*** Satellite services use radio transmission between

authorized geostationary satellite space stations and earth stations for common carrier and private communications. FCC authorization is required to construct, launch and operate space stations. Commission records reveal that there are 24 space station licensees. At this time, we are unable to estimate of the number of small business licensees that are geostationary space stations that could be impacted by the forfeiture guidelines.

45. ***Space Stations (Non-Geostationary).*** Satellite space stations orbit the earth in non-geostationary orbits. Because a satellite system is generally comprised of a number of technically identical space stations, a "blanket" system application may be filed for a specified number of space stations. The space stations may transmit to fixed or mobile earth stations for common carrier or private communications. There are six Non-Geostationary Space Station licensees. At this time, we are unable to estimate of the number of small business licensees that are Non-Geostationary Space Stations that could be impacted by the forfeiture guidelines.

46. ***Direct Broadcast Satellites.*** The direct broadcast satellite (DBS) service permits signals transmitted or retransmitted by space stations to be directly received by the public. Because DBS provides subscription services, DBS falls within the SBA definition of Cable and Other Pay Television Services. This definition provides that a small entity is expressed as one with $11.0 million in annual receipts. [90] There are eight DBS licensees as of December 1996. At this time, we are unable to estimate of the number of small business licensees that are DBS licensees that could be impacted by the forfeiture guidelines.

MASS MEDIA SERVICES

47. ***Commercial Radio and Television Services.*** The proposed rules and policies will apply to television broadcasting licensees, radio broadcasting licensees, permittees and potential licensees of either service.[91] The SBA defines a television broadcasting station that has no more

[90] SIC Code 4841.

[91] We tentatively believe that the SBA's definition of "small business" greatly overstates the number of radio and television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the proposals on small television and radio stations. However, for purposes of this *Policy Statement*, we utilize the SBA's definition in determining the number of small businesses to which the proposed rules would apply, but we reserve the right to adopt a more suitable definition of "small business" as applied to radio and television broadcast stations or other entities subject to the forfeiture guidelines adopted in this *Policy Statement* and to consider further the issue of the number of small entities that are radio and television broadcasters or other small media entities in the future. *See Report and Order* in MM Docket No. 93-48 (*Children's Television Programming*), 11 FCC Rcd 10660, 10737-38 (1996), *citing* 5 U.S.C. § 601(3). We have pending proceedings seeking comment on the definition of and data relating to small businesses. In our *Notice of Inquiry* in GN Docket No. 96-113 (Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses), FCC 96-216, released May 21, 1996, we requested commenters to provide profile data about small telecommunications businesses in particular services, including television, and the market entry barriers they encounter, and we also sought comment as to how to define small businesses for purposes of implementing Section 257 of the Telecommunications Act of 1996, which requires us to identify market entry barriers and to prescribe regulations to eliminate those barriers. Additionally, in our *Order and Notice of Proposed Rule Making* in MM Docket No. 96-16 (In the Matter of

than $10.5 million in annual receipts as a small business.[92] Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.[93] Included in this industry are commercial, religious, educational, and other television stations.[94] Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.[95] Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.[96] There were 1,509 television stations operating in the nation in 1992.[97] That number has remained fairly constant as indicated by the approximately 1,550 operating television broadcasting stations in the nation as of August, 1996.[98] For 1992,[99] the number of

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Streamlining Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines), 11 FCC Rcd 5154 (1996), we invited comment as to whether relief should be afforded to stations: (1) based on small staff and what size staff would be considered sufficient for relief, 10 or fewer full-time employees; (2) based on operation in a small market; (3) based on operation in a market with a small minority work force; or (4) based on a combination of these factors.

[92] 13 C.F.R. § 121.201, SIC Code 4833 (1996)

[93] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1*992 Census of Transportation, Communications and Utilities, Establishment and Firm Size,* Series UC92-S-1, Appendix A-9 (1995).

[94] *Id. See* Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes "Television Broadcasting Stations" (SIC Code 4833) as:

> Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

[95] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *1992 Census of Transportation, Communications And Utilities, Establishment and Firm Size,* Series UC92-S-1, Appendix A-9 (1995).

[96] *Id.* SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 (Theatrical Producers and Miscellaneous Theatrical Services) (producers of live radio and television programs).

[97] FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce.

[98] FCC News Release No. 64958, Sept. 6, 1996.

[99] Census for Communications' establishments are performed every five years ending with a "2" or "7". *See* Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce.

television stations that produced less than $10.0 million in revenue was 1,155 establishments.[100]

48. Additionally, the Small Business Administration defines a radio broadcasting station that has no more than $5 million in annual receipts as a small business.[101] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[102] Included in this industry are commercial, religious, educational, and other radio stations.[103] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[104] However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another SIC number.[105] The 1992 Census indicates that 96 percent of (5,861 of 6,127) radio station establishments produced less than $5 million in revenue in 1992.[106] Official Commission records indicate that 11,334 individual radio stations were operating in 1992.[107] As of August 1996, official Commission records indicate that 12,088 radio stations were operating.[108]

49. Thus, the Report and Order adopted today will affect approximately 1,550 television stations; approximately 1,194 of those stations are considered small businesses.[109] Additionally, the Policy Statement will affect 12,088 radio stations, approximately 11,605 of which are small

[100] The amount of $10 million was used to estimate the number of small business establishments because the relevant Census categories stopped at $9,999,999 and began at $10,000,000. No category for $10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

[101] 13 C.F.R. § 121.201, SIC 4832.

[102] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce.

[103] *Id*.

[104] *Id*.

[105] *Id*.

[106] The Census Bureau counts radio stations located at the same facility as one establishment. Therefore, each co-located AM/FM combination counts as one establishment.

[107] FCC News Release No. 31327, Jan. 13, 1993.

[108] FCC News Release No. 64958, Sept. 6, 1996.

[109] We use the 77 percent figure of TV stations operating at less than $10 million for 1992 and apply it to the 1996 total of 1,550 TV stations to arrive at 1,194 stations categorized as small businesses.

businesses.[110] These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television or non-radio affiliated companies. In addition to owners of operating radio and television stations, any entity who seeks or desires to obtain a television or radio broadcast license such as a permittee may be affected by the forfeiture guidelines in the Report and Order. The number of entities that may seek to obtain a television or radio broadcast license is unknown.

Alternative Classification of Small Stations

50. An alternative way to classify small radio and television stations is the number of employees. The Commission currently applies a standard based on the number of employees in administering its Equal Employment Opportunity Rule (EEO) for broadcasting.[111] Thus, radio or television stations with fewer than five full-time employees are exempted from certain EEO reporting and record keeping requirements.[112] We estimate that the total number of broadcast stations with 4 or fewer employees is approximately 4,239.[113]

Experimental, auxiliary, and special broadcast and other program distribution services

51. This service involves a variety of transmitters, generally used to relay broadcast programming to the public (through translator and booster stations) or within the program

[110] We use the 96% figure of radio station establishments with less than $5 million revenue from the Census data and apply it to the 12,088 individual station count to arrive at 11,605 individual stations as small businesses.

