

Commission has established the following allotment of time and order of presentation. The meeting will convene at 1:30 p.m., May 24, 2010, in the Commission's Main Hearing Room 100,

800 North Capitol Street, NW., Washington, DC 20573.

The Federal Maritime Commission welcomes written comments for the record. All written comments submitted in this proceeding (an Original and 15

copies) including written statements presented at the May 24th meeting are due by Friday, June 4, 2010. Written submissions, except for confidential business information, will be available for public inspection.

#### PANEL I

Participant(s)	Company	Time allotment (in minutes)
Edward D. Greenberg, Attorney for NCBFAA .....	National Customs Brokers & Forwarders Association of America, Inc. ....	10
Paulette Kolba, VP Ocean Compliance Panalpina, Inc. ....	Pantainer Ltd. ....	10
Robert J. Schott, President .....	SEASCHOTT, Division of AIRSCHOTT, Inc. ....	10
Robert A. Voltmann, President & CEO .....	Transportation Intermediaries Association .....	10

#### PANEL II

Participant(s)	Company	Time allotment (in minutes)
Neil Barni, President .....	CargoSphere .....	10
James E. Devine, President .....	Distribution Publications, Inc. ....	10
Stan Levy, President .....	Stan Levy Consulting .....	10
Gerard P. Wardell, President; Laurie A. Olson, VP Tariff Operations. ....	RateWave Tariff Services, Inc. ....	10

**Karen V. Gregory,**  
*Secretary.*

[FR Doc. 2010-12299 Filed 5-20-10; 8:45 am]

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 1 and 17

[WT Docket No. 10-88; RM 11349; FCC 10-53]

### 2004 and 2006 Biennial Regulatory Reviews—Streamlining and Other Revisions of the Commission's Rules Governing Construction, Marking and Lighting of Antenna Structures; Amendments To Modernize and Clarify the Commission's Rules Concerning Construction, Marking and Lighting of Antenna Structures

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this Notice of Proposed Rulemaking (NPRM), the Commission seeks comment on revisions to the Commission's rules governing the construction, marking, and lighting of antenna structures. The Commission initiates this proceeding to update and modernize the Commission's rules.

**DATES:** Interested parties may file comments on or before July 20, 2010, and reply comments on or before August 19, 2010. Written comments on the Paperwork Reduction Act proposed

information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before July 20, 2010.

**ADDRESSES:** You may submit comments, identified by WT Docket No. 10-88; RM 11349; FCC 10-53, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Federal Communications Commission's Web site:* <http://www.fcc.gov/cgb/ecfs/>. Follow the instructions for submitting comments.
- *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: [FCC504@fcc.gov](mailto:FCC504@fcc.gov) or phone: 202-418-0530 or TTY: 202-418-0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

In addition to filing comments with the Secretary, a copy of any comments

on the Paperwork Reduction Act information collection requirements contained herein should be submitted to the Federal Communications Commission via e-mail to [PRA@fcc.gov](mailto:PRA@fcc.gov) and to Nicholas A. Fraser, Office of Management and Budget, via e-mail to [Nicholas.A.Fraser@omb.eop.gov](mailto:Nicholas.A.Fraser@omb.eop.gov) or via fax at 202-395-5167.

**FOR FURTHER INFORMATION CONTACT:** John Borkowski, Wireless Telecommunications Bureau, (202) 418-0626, e-mail [John.Borkowski@fcc.gov](mailto:John.Borkowski@fcc.gov). For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an e-mail to [PRA@fcc.gov](mailto:PRA@fcc.gov) or contact Judith B. Herman at 202-418-0214 or via the Internet at [Judith-B.Herman@fcc.gov](mailto:Judith-B.Herman@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rulemaking in WT Docket No. 10-88; RM 11349; FCC 10-53, adopted April 12, 2010, and released on April 20, 2010. The full text of the NPRM is available for public inspection and copying during business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. It also may be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554; the contractor's Web site, <http://www.bcpweb.com>; or by calling (800) 378-3160, facsimile (202) 488-5563, or e-mail [FCC@BCPIWEB.com](mailto:FCC@BCPIWEB.com). Copies of

the public notice also may be obtained via the Commission's Electronic Comment Filing System (ECFS) by entering the docket number WT Docket No. 10–88. Additionally, the complete item is available on the Federal Communications Commission's Web site at <http://www.fcc.gov>.