[111] The Commission's definition of a small broadcast station for purposes of applying its EEO rules was adopted prior to the requirement of approval by the SBA pursuant to Section 3(a) of the Small Business Act, 15 U.S.C. § 632 (a), as amended by Section 222 of the Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, § 222(b)(1), 106 Stat. 999 (1992), as further amended by the Small Business Administration Reauthorization and Amendments Act of 1994, Pub. L. No. 103-403, § 301, 108 Stat. 4187 (1994). However, this definition was adopted after the public notice and the opportunity for comment. *See Report and Order* in Docket No. 18244, 23 FCC 2d 430 (1970).

[112] *See, e.g*., 47 C.F.R. § 73.3612 (Requirement to file annual employment reports on Form 395 applies to licensees with five or more full-time employees); *First Report and 0rder* in Docket No.21474 (*Amendment of Broadcast Equal Employment Opportunity Rules and FCC Form 395*), 70 FCC 2d 1466 (1979). The Commission is currently considering how to decrease the administrative burdens imposed by the EEO rule on small stations while maintaining the effectiveness of our broadcast EEO enforcement. Order and Notice of Proposed Rule Making in MM Docket No. 96-16 (*Streamlining Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines*), 11 FCC Rcd 5154 (1996). One option under consideration is whether to define a small station for purposes of affording such relief as one with ten or fewer full-time employees.

[113] Compilation of 1994 Broadcast Station Annual Employment Reports (FCC Form 395B), Equal Opportunity Employment Branch, Mass Media Bureau, FCC.

distribution chain (from a remote news gathering unit back to the station). The Commission has not developed a definition of small entities applicable to broadcast auxiliary licensees. Therefore, the applicable definition of small entity is the definition under the Small Business Administration (SBA) rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.

52. There are currently 2,785 FM translators and boosters, 4,979 TV translators, and 1,951 Low Power TV stations which will be affected by the new forfeiture guidelines.[114] The FCC does not collect financial information on any broadcast facility and the Department of Commerce does not collect financial information on these auxiliary broadcast facilities. We believe, however, that most, if not all, of these auxiliary facilities, including Low Power TV stations, could be classified as small businesses by themselves. We also recognize that most translators and boosters are owned by a parent station which, in some cases, would be covered by the revenue definition of small business entity discussed above. These stations would likely have annual revenues that exceed the SBA maximum to be designated as a small business (either $5 million for a radio station or $10.5 million for a TV station).

Multipoint Distribution Service (MDS)

53. This service involves a variety of transmitters, which are used to relay programming to the home or office, similar to that provided by cable television systems.[115] In connection with the 1996 MDS auction the Commission defined small businesses [116] as entities who had annual average gross revenues for the three preceding years not in excess of $40 million. This definition of a small entity in the context of MDS auctions has been approved by the SBA. See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 10 FCC Rcd 9589 (1995). There are 1,573 previously authorized and proposed MDS stations currently licensed. These stations were licensed prior to implementation of Section 309(j) of the Act. Licenses for new MDS facilities are now awarded to auction winners in Basic Trading Areas (BTAs) and BTA-like areas.[117] The MDS

[114] *See* News Release, "Broadcast Stations Totals as of May 31, 1997", released June 6, 1997.

[115] For purposes of this item, MDS also includes single channel Multipoint Distribution Service (MDS) and Multipoint Distribution Service (MMDS) application and authorizations collectively.

[116] *See* 47 C.F.R. § 1.2110 (a)(1).

[117] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 10 FCC Rcd 9589 (1995). A Basic Trading Area (BTA) is the geographic area by which the Multipoint Distribution Service is licensed. *See* Rand McNally 1992 Commercial Atlas and Marketing Guide, 123rd Edition, pp. 36-39.

auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 BTAs. Of the 67 auction winners, 61 meet the definition of a small business. Thus, we conclude that there are 1,634 MDS providers that are small businesses as deemed by the SBA and the Commission's auction rules.

Instructional Television Fixed Services (ITFS)

54. Instructional Television Fixed Service stations (ITFS) are used to relay educational and instructional programming to the home or office. There are presently 2,032 ITFS licensees. All but one hundred of these licenses are held by educational institutions. As stated earlier, educational institutions are included in the definition of a small business. See Appendix C, para. 6, supra. Thus, 1,932 licensees are small businesses.

OFFICE OF ENGINEERING AND TECHNOLOGY AUTHORIZATIONS

55. Inasmuch as the RFA amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small businesses within each of the services or the number of small businesses seeking Commission authorization from our technical office that could be affected by the forfeiture guidelines. We have, however, made estimates based on our knowledge about the applications that have been submitted in the past. To the extent that a government entity may be a licensee or an applicant, the impact on those entities is included in the estimates for small businesses below.

Experimental Radio Service

56. The Experimental Radio Service (ERS) provides for experimental uses of radio frequencies and for development of techniques and systems that are not otherwise permitted under existing service rules. The ERS provides opportunities for manufacturers, inventors, entrepreneurs, and students to experiment with new radio technologies, new equipment designs, characteristics of radio wave propagation, or new service concepts related to the use of the radio spectrum. The Commission has not developed a definition of small entities applicable to the ERS. Therefore, the applicable definition of small entity is the definition under SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[118] Since the RFA amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small businesses involved in the ERS. The Commission processes approximately 1,000 applications a year for experimental radio operations. About half of these are renewals and the other half are for new licenses. The majority of experimental licenses, about 70%, are issued to large companies such as Motorola and to Department of Defense contractors such as Northrop and Lockheed-Martin. Thus, the remaining 30%, or as many as 300 applications, we assume, for purposes of evaluations and conclusions in this FRFA, will be awarded to small entities, as that term is defined by the SBA.

[118] 13 C.F.R. § 120.121, SIC Code 4812.

Equipment Authorization Program

57. The FCC's equipment authorization requirements are intended to ensure that radio and other electronic equipment comply with technical requirements in the FCC rules. These requirements generally are designed to minimize the potential for interference to television and radio communications. Certain equipment must be authorized by the FCC while others may be self-authorized by the manufacturer. The FCC equipment authorization procedures are called_type acceptance, certification and notification. The self-authorization processes are called verification and manufacturer declaration of conformity.

58. ***Type acceptance.*** Type acceptance generally applies to radio transmitters used in the licensed radio services, such as land, aeronautical and maritime mobile transmitters.[119] Type acceptance requires submittal of a written application to the Commission, including an application form, test report showing compliance with the standards, and complete technical description of the device. The Commission has not developed a definition of small entities applicable to type accepted devices. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[120] Since the RFA amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small businesses that make equipment subject to type acceptance. We are unable at this time to make a precise estimate of the number of type acceptance grantees and applicants that are small businesses.

59. The Commission received approximately 730 requests for type acceptance in calendar year 1996. Most equipment subject to type acceptance is produced by large companies such as Motorola, Lucent Technologies, Ericsson, etc. The majority of type acceptance grants, approximately 80%, are issued to large companies. Given this fact, the remaining 20%, or as many as 146 applications, we assume, for purposes of evaluations and conclusions in this FRFA, will be awarded to small entities, as that term is defined by the SBA.