## Synopsis of the Notice of Proposed Rulemaking

### I. Introduction

1. In this Notice of Proposed Rulemaking (NPRM), the Commission seeks comment on revisions to the Commission's part 17 rules governing the construction, marking, and lighting of antenna structures. The Commission initiates this proceeding to update and modernize the part 17 rules. These proposed revisions are intended to improve compliance with these rules and allow the Commission to enforce them more effectively, helping to better ensure the safety of pilots and aircraft passengers nationwide. These proposed revisions would also remove outdated and burdensome requirements without compromising the Commission's statutory responsibility to prevent antenna structures from being hazards or menaces to air navigation.

### II. Discussion

2. This NPRM proposes amendments to the part 17 rules to update and modernize them, including harmonizing them with Federal Aviation Administration (FAA) rules where appropriate. The following discussion will examine the entirety of part 17, considering: (1) Antenna structure registration and marking and lighting specifications; (2) maintenance of marking and lighting; and (3) other matters.

#### A. Antenna Structure Registration and Marking and Lighting Specifications

##### 1. Provisions Governing Specification of Marking and Lighting

3. The provisions governing specification of marking and lighting for registered antenna structures are set forth in Sections 17.21 through 17.23 of the rules. Section 17.21 specifies that painting and lighting of an antenna structure is required if the structure exceeds 200 feet in height or if it requires aeronautical study, unless an applicant can show that absence of (or lesser) marking would not impair air safety. Section 17.22 provides that the Commission will generally assign specifications for painting and lighting in accordance with FAA Circulars referenced in Section 17.23, but also provides that if such painting or lighting

is confusing, or endangers rather than assists airmen, the Commission may specify painting or lighting in the individual situation. Section 17.23 provides that, unless otherwise specified by the Commission, each new or altered antenna structure to be registered on or after January 1, 1996, must conform to the FAA's painting and lighting recommendations set forth on the structure's FAA determination of "no hazard" as referenced in FAA Advisory Circulars AC 70/7460–1J ("Obstruction Marking and Lighting") and AC 150/5345–43E ("Specification for Obstruction Lighting Equipment"), both of which are cross-referenced.

4. In its 2004 Biennial Review Comments, PCIA—the Wireless Infrastructure Association (PCIA) states that FAA Advisory Circular AC 70/460–1J referenced in Section 17.23 has been superseded, creating a conflict between the Commission's marking and lighting requirements and the FAA's. In the Biennial Review Proceeding, PCIA, CTIA—the Wireless Association (CTIA), and Cingular Wireless LLC (Cingular) proposed that Section 17.23 be amended to reference the most recent versions of the FAA Advisory Circulars. PCIA seeks this rule change in its Petition for Rulemaking as well. In their comments on PCIA's Petition for Rulemaking, Cingular, Crown Castle USA, Inc. (Crown Castle), and the National Association of Broadcasters (NAB) agree that the Commission's rules should be consistent with the most recent FAA painting and lighting recommendations. In its Petition for Rulemaking, PCIA also seeks to amend Section 17.23 to clarify that the lighting and marking specifications assigned to a structure by the Commission upon registration do not change unless the FAA recommends new specifications for that particular structure.

5. The Commission proposes several revisions to these provisions. First, the Commission agrees with commenters that the rules should not reference obsolete editions of the Advisory Circulars. Rather than updating the references in the current rules, however, the Commission proposes to delete any reference to Advisory Circulars as unnecessary and potentially confusing. Because each antenna structure owner is clearly notified through the registration process of the specifications that apply to a particular structure, first by the FAA itself in its "no hazard" determination, and then by the Commission in the owner's antenna structure registration, the Commission believes that specific reference in the rules to particular Advisory Circulars is unnecessary. Such references also may

cause confusion if the FAA updates the relevant circulars more frequently than the Commission amends its part 17 rules. Also, certain older registrations reference discontinued FCC Form 715/715A rather than the Advisory Circulars. To avoid these results, the Commission proposes that the rules require the marking and lighting recommended in the FAA determination and associated study, unless otherwise specified, rather than in any particular circular. The Commission seeks comment on this proposal, and in particular on whether there are any circumstances in which this approach would not be clear.