60. ***Certification***. Certification applies to low power radio transmitters and electronic equipment governed by Parts 15 and 18 of the rules. The certification process is similar to Type Acceptance, since it also requires submittal of a written application similar to type acceptance. The Commission has not developed a definition of small entities applicable to certified devices. Therefore, the applicable definition of a small entity is the definition under the SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[121] Because the RFA amendments were not in

[119] 47 C.F.R. §§ 2.905, 2.1001.

[120] 13 C.F.R. § 121.201, SIC Code 4812.

[121] 13 C.F.R. § 121.201, SIC Code 4812.

effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small businesses that manufacture equipment subject to certification. We are unable at this time to make a precise estimate of the number of certification grantees and applicants that are small businesses.

61. The Commission received approximately 5,100 requests for certification in calendar year 1996. The majority of certification grants, approximately 60%, are issued to large companies such as Motorola, Lucent Technologies, Ericsson, IBM, Compaq, Apple Computers, etc. Given this fact, the remaining 40%, or as many as 2,000 applications, we assume, for purposes of evaluations and conclusions in this FRFA, will be awarded to small entities, as that term is defined by the SBA.

62. ***Notification***. Notification is a streamlined equipment authorization procedure that requires submittal of an application form and photographs of the equipment, but no test report or technical data. This procedure has been applied to equipment manufactured with a good record of technical compliance, but the Commission believes it prudent to continue monitoring the introduction of new products.[122] The Commission has not developed a definition of small entities applicable to notified devices. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons. [123] Because the RFA amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small businesses that manufacture devices subject to notification. We are unable at this time to make a precise estimate of the number of certification grantees and applicants that are small businesses.

63. The Commission received approximately 470 requests for notification in calendar year 1996. The majority of certification grants, approximately 80%, are issued to large companies such as Motorola, Lucent Technologies, Ericsson, IBM, etc. Given this fact, the remaining 20%, or as many as 95 applications, we assume, for purposes of evaluations and conclusions in this FRFA, will be awarded to small entities, as that term is defined by the SBA.

64. ***Verification.*** Verification is a manufacturer self-approval procedure. This procedure has been reserved for equipment that has a good record of compliance by the industry, and the Commission considers it likely that good compliance will continue with reduced oversight.[124] Additionally, ***Declaration of Conformity (DoC)*** is a new procedure that gives manufacturers of personal computer equipment the option to self-declare conformity with the Commission's radio noise standards.[125] The DoC procedure is similar to the verification procedure,

[122] 47 C.F.R. § 2.904.

[123] 13 C.F.R. § 121.201, SIC Code 4812.

[124] 47 C.F.R. § 2.902.

[125] 47 C.F.R. § 2.906. *See also Amendment of Parts 2 and 15 of the Commission's Rules to Deregulate the Equipment Authorization Requirements for Digital Devices* in ET Docket No. 95-19, released May 14, 1996.

however, the compliance tests must be performed by an accredited laboratory. The equipment labelling and certain other requirements were simplified to provide incentives to use this new procedure. The Commission has not developed a definition of small entities applicable to experimental licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons. [126] Because the RFA amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small businesses that manufacture equipment subject to verification or declaration of conformity. We are, therefore, unable at this time to make a precise estimate of the number of manufacturers of devices subject to verification of DoC that are small businesses. The Commission has no statistics on how many entities use the verification or DoC procedures because the Commission receives no information from the users of verification or DoC processes.

WIRELESS AND COMMERCIAL MOBILE SERVICES

65. ***Cellular Licensees***. Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. The closest applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies. The most reliable source of information regarding the number of cellular services carriers nationwide of which we are aware appears to be the data that the Commission collects annually in connection with the TRS Worksheet.[127] According to the most recent data, 792 companies reported that they were engaged in the provision of cellular services.[128] 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 services carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 792 small entity cellular service carriers that may be affected by the Report and Order adopted today.

66. ***220 MHz Radio Services***. For 220 MHz service licenses that will be awarded by auction, the Commission has adopted a two-tiered definition for purposes of bidding on the nationwide, Regional and EA licenses. Specifically, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the three preceeding years. A "small business" is an entity that, together with affiliates and controlling principals, has average gross revenues that are not more than $15 million

[126] 13 C.F.R. § 121.201, SIC Code 4812.

[127] Federal Communications Commission. CCB industry Analysis Division, *Telecommunication Industry Revenue: TRS Worksheet Data*, Tbl. 1 (Average Total Telecommunication Revenue Reported by Class of Carrier) (Dec. 1996) (*TRS Worksheet*).

[128] *Id.*

for the three preceeding years.[129] Because there have been no auctions for this service as of yet and the parameters of the industry have not been fully defined, any estimate of the number of small businesses who will seek to bid in the future auctions is not yet determined. With respect to existing 220 MHz licensees, there are approximately 3,800 non-nationwide Phase I licensees and 4 nationwide licensees currently authorized to operate in the 220 MHz band. The Commission does not have sufficient information to determine how many of these existing licensees would qualify as small businesses under the SBA definition of small business, *i.e.*, a radiotelephone company with fewer than 1,500 employees.

67. ***Private and Common Carrier Paging.*** The Commission has proposed a two-tier definition of small businesses in the context of auctioning licenses in the Common Carrier Paging and exclusive Private Carrier Paging services. Under the proposal, a small business will be defined as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than $3 million, or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding years of not more than $15 million. Since the SBA has not yet approved this definition for paging services, we will utilize the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[130] At present, there are approximately 24,000 Private Paging licensees and 74,000 Common Carrier Paging licensees. We estimate that the majority of private and common carrier paging providers would qualify as small businesses under the SBA definition.

68. With respect to the paging auctions, the Commission anticipates that a total of 15,531 non-nationwide geographic area licenses will be granted or auctioned. The geographic area licenses will consist of 3,050 Major Trading Area (MTA)[131] licenses and 12,481 Economic Area (EA)[132]

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129 Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Third Report and Order; Fifth Notice of Proposed Rulemaking*, PR Docket No. 89-552, FCC 97-57 (released March 12, 1997).

130 13 C.F.R. § 121.201, SIC Code 4812.

131 Rand McNally organizes the 50 states and the District of Columbia into 47 Major Trading Areas (MTAs) and 487 Basic Trading Areas (BTAs). Rand McNally is the copyright owner of the MTA/BTA Listings, which list the counties contained in each BTA/MTA, as embodied in Rand McNally's Trading Area System BTA/MTA Diskette and geographically represented in the map contained in Rand McNally's *Commercial Atlas & Marketing Guide*. A paging authorization grantee who does not obtain a copyright license from Rand McNally for use of the copyrighted material may not rely on grant of a Commission authorization as a defense to any claim of copyright infringement brought by Rand McNally against such grantee.