6. PCIA proposes that the Commission specify in the rules that lighting and marking requirements do not change unless the FAA recommends new specifications for particular structures. PCIA believes this language is necessary to clarify that a revised FAA Circular does not impose new obligations upon already-approved antenna structures. PCIA also indicates that this proposal seeks rule codification of a statement made on the FCC's Web site. The Commission seeks comment on PCIA's proposal. The Commission also seeks comment on whether, in the event the FAA changes its standards, it may instead be preferable for the Commission to have the flexibility to apply any new standards retroactively. Should the Commission defer in the first instance to the FAA as the expert agency on aircraft navigation safety as to whether revised standards should be applied to existing structures, unless otherwise specified by the FCC?

7. Consistent with this discussion, the Commission proposes several specific changes to the rules. Section 17.4 of the rules contains an overview of the antenna structure registration process. The Commission proposes adding to § 17.4 a provision clarifying that the FAA's recommended specifications are generally mandatory, but that the Commission may specify additional or different requirements. The Commission believes stating this simply up front will provide clarity regarding the central obligation of structure owners. The Commission also proposes to amend § 17.4 to indicate that no changes may be made to the lighting or marking specifications on an antenna structure registration without prior FAA and Commission approval. The Commission seeks comment on these proposals.

8. With respect to §§ 17.21 through 17.23, the Commission first proposes to amend § 17.21(a), which provides that antenna structures shall be painted and lighted when they exceed 60.96 meters (200 feet) in height above ground level

or they require special aeronautical study. The Commission proposes to instead reference FAA notification requirements. The Commission believes that referencing FAA notification requirements will clarify which antenna structures must comply with § 17.21. The Commission would retain the provision in § 17.21(b) that the Commission may modify requirements “for painting and/or lighting of antenna structures when it is shown by the applicant that the absence of such marking would not impair the safety of air navigation, or that a lesser marking requirement would insure the safety thereof.” The Commission then proposes to delete as unnecessary the first sentence of § 17.22, which provides: “Whenever painting or lighting is required, the Commission will generally assign specifications in accordance with the FAA Advisory Circulars referenced in Section 17.23.” The Commission would redesignate as paragraph 17.21(c) the remainder of current § 17.22, specifying that “[i]f an antenna installation is of such a nature that its painting and lighting in accordance with these specifications are confusing, or endanger rather than assist airmen, or are otherwise inadequate, the Commission will specify the type of painting and lighting or other marking to be used in the individual situation.” Finally, the Commission would amend § 17.23, as discussed above, to replace the reference to specific Advisory Circulars with a more general reference to the FAA’s determination of no hazard and associated study, and to clarify the structure owner’s obligation to comply with any other specifications prescribed by the Commission. The Commission seeks comment on all these proposals.

9. Finally, the Commission proposes deleting § 17.17(a). The Commission’s proposed removal of reference to FAA circulars in § 17.23 would eliminate the need for the stated exception in § 17.17(a). Moreover, the language in § 17.17(a) has resulted in some confusion as to what painting and lighting specifications antenna structures authorized prior to July 1, 1996, must maintain. The Commission does not make a specific proposal to amend § 17.17(b) in this Notice, but the Commission notes that the Commission would need to conform § 17.17(b) to any decision regarding PCIA’s proposal to specify that lighting and marking requirements do not change unless the FAA recommends new specifications for particular structures. The Commission seeks comment on these proposals.

## 2. Accuracy of Location and Height Data

10. Section 17.4(a)(1) provides that alteration of an existing antenna structure requires a new registration. However, the Commission’s rules do not define what constitutes an alteration such that a new registration is required. In the *ASR Streamlining Order* (11 FCC Rcd at 4287), the Commission determined that any change or correction of antenna structure site data of one second or greater in longitude or latitude, or one foot or greater in height, requires a new aeronautical study and a new determination by the FAA. The Commission noted that these criteria are consistent with the FAA’s standards for when a new notification is required. In order to clarify the obligations of antenna structure owners, the Commission proposes adding a new section to § 17.4 specifying that any change in height of one foot or greater or any change in coordinates of one second or greater requires prior approval from the FAA and the Commission. The Commission seeks comment on this proposal.

11. Consistent with this standard, the Commission also seeks comment on whether to amend its rules to require that the height information provided on FCC Form 854 must be accurate within one foot and the coordinates provided in FCC Form 854 must be accurate within one second of longitude and latitude. The Commission further seeks comment on whether to require that antenna structure owners must use the most accurate data available when reporting height information and site coordinates, and on whether the Commission should specify a particular survey method. In the *ASR Streamlining Order*, the Commission stated that antenna structure owners “may use surveying tools of differing accuracy, such as maps, GPS receivers, or GPS receivers with differential corrections to obtain site data.” Moreover, in the *ASR Clarification Order* (15 FCC Rcd at 8678–8679), the Commission declined to mandate a specific accuracy standard for the submission of antenna structure data in deference to the FAA. It has been the Commission’s experience, however, that measurements taken using older survey methods may differ significantly from those performed using current GPS technology. In light of developments in technology and practice, the Commission therefore finds it appropriate to revisit whether the Commission should specify accuracy standards or survey methods. The Commission asks commenters to address whether the Commission should continue to defer to the FAA’s

expertise, and whether the Commission’s promulgation of rules would risk creating conflicts with the FAA’s process. Any comments proposing a specific method should explain that method and the benefits of mandating it for new antenna structure registrants.

## 3. Structures Requiring FAA Notification

12. Section 17.7 of the Commission’s rules sets forth which antenna structures require notification to the FAA. Section 17.14 of the Commission’s rules sets forth certain categories of antenna structures that are exempt from notification to the FAA. Sections 17.7 and 17.14 are restatements of FAA rules. Specifically, § 17.7 of the Commission’s rules is a restatement of § 77.13 of the FAA’s rules. Section 17.14 of the Commission’s rules is a restatement of § 77.15 of the FAA’s rules. These restatements of FAA rules in Commission rules appear to be unnecessary and duplicative, and their inclusion risks creating confusion in the event the FAA were to change its criteria. The Commission therefore proposes to delete §§ 17.7 and 17.14 of the Commission’s rules. In lieu of these full restatements of FAA rules, the Commission proposes adding cross-references to relevant FAA rules in § 17.4 of the Commission’s rules, which provides that the owner of any proposed or existing antenna structure that requires notice of proposed construction to the FAA must register the structure with the Commission. The Commission seeks comment on this tentative conclusion, and on whether there is any reason the Commission should retain language in its own rules stating which antenna structures require notification to the FAA.

## 4. Pending FAA Rulemaking Proceeding

13. The FAA’s current part 77 rules set forth regulations pertaining to the physical attributes of objects (including communications facilities) that may affect navigable airspace. Under these rules, parties proposing to construct or modify a structure must file a “Notice of Proposed Construction or Alteration” with the FAA. The FAA then conducts an obstruction evaluation to determine whether the proposed structure will pose a hazard to air navigation. The Commission has, in turn, required any antenna structure for which a Notice of Proposed Construction or Alteration must be filed with the FAA to be registered with the Commission as well. As discussed in more detail above, this registration requirement is the vehicle by which the Commission exercises its

authority under the Communications Act to require painting and lighting of towers that may constitute a hazard to air navigation.

14. In a Notice of Proposed Rulemaking released in June, 2006, the FAA has proposed to modify its notification rules. Under the FAA's proposal, among other things, events that give rise to a notification requirement would be expanded to include construction of new facilities that operate on specified frequency bands, changes in authorized frequency, addition of new frequencies, increases in effective radiated power or antenna height above certain thresholds, and changes in antenna configuration for communications facilities that operate in specified radio frequency bands, independent of the physical attributes of such facilities. The Commission seeks comment on how the outcome of the FAA's proceeding may affect any of the matters being considered in the instant proceeding. In particular, the Commission seeks comment on whether, if the FAA were to adopt its proposed rules in whole or in part, the Commission should modify any of its rules or change any proposed approaches to issues addressed in this proceeding. In this regard, one such significant issue is whether the Commission should continue to require all instances of "Notice of Proposed Construction or Alteration" required by the FAA to result in an antenna structure registration or amendment of antenna structure registration with the Commission.

#### *B. Maintenance of Marking and Lighting*

15. The part 17 rules also detail certain requirements that concern the maintenance of the marking and lighting on antenna structures. These requirements include inspection and maintenance of lighting, records of extinguishment or improper functioning of lights, and maintenance of painting. The Commission believes that some of these requirements are unnecessarily burdensome to antenna structure owners and may be less effective at preventing hazards to air navigation than certain alternatives. The Commission also believes that some interpretations of these requirements overly complicate its enforcement efforts in this important public safety area. Therefore, the Commission is proposing several amendments and deletions to streamline and clarify these rules.