132 The Bureau of Economic Analysis of the Department of Commerce has divided the U.S. into 172 EAs, effective April 10, 1995, to facilitate regional economic analysis. Each EA consists of one or more economic nodes -- metropolitan areas or similar areas that serve as centers of economic activity -- and the surrounding counties that are economically related to the nodes. Final Redefinition of the BEA Economic Areas, Department of Commerce, Docket No. 950-3020-64-5064-01, 60 Fed. Reg. 13,114 (March 10, 1995).

licenses. In addition to the 47 Rand McNally MTAs, the Commission is adding three MTAs for the U.S. territories of (1) Guam and the Northern Mariana Islands, (2) Puerto Rico and the U.S. Virgin Islands, and (3) American Samoa. The Commission is also licensing Alaska as a single MTA separate from the Seattle MTA. There will be a total of 51 MTA licenses auctioned for each non-nationwide 931 MHz and exclusive 929 MHz channel. No auctions of paging licenses has been held yet, and there is no basis to determine the number of licenses that will be awarded to small entities. Given the fact that nearly all radiotelephone companies have fewer than 1,000 employees,[133] and that no reliable estimate of the number of prospective paging licensees can be made, the Commission assumes, for purposes of the evaluations and conclusions in this FRFA, that all the 15,531 geographic area paging licenses will be awarded to small entities, as that term is defined by the SBA.

69. ***Interconnected Business Services.*** Since the Commission did not define a small business with respect to for-profit interconnected business services, we will utilize the SBA's definition applicable to radiotelephone companies -- i.e. an entity employing no more than 1,500 persons. [134] The size data provided by the SBA does not enable us to make a meaningful estimate of the number of for-profit interconnected business service providers which are small entities because it combines all radiotelephone companies with 500 or more employees.[135] We therefore used the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. Data from the Bureau of the Census' 1992 study indicates that only 12 out of a total of 1,178 radiotelephone firms which operated during 1992 had 1,000 or more employees.[136] We do not know, however, how many of the 1,178 firms were for-profit interconnected business service companies. Given this fact, we assume, for purposes of this FRFA, that all of the current inter-connected business service licensees are small entities, as that term is defined by the SBA. Although there are in excess of 13,000 for-profit interconnected business service licenses, we are unable to determine the number of for-profit interconnected business service licensees because a single licensee may own several licenses.

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[133] The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

[134] 13 C.F.R. § 121.201, SIC Code 4812.

[135] U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, SIC Code 4812 Tbl. 3 (radiotelephone communications industry data adopted by the SBA Office of Advocacy).

[136] *See U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities*, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms; 1992, SIC Code 4812 (issued May 1995).

70. ***Mobile Service Carriers.*** Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under the SBA rules is for radiotelephone (wireless) companies. The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that the Commission collects annually in connection with the TRS Worksheet. According to the most recent data, 117 companies reported that they were engaged in the provision of mobile services. [137] 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 mobile service carriers that would qualify under the SBA's definition. Consequently, we estimate that there are fewer than 117 small entity mobile service carriers that may be affected by the forfeiture guidelines in the Report and Order adopted here today.

71. ***PCS Licensees: Broadband and Narrowband.*** The Commission, with respect to narrowband and broadband PCS, defines small businesses to mean firms who have gross revenues of not more than $40 million in each of the preceding three calendar years. This definition of "small entity" in the context of the PCS services has been approved by the SBA.[138]

72. **Broadband PCS**. 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 has defined "small entity" in the auctions for Blocks C and F as a entity that has average gross revenues of less than $40 million in the three previous calendar years.[139] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with their affiliates, has average gross revenue of not more than $15 million for the preceding three calendar years.[140] These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA. 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. However, licenses for Blocks C through F have not been awarded fully, therefore there are few, if any, small

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[137] *Id.*

[138] *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 10 FCC Rcd 175,196 (1995); Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5581-5584 (1995); 47 C.F.R. §§ 24.320(b) and 24.720(b).

[139] *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*, 11 FCC Rcd 7824 (1996).

[140] *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*, 11 FCC Rcd 7824 (1996).

businesses currently providing PCS services. Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning bidders and the 93 qualifying bidders in the D, E, and F Blocks, for a total of 183 small PCS providers as defined by the SBA and the Commission's auction rules.

73. **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. Based on this information, we conclude that all 41 of the narrowband PCS licensees may be affected by the Policy Statement adopted in this proceeding. 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 in the auctions. Those auctions, however, have not yet been scheduled. Given the facts that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume, for purposes of our evaluations and conclusion in this FRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

74. ***Resellers***. We were unable to obtain reliable data regarding the number of entities that resell services or how many of these are small entities. Since the Regulatory Flexibility Act amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small businesses in this category. We note, however, that resellers are included among the 1,178 radiotelephone firms described in the 1992 Census data discussed above, 12 of which had 1,000 or more employees. Given the facts that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of resellers can be made, we assume, for purposes of our evaluations and conclusions in this FRFA, that all resellers are small entities, as that term is defined by the SBA.

75. ***Location and Monitoring Service/Automatic Vehicle Monitoring (LMS/AVM).*** The Commission has not adopted a definition of a small business specific to location and monitoring/automatic vehicle monitoring (LMS/AVM) systems, which are defined in Section 90.7 of the Commission's Rules. [141] Accordingly, we will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[142] No auctions have been held for the LMS service. The Commission has not yet determined whether it will award licenses based on Rand McNally's MTAs and BTAs, EAs, or some other geographic basis, so it cannot yet be predicted how many licenses will be awarded for this service. We do anticipate that most LMS licensees will fit the definition of small business provided by the SBA.

[141] 47 C.F.R. § 90.7.

[142] 13 C.F.R. § 121.201, SIC Code 4812.

76. ***Rural Radiotelephone Service.*** The Commission has not adopted a definition of small business specific to the Rural Radiotelephone Service, which is defined in Section 22.99 of the Commission's Rules.[143] A significant subset of the Rural Radiotelephone Service is BETRS, or Basic Exchange Telephone Radio Systems (the parameters of which are defined in Sections 22.757 and 22.759 of the Commission's Rules). Accordingly, we will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them fit within the SBA's definition of a small business.[144]

77. ***Air-Ground Radiotelephone Service.*** The Commission has not adopted a definition of small business specific to the Air-Ground Radiotelephone Service, which is defined in Section 22.99 of the Commission's Rules.[145] Accordingly, we will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[146] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them fit within the SBA's definition.

78. ***Antenna Structures.*** Antenna structure owners include Commission licensees as well as non-licensees.[147] The term "antenna structure" includes any structure used to support a communications antenna, *e.g.*, a tower built specifically for communications, a water tower with an antenna, an observation tower with an antenna. These structures are owned by a vast array of companies of all sizes operating in all U.S. business categories. For the purposes of determining whether an owner is a small business as defined by the Small Business Administration, however, each owner would need to be evaluated within its own business area. Because of the vast array of owners, the Commission has not developed, nor would it be possible to develop, a definition of "small entities" specifically applicable to antenna structure owners.

79. Because the RFA amendments were not in effect until comment period for this proceeding was closed, the Commission was unable to request information regarding the number of

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[143] 47 F.C.R. § 22.9.

[144] 13 C.F.R. § 121.201, SIC Code 4812.

[145] *Id*.

[146] *Id.*

[147] *See Streamlining the Commission's Antenna Structure Clearance Procedure and Revision of Part 17 of the Commission's Rules Concerning Construction, Marking, and Lighting of Antenna Structures*, 11 FCC Rcd 4272 (1995) (Commission amended 303(q) of the Communications Act to provide that non-licensee tower owners, in addition to the licensees on the tower, would be held liable for tower painting and lighting requirements).

small entities that are antenna structure owners. Therefore, the Commission is unable at this time to estimate the number of small businesses which could be impacted by the forfeiture guidelines. Furthermore, until recently, the Commission did not request or retain information specifically from antenna structure owners. The Commission's records, however, indicate that there are approximately 500,000 antenna structures in the U.S., many of which may be owned by the same entity. Because there are no limitations on which entities may own antenna structures, these rules could potentially impact many small businesses in the U.S.

80. Lastly, we note that licensees other than the tower owner may also be licensed to an antenna structure. For purposes of this analysis, licensees that are not tower owners are included in the discussion for the service for which they are licensed.

81. ***Low Power Radio Service (LPRS) Manufacturers/Importers.*** The Commission has not developed a definition of small entities specifically applicable to Low Power Radio Service (LPRS) manufacturers and importers. Therefore, the applicable definition of small entity is the definition under the Small Business Administration rules applicable to radio and television broadcasting and communications equipment manufacturers.[148] This definition provides that a small entity is any entity employing less than 750 persons.[149] Additionally, the SBA rules state that wholesale electronic parts and equipment firms must have 100 or fewer employees in order to qualify as a small business entity.[150] Since the RFA amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small entities that may choose to manufacture LPRS equipment. Furthermore, 12,161 of the 12,654 wholesale electronic parts and equipment firms have fewer than 100 employees, and would be classified as small entities. Therefore, for purposes of our evaluations and conclusions in this FRFA, we estimate that there are at least 13,086 potential manufacturers or importers of LPRS equipment which are small businesses, as that term is defined by the SBA.

82. ***Automatic Maritime Telecommunications Systems (AMTS).*** The Commission has not developed a definition of small entities specifically applicable to AMTS licensees. Therefore, the applicable definition of small entity is the definition under the Small Business Administration rules applicable to radiotelephone service providers. This definition provides that a small entity is any entity employing no more than 1,500 persons.[151] Since the RFA amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small AMTS businesses and is unable at this time to determine the precise number of AMTS firms which are small businesses.

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[148] 13 C.F.R. § 121.201, SIC Code 3663.

[149] *See* 13 C.F.R. §121.201, SIC Code 3663.

[150] *See* 13 C.F.R.§ 121.20, SIC Code 5065.

[151] *See* 13 C.F.R. §121.201, SIC Code 4812.

83. The size data provided by the SBA does not enable us to make a meaningful estimate of the number of AMTS firms which are small businesses. Therefore, we used the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. This document shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. There are three AMTS licensees which are authorized on an exclusive basis along the Mississippi River, portions of the West Coast, and nearly the entire East Coast. Because most of the nation's coastline has been or will be covered by the present licensees, it is unlikely that a large number of additional licenses will be authorized in the future. Therefore, for purposes of our evaluations and conclusions in this FRFA, we estimate that there are three AMTS licensees which are small businesses, as it is defined by the SBA.

84. ***Specialized Mobile Radio Licensees (SMR).*** Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz Specialized Mobile Radio (SMR) licenses to firms that had revenues of less than $15 million in each of the three previous calendar years. This regulation defining "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.[152]

85. The forfeiture guidelines adopted in this Policy Statement applies 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. Since the RFA amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small businesses in this category. We do know that one of these firms has over $15 million in revenues. We assume, for purposes of our evaluations and conclusions in this FRFA, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA.

86. 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 conclude that the number of geographic area SMR licensees affected by the forfeiture guidelines includes these 60 small entities.

87. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore,

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[152] *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*, 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 Rule Making,* 11 FCC Rcd 1463 (1995).

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. However, the Commission 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 to estimate, moreover, how many small entities within the SBA's definition will win these licenses. Given the facts 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 assume, for purposes of our evaluations and conclusions in this FRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

88. **Private Land Mobile Radio Services (PLMR)**. The forfeiture guidelines adopted in this Report and Order will apply to small businesses that choose to use, manufacture, or design radios that operate in the Private Land Mobile Radio (PLMR) bands below 512 MHz. There are no Commission imposed requirements, however, for any entity to use or produce these products.

89. ***PLMR Manufacturers***. The Commission has not developed a definition of small entities specifically applicable to Private Land Mobile Radio (PLMR) manufacturers. Therefore, for the purposes of this analysis, the applicable definition of small entity is the definition under the SBA rules applicable to radio and television broadcasting and communications equipment manufacturers. The SBA defines a small entity in this category as one in which less than 750 persons are employed.[153]

90. Because the RFA amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small entities that manufacture PLMR equipment and is unable at this time to make a precise estimate of the number of manufacturers which are small businesses. However, the 1992 Census of Manufacturers, conducted by the Bureau of Census, which is the most comprehensive and recent information available, shows that approximately 925 out of the 948 entities manufacturing radio and television transmitting equipment in 1992 employed less than 750 persons.[154] We are unable to discern from the Census data precisely how many of these manufacturers produce private land mobile radios. Further, any entity may choose to manufacture such radio equipment. Therefore, for purposes of our evaluations and conclusions in this FRFA, we stipulate that there are at least 925 manufacturers and potential manufacturers of PLMR equipment which are small businesses, as that term is defined by the SBA.

91. ***PLMR Licensees***. Private land mobile radio systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of

[153] 13 C.F.R. § 120.121, SIC Code 3663.

[154] *1992 Census of Manufacturers* (1995).

PLMR users, the Commission has not developed nor would it be possible to develop a definition of small entities specifically applicable to PLMR users. For the purpose of determining whether a licensee is a small business as defined by the SBA, each licensee would need to be evaluated within its own business area.

92. Because the RFA amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small entities that are private land mobile radio licensees. Therefore, the Commission is unable at this time to make a precise estimate of the number of small businesses which could be impacted by the rules. However, the Commission's 1994 Annual Report on PLMRs[155] indicates that at the end of fiscal year 1994 there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Further, because any entity engaged in a commercial activity is eligible to hold a PLMR license, these rules could potentially impact every small business in the U.S.

93. **Estimates for Local Multipoint Distribution Service (LMDS)**. The rules adopted in this *Report and Order* will apply to any company which chooses to apply for a license in the new services. In addition, the new rules impact fixed microwave licensees, some of whom requested that the Commission institute a channeling plan in the 28 GHz band to set standards for point-to-point microwave equipment manufacturers. With regard to both the traditional point-to-point entities and the Local Multipoint Distribution Service (LMDS), the Commission has not developed a definition of small entities applicable to such licensees. The SBA definitions of small entity for LMDS are the definitions applicable to radiotelephone companies and to pay television services. The definition of radiotelephone companies provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[156] The definition of a pay television service is one which has annual receipts of less than $11 million.[157] Since the Regulatory Flexibility Act amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the potential number of small businesses interested in LMDS and is unable at this time to determine the precise number of potential applicants which are small businesses.