#### *1. Inspection and Maintenance of Lighting*

16. The basic regime governing inspection and maintenance of required lighting is set forth in §§ 17.47, 17.48, and 17.56(a) of the rules. Section 17.47 of the rules requires antenna structure owners to make an observation of the antenna structure's lights at least once each 24 hours either visually or by observing an automatic properly maintained indicator designed to register any failure of such lights or, alternatively, to provide and properly maintain an automatic alarm system designed to detect any failure of such lights and to provide indication of such failure to the owner. Section 17.47 also requires antenna structure owners to inspect at intervals not to exceed 3 months all automatic or mechanical control devices, indicators, and alarm systems associated with the antenna structure lighting to insure that such apparatus is functioning properly. Section 17.48(a) of the Rules requires immediate notification to the nearest Flight Service Station (FSS) or office of the FAA of any observed or otherwise known extinguishment or improper functioning of any top steady burning light or any flashing obstruction light, regardless of its position on the antenna structure, not corrected within 30 minutes. Upon notification of such an incident, the FAA issues a Notice to Airmen (NOTAM) to alert aircraft of the light outage. Section 17.48(b) of the Rules provides that "[a]n extinguishment or improper functioning of a steady burning side intermediate light or lights, shall be corrected as soon as possible, but notification to the FAA or [sic] such extinguishment or improper functioning is not required." Section 17.56(a) of the rules requires antenna structure owners to replace or repair lights, automatic indicators or automatic control or alarm systems as soon as practicable.

17. In their comments to the 2004 Biennial Review, PCIA, CTIA and Cingular argue that quarterly physical inspection of antenna structures imposes needless and costly burdens and adds nothing to the reliability of the system. Also, the Commission, initially, and later the Wireless Telecommunications Bureau on delegated authority, have granted several tower owners waivers of § 17.47(b) of the Rules to permit annual rather than quarterly inspections for their automatic or mechanical control devices, indicators and alarm systems associated with their antenna structure lighting, on the basis that they use advanced monitoring systems. In its

Petition for Rulemaking, PCIA, consistent with these waiver requests, recommends amendment of Section 17.47(b) of the rules to exempt systems using network operations control (NOC) center-based monitoring technologies from any requirement to regularly inspect all automatic or mechanical systems associated with antenna structure lighting. Sprint Nextel Corporation (Sprint Nextel), Cingular, Crown Castle and NAB all support such a rule amendment. In comments on a waiver request, Hark Tower Systems, Inc., also supported this approach.

18. The Commission seeks comment on two possible alternative changes to § 17.47. First, the Commission seeks comment on whether to delete § 17.47 of the rules in its entirety. The Commission is concerned that the current regime, which includes separate requirements for inspecting lighting systems, providing notice of extinguished lights, and replacing malfunctioning lights and monitoring systems, may create ambiguity for antenna structure owners regarding their regulatory obligations. In particular, an antenna structure owner may incorrectly conclude that so long as it performs the inspections required under § 17.47, it will not be subject to enforcement action if its lights fail to function. Eliminating the inspection requirements under § 17.47 would make clear that what matters is that the lighting required under the antenna structure registration remains on, or, if required lights become extinguished, that the structure owner promptly request a NOTAM. If these requirements are not met, the Commission may subject the structure owner to enforcement action regardless of the measures it followed to inspect its lighting and monitoring systems; and if these requirements are met, it would be immaterial to us how the structure owner ensured that its lights would remain functioning or NOTAMs would be requested. The Commission seeks comment on this possible approach, including on whether inspection requirements are necessary to ensure responsible monitoring of lighting systems.