94. The size data provided by the SBA does not enable us to make a meaningful estimate of the number of telecommunications providers which are small entities because it combines all radiotelephone companies with 500 or more employees.[158] We therefore used the 1992 Census of

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[155] Federal Communications Commission, *60th Annual Report, Fiscal Year 1994* at 116.

[156] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

[157] *Id.*, SIC Code 4841.

[158] U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, SIC Code 4812 (radiotelephone communications industry data adopted by the SBA Office of Advocacy).

Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. This document shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.[159] Therefore, a majority of LMDS entities providing radiotelephone services could be small businesses under the SBA's definition. Likewise, the size data provided by the SBA does not enable us to make a meaningful estimate of the number of cable and pay television providers which are small entities because it combines all such providers with revenues of less than $11 million.[160] We therefore used the 1992 Census of Transportation, Communications, and Utilities, (Table 2D), conducted by the Bureau of the Census, which is the most recent information available. This document shows that only 36 of 1,788 firms providing cable and pay television service have a revenue of greater than $10 million. Therefore, the vast majority of LMDS entities providing video distribution could be small businesses under the SBA's definition. However, in the *Third NPRM*,[161] we proposed to define a small business as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding years of less than $40 million. We have not yet received approval by the SBA for this definition because the service rules for LMDS have not been finalized. A definition of small point-to-point entities have not yet received approval by the SBA because such entities have not as yet been subject to competitive bidding procedures.

95. We assume, for purposes of our evaluations and conclusions in this FRFA, that nearly all of the LMDS licensees will be small entities, as that term is defined by the SBA. We note that in the accompanying Fourth Notice of Proposed Rulemaking, we ask whether eligibility of LECs and cable companies, who enjoy a monopoly or near-monopoly in their service areas, be restricted with regard to the LMDS license in their area, in order to encourage competition. Many of the competitors using LMDS to compete with LECs or cable companies could be small businesses.

96. With regard to traditional point-to-point microwave entities, the same analysis for small radiotelephone entities as made above applies to these entities. In the *Report and Order*, the Commission declines to specify a channeling plan for point-to-point entities.[162] It is the Commission's opinion that retaining maximum system design flexibility for LMDS licensees within their service areas precludes our specifying a point-to-point channeling plan. Entities interested in

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[159]U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

[160]*Id*., SIC 4841.

[161]*In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services and Suite 12 Group Petition for Pioneer's Preference*, CC Docket No. 92-297, 11 F.C.C. Rcd. 53 (1995) ("*Third NPRM*"), para. 188.

[162]Section III(H), *supra*.

providing point-to-point service may seek other spectrum or may become LMDS licensees and configure their systems as they choose. In addition, such entities may lease spectrum, or seek partitioning or disaggregation opportunities from LMDS licensees. Moreover, the traditional point-to-point microwave equipment manufacturing industry could seek to establish standards for its members to use in the 28 GHz band. Accordingly, this Report and Order does not provide direct relief requested by, *e.g.*, the Telecommunications Industry Association, which represents fixed microwave entities, the majority of whom may be small businesses.

97. Another category of small entities affected by this Report and Order are those operating in the 17.5-19.5 GHz frequency band. These entities are fixed point-to-point microwave entities of many subcategories. The same analysis for these entities as made for traditional fixed microwave entities made above applies to these entities (a definition of small point-to-point entities has not been submitted for approval by the SBA because such entities have not as yet been subject to competitive bidding procedures). The Report and Order does not change the Commission's treatment of these entities, but it adds potential additional satellite operators in the band with which the entities will have to coordinate in the future. The Commission has coordination procedures in effect; should they prove inadequate in the future, we will reconsider the issue at that time.

98. ***Interactive Video and Data Services (IVDS)***. IVDS is a communications-based service subject to regulation as a wireless provider of pay television services under Standard Industrial Classification 4841 (SIC 4841), which covers subscription television services. The Small Business Administration (SBA) defines small businesses in SIC 4841 as businesses with annual gross revenues of $11 million or less. 13 C.F.R. § 121.201. In a separate proceeding, we proposed to extend special provisions to small businesses with average gross revenues for each of the preceding three (3) years that do not exceed $15 million, and additional benefits to very small businesses who have less than an average of $3 million in gross revenues in each of the last three years.[163] We observed that this proposal was consistent with our approach in other wireless services, see e.g., the 900 MHz specialized mobile radio service, and is narrowly tailored to address the capital requirements for IVDS.[164] The Commission is soliciting SBA approval for the small business definitions for this and other auctionable services.

99. The Commission's estimate of the number of small business entities subject to the rules begins with the Bureau of Census report on businesses listed under SIC 4841, subscription television services. The total number of entities under this category is 1,788. There are 1,463 companies in the 1992 Census Bureau report which are categorized as small businesses providing cable and pay TV services. We know that many of these businesses are cable and television service businesses, rather than IVDS licensees. Therefore, the number of small entities currently in this

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[163] *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule making in the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 61 FCC Rcd 49103 (FCC 96-330, adopted: August 6,1996, released: October 10, 1996).

[164] *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639 (1995).

business which will be subject to the rules will be less than 1,463.

100. The first IVDS auction resulted in 170 entities winning licenses for 594 MSA licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, we defined a small business as an entity with a net worth not in excess of $6 million and average net income after Federal income taxes for the two preceding years not in excess of $2 million.[165] In the upcoming IVDS re-auction of approximately 100 licenses in metropolitan service area (MSA) markets and auction of 856 licenses in rural service area (RSA) markets (two licenses per market), we have proposed bidding credits and installment payments to encourage participation by small and very small businesses. We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our proposed rules. Given the success of small businesses in past IVDS auctions, and that small businesses make up over 80 percent of firms in the subscription television services industry, we assume for purposes of this FRFA that all of the licenses may be awarded to small businesses.

101. It is impossible to accurately predict how many small businesses will apply to participate in future auctions. In the last IVDS auction, there were 289 qualified applicants. We do not anticipate that there will be significantly more participants in the subsequent IVDS auction.

102. ***Amateur Radio Service.*** Rules for the amateur service regulate a radiocommunication service for the purpose of self-training, intercommunication and technical investigations carried out by individual amateurs, that is, duly authorized persons interested in radio technique solely with a personal aim and without pecuniary interest.[166] However, the Commission also grants amateur licenses to organizations or clubs, e.g., the American Radio Relay League, military clubs, and Radio Amateur Civil Emergency Services (RACES). [167] As of November 1996, Commission records indicate that amateur licenses have been issued to 4,767 clubs and RACES. These clubs are generally nonprofit organizations and, therefore, fit the definition of a small business as defined by the SBA. See 15 U.S.C. § 632.

103. ***Aviation and Marine Radio Service.*** Small businesses in the aviation and marine radio services use a marine very high frequency (VHF) radio, any type of emergency position indicating radio beacon (EPIRB), and/or radar, a VHF aircraft radio, and/or any type of emergency locator transmitter (ELT). The Commission has not developed a definition of small entities specifically applicable to these small businesses. Therefore, the applicable definition of small entity is the definition under the Small Business Administration rules applicable to water transportation

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[165] *Fourth Report and Order In the Matter of Implementation of Section 309(j) of the Communications Act-Competitive Bidding*, 9 FCC Rcd 2330 (1994).

[166] *See* 47 C.F.R. § 97.1 *et seq*.

[167] 47 C.F.R. § 97.5 (b)(1),(2), (3),(4).

and transportation by air. This definition provides that a small entity is any entity employing no more than 500 persons for water transportation, and 1,500 for transportation by air.[168] Inasmuch as the RFA amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small entities and is unable at this time to make a meaningful estimate of the number of potential small businesses.

104. Most applicants for individual recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. Therefore, for purposes of our evaluations and conclusions in this FRFA, we estimate that there may be at least 712,000 potential licensees which are small businesses, as that term is defined by the SBA.

105. ***Microwave Video Services.*** Microwave services includes common carrier,[169] private operational fixed,[170] and broadcast auxiliary radio services.[171] At present, there are 22,015 common carrier licensees, approximately 61,670 private operational fixed licensees and broadcast auxiliary radio licensees in the microwave services. Inasmuch as the Commission has not yet defined a small business with respect to microwave services, we will utilize the SBA's definition applicable to radiotelephone companies -- i.e., an entity with less than 1,500 persons.[172] Because the RFA amendments were not in effect until after the record in this proceeding was closed, the Commission was unable to request information from the microwave service providers regarding the number of small businesses within the three microwave services listed above. As for estimates regarding small businesses within the broadcast service, we rely on our estimates as discussed under mass media services in paragraphs 47 through 49, supra, in this Appendix C. Although some of these companies may have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of microwave service providers other than broadcast licensees that would qualify under the SBA's definition.

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[168] *See* 13 C.F.R. § 121.201, SIC Major Group Code 44 -- Water Transportation (4491, 4492, 4493, 4499) and 45 -- Transportation by Air (4522, 4581).

[169] 47 C.F.R. § 101 *et seq* (formerly part 21 of the Commission's rules).

[170] Persons eligible under Parts 80 and 90 of the Commission's rules can use private Operational Fixed Microwave services. *See* 47 C.F.R. §§ 80 *et seq*, 90 *et seq*. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use an operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[171] Broadcast Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's rules. *See* 47 C.F.R. § 74 *et seq*. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points, such as a main studio and an auxiliary studio. The broadcast auxiliary microwave services also include mobile TV pickups which relay signals from a remote location back to the studio.

[172] 13 C.F.R. § 121.201, SIC Code 4812.

106. ***Public Safety Radio Services.*** Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.[173] There are a total of approximately 127,540 licensees within these services. Governmental entities as well as private businesses comprise the licensees for these services. As we indicated previously, all governmental entities with populations of less than 50,000 fall within the definition of a small business. As stated in paragraph 6, supra, of this Appendix C, there are 37,566 governmental entities with populations of less than 50,000. Because the RFA amendments were not in effect until after the record in this proceeding was closed, the Commission was unable to request information regarding the number of governmental entities with populations of less than 50,000 that are public safety radio service licensees. For purposes of this analysis, we will assume that all of the 37,566 governmental entities with populations of less than 50,000 would be licensees that could be affected by the forfeiture policy adopted here today.[174] As for the licensees within these services other than governmental entities, we are unable at this time to estimate the number of licensees that would qualify under the SBA's definition.

107. ***Personal Radio Services.*** Personal radio services provide short-range, low power radio for personal communications, radio signalling and business communications not provided for in other services. These services include citizen band (CB) radio service, general mobile radio service (GMRS), radio control radio service, and family radio service (FRS). [175] Inasmuch as the CB, GMRS, and FRS licensees are individuals, no small business definition applies for these

[173] With the exception of the special emergency service, these services are governed by subpart B of Part 90 of the Commission's rules. 47 C.F.R. §§ 90.15 - 90.27. The police service includes 26,608 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes 22,677 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service that is presently comprised of 40,512 licensees that are state, county, or municipal entities that use the radio for official purposes not covered by other public safety services. There are 7,325 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The 9,480 state and local governments are licensed to highway maintenance service provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The 1,460 licensees in the Emergency Medical Radio Service (EMRS) use the 39 channels allocated to this service for emergency medical service communication related to the actual delivery of emergency medical treatment. 47 C.F.R. § § 90.15-90.27. The 19,478 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities. 47 C.F.R. §§ 90.33- 90.55.

[174] *See* note 9, *supra* in the instant Appendix C.

[175] Licensees in the Citizens Band (CB) Radio Service, General Mobile Radio Service (GMRS), Radio Control(R/C) Radio Service and Family Radio Service (FRS) are governed by subpart D, subpart A, subpart C , and subpart B, respectively, of Part 95 of the Commission's rules. 47 C.F.R. §§ 95.401 - 95.428; §§ 95.1- 95.181; §§ 95.201 - 95.225; 47 C.F.R. §§ 95.191 - 95.194.

services. As for any business licensed within these services, we note that the RFA amendments were not in effect until the record in this proceeding was closed. Thus, the Commission was unable to request information regarding the number of any businesses that are licensed within the personal radio services. Therefore, we are unable at this time to estimate the number of licensees that would qualify under the SBA's definition.

108. ***Offshore Radiotelephone Service.*** The offshore radiotelephone service allows common carriers to use conventional duplex analog technology to provide telephone service to persons located on offshore structures or (in helicopters en route to) oil exploration and production platforms in the Gulf of Mexico. The service operates on several UHF TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico.[176] At present, there are approximately 55 licensees in this service. Offshore radiotelephone service is a radio service in which wireless commercial carriers are authorized to offer and provide radiotelecommunications service for hire to subscribers on structures in the offshore coastal waters of the Gulf of Mexico. As for any business licensed within these services, we note that the RFA amendments were not in effect until the record in this proceeding was closed. Thus, the Commission was unable to request information regarding the number of small businesses that are licensed within this service. Therefore, we are unable at this time to estimate with greater precision the number of licensees that would qualify under the SBA's definition.

OTHER SMALL BUSINESSES THAT RECEIVE CITATIONS

109. Section 503 of the Act provides that even persons and entities that are not licensees may receive a forfeiture if engaged in an action for which a Commission license or other authorization is required. Parties or entities who are engaged in an action that does not require Commission authorization but violates the Communications Act or the Commission's rules may receive a forfeiture if they violate the Act or rules subsequent to receiving a citation from the Commission that explains that their actions constitute a violation and provides an opportunity to discuss the violative action.[177] Thus, any small business not previously discussed, including governmental and not for profit entities, that engage in an action that does not require Commission authorization but violates the Act or rules could potentially be affected by the forfeiture guidelines adopted here today.

d. Steps Taken to Minimize the Economic Impact on Small Entities and Significant Alternatives Considered and Rejected. This section analyzes the impact on small businesses in the context of the Policy Statement adopted today.

Minimizing Economic Impact on Small Entities

[176] These licensees are governed by subpart I of Part 22 of the Commission's rules. 47 C.F.R. § 22.1001-22.1037.

[177] 47 U.S.C. § 503 (b)(5).

110. In developing the Policy Statement adopted today, we made efforts to minimize the economic impact on small entities. Although the comments supported the implementation of uniform forfeiture amounts based on the violation rather than the service, the comments did not elaborate on how this uniform amount should be developed. In developing uniform forfeiture amounts, we chose to use the forfeiture category with the lowest statutory maxima in order to establish the base forfeiture amounts. We noted that, while the base forfeiture amounts are indeed close to the statutory maxima in the "other" category, most of the entities in the "other" category would not be disadvantaged because, except in egregious cases, they would generally receive a forfeiture only after receipt of a warning.

111. The forfeiture guidelines adopted today establish several base amounts that are lower than that proposed in the NPRM. For example, the base forfeiture amount for slamming violations was reduced to better reflect the concerns raised by common carriers and the forfeiture amounts assessed during the interim period. We also reconciled the base forfeiture amount for other violations that seemed duplicative or overlapping. For example, we agreed with the concern that the base forfeiture amount for violations such as using unauthorized frequencies should not be higher than forfeitures for operating at an unauthorized location. Thus, we use the same base forfeiture amounts for these violations.

112. Documenting one's inability to pay a forfeiture was one of the greatest concerns raised in the comments. Licensees that are now subject to a higher statutory maxima due to their common carrier status as well as licensees that own and operate ancillary communications businesses fear that high forfeitures will put them out of business. We reiterate here that forfeitures are not assessed against those licensees that comply with the Act and rules. Only when a licensee's non-compliant actions warrant a sanction do we assess a forfeiture. Moreover, we only assess high forfeitures against a licensee when it flagrantly disregards the Act or our rules and the violations warrant action short of license revocation.

113. As for forfeitures that a licensee believes it cannot afford to pay relative to its financial situation, we must look to the totality of the circumstances surrounding the individual case. The parent company's ability to pay, therefore, is relevant in evaluating the subsidiary company's ability to pay the forfeiture. We are, however, cognizant of the concerns raised by small businesses as to the burden and expense of documenting inability to pay by means of an audited financial statement. We reiterate that the Commission has the flexibility to consider any documentation (e.g., balance sheets, profit/loss statement certified by the licensee) that it considers probative, objective evidence of the violator's inability to pay a forfeiture. See para. 4, supra. Moreover, our evaluation of a violator's ability to pay a forfeiture comports with the SBREFA requirements.[178]

Significant Alternatives Considered and Rejected

[178] *See* Section 223 of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, 110 Stat. 857.

114. The forfeiture guidelines adopted here today in the instant Report and Order reflects careful analysis of comments submitted by both large and small licensees as well as communication associations and members of the general public regarding an NPRM that requested information on all aspects of the proposed forfeiture policy. Although CMRS and PCS licensees contended that a further NPRM was necessary because they were not in existence when the forfeiture amounts were statutorily increased, we note that the NPRM in the instant rule making requested comments on all aspects of the forfeiture policy and that these licensees did take the opportunity to comment on the proposed forfeiture guidelines. Thus, a further NPRM was not warranted. Likewise, we rejected the suggestions from the "new" common carriers, i.e., licensees previously classified in the "other" category but now defined as common carriers pursuant to Section 332(c)(1) of the Act, 47 U.S.C. § 332(c)(1), that a further NPRM was warranted because these licensees are now evaluated under a different forfeiture statutory maxima. Inasmuch as the Act classified these licensees as common carriers, they must also be classified as common carriers for purposes of assessing forfeitures. We also rejected their alternative recommendation that they be assessed forfeitures based on their previous classification in the "other" category for the same reason. Lastly, we did not address the impact of forfeitures assessed against those licensed by transmitter versus those licensed by marketplace because this concern relates to licensing procedures and, thus, is not within the scope of this proceeding.

115. We continue to believe that, while the Policy Statement serves as a guideline or starting point for most of the violations for which we assess forfeitures, we retain our discretion to depart from the guidelines in appropriate circumstances. We found unpersuasive the concern that using discretion would result in increased litigation. Regardless of the method used to assess a forfeiture, dissatisfied parties can seek reconsideration before the Commission or voice their objections in a trial de novo in district court. We also continue to believe that we may properly use the existence of underlying facts of prior violations in the issuance of a subsequent NAL. Notwithstanding the concerns raised in the comments, we believe that this approach is faithful to the legislative history and congressional intent.

116. The Policy Statement adopted in the instant Report and Order today provides sufficient flexibility to allow for forfeitures to be assessed at less than the base amount; thus we decline to address specifically when a violation would constitute a partial violation of a rule as was suggested by one of the commenters. We did reject the suggestions that we use this forum as an opportunity to provide amnesty for licensees for violations such as EBS; such a request is moot. Likewise we rejected the suggestions of amnesty for other violations where the issue is either moot (e.g., the broadcast operator on duty obligation) or suggestions that require Congressional action (e.g., eliminating the statutory prohibition against broadcasting lottery information). We also rejected the suggestions that we cancel any pending cases that were assessed under the prior Policy Statement or that we assess forfeitures in the interim period based on the pre-1989 statutory maxima. We reiterate that the Commission has full authority to apply the increased statutory maxima in effect since 1989 and to adjust its policies and decisions in specific cases on an ongoing basis to take account of increased statutory amounts or changes in Commission enforcement priorities, regardless of the existence or non-existence of a forfeiture policy statement.

Reporting, Recordkeeping, and Other Compliance Requirements:

117. The adopted forfeiture guidelines seek to clarify how the Commission assesses fines when a party has violated the Act or rules, including what forfeiture amount a small business could reasonably expect to be assessed by the Commission if it fails to comply with the rules. Thus, the adopted forfeiture policy statement does not require that violators provide any reports or impose any other compliance requirements. Forfeitures will be levied for violations of rules which have already been adopted and subjected to the RFA and SBREFA requirements. As to the record keeping concerns raised by some commenters in establishing inability to pay a forfeiture, the forfeiture policy statement does not impose new requirements. The Policy Statement makes clear that the Commission will consider objective documented evidence in support of an argument of inability to pay a forfeiture. Such objective evidence would logically include business financial records generally maintained on a routine basis by any type of business entity regardless of size. Thus, the Policy Statement adopted in the instant Report and Order has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose no new or modified reporting and recordkeeping requirements or burdens on the public.

Report to Congress: The Commission shall include a copy of this Final Regulatory Flexibility Analysis, along with this Report and Order, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA (or summary thereof) will also be published in the Federal Register.