19. Second, if the Commission determines not to eliminate all inspection requirements, the Commission seeks comment on whether to amend § 17.47(b) to exempt certain systems using NOC center-based monitoring technologies from the requirement to quarterly inspect all automatic or mechanical systems associated with antenna structure lighting. As explained in the Commission's order granting waivers to

American Tower Corporation (ATC) and Global Signal, Inc. (GSI), the types of systems used by ATC, GSI, and others reliably diagnose problems, including any failures of control devices, indicators and alarm systems, within real time. Thus, quarterly inspections of such systems may unnecessarily burden antenna structure owners without promoting aircraft navigation safety, and relieving inspection requirements for such towers may encourage tower owners to adopt state-of-the-art systems. In granting the ATC and GSI waiver requests, the Commission found that the use of advanced technology in those instances provided the benefits of more rapid response for lighting failures, with attendant aircraft safety benefits. The Commission seeks comment on the benefits and drawbacks of eliminating quarterly inspection requirements for systems utilizing advanced self-monitoring technology, and on whether required regular inspections that are less frequent, such as annually, should be retained. The Commission also seeks comment as to how the systems to be exempted from the quarterly inspection requirement should be defined.

20. The Commission proposes to retain the requirement in § 17.48(a) that antenna structure owners promptly report outages of top steady burning lights or flashing antenna structure lights to the FAA. However, the Commission believes amendment of this provision is necessary to ensure that a NOTAM is maintained so long as any outage continues. The FAA cancels all such notices within 15 days. However, the Commission's rules do not currently require antenna structure owners to notify the FAA if repairs to an antenna structure's lights require more than 15 days. Therefore, the Commission proposes to require antenna structure owners to provide continuously active NOTAM notice to the FAA of these lighting outages in accordance with current FAA requirements. Accordingly, antenna structure owners would be required to contact the FAA to extend the lighting outage date after 15 days and provide a return to service date. The Commission seeks comment on this proposal. The Commission specifically asks commenters to discuss how the Commission should balance the public interest benefit of having antenna structure owners contact the FAA every 15 days during a light outage against the burden on antenna structure owners of continual notification requirements. The Commission also notes that the reporting requirement of § 17.48(a) requires that the FAA be notified "by telephone or telegraph." The

Commission tentatively concludes that this rule should be updated to require notification by means acceptable to the FAA, which currently is by a nationwide toll-free telephone number for reporting lighting outages, and the Commission seeks comment on this proposal.

21. Finally, the Commission requests comment on whether its rules should include time frames for replacing or repairing extinguished lights notwithstanding the issuance of a NOTAM, and if so, what those time frames should be. The Commission believes that the current requirements to replace or repair lights "as soon as practicable" (in § 17.56(a)) or "as soon as possible" (in § 17.48(b)) may be overly vague, and may engender confusion as to whether diligent efforts to correct lighting malfunctions obviate the need for a NOTAM. Accordingly, the Commission tentatively concludes that these provisions should be deleted. By proposing to delete these rule sections, however, the Commission does not intend to provide antenna structure owners with an unlimited amount of time to repair the lighting systems on their antenna structures, nor does the Commission suggest that antenna structure owners may avoid repairing the lighting systems on their antenna structures indefinitely by continually filing for NOTAMs. Moreover, because the FAA does not accept notifications or issue NOTAMs for extinguished steady burning side intermediate lights, in the absence of Section 17.48(b) the Commission's rules would contain no requirements relating to maintenance of these lights. The Commission therefore seeks comment on whether the Commission should implement a time limitation for lighting system repairs. If such a requirement is implemented, should it be based on the geographic location of the antenna structure? Should weather conditions be considered when determining the reasonableness of a time period requirement? The Commission seeks comment on these proposals.

## 2. Elimination of Unnecessary Provisions

22. Sections 17.45, 17.51, and 17.56(b) each set forth specific requirements for antenna structure owners to follow in exhibiting or maintaining lights. Section 17.45 of the rules specifies the type of temporary warning lights to be used during construction of antenna structures for which red obstruction lighting is required. Section 17.51 of the rules requires red obstruction lighting to be on from sunset to sunrise and high intensity and medium intensity lighting

to burn continuously. Section 17.56(b) requires that the flash tubes in a high intensity obstruction lighting system shall be replaced whenever the peak effective daytime intensity falls below 200,000 candelas.

23. The Commission notes that in their 2004 Biennial Review comments, PCIA, CTIA and Cingular ask that § 17.51 be amended to harmonize it with Section 17.48 (Notification of Extinguishment or Improper Functioning Lights). Specifically, PCIA states that § 17.51 should be revised to provide that a malfunctioning flashing light does not violate § 17.51, so long as a NOTAM has been sought by the tower owner or operator and issued by the FAA. PCIA also suggests that § 17.51 should provide that it is not violated when a malfunction is beyond the control of the tower owner/operator (such as in a power failure).

24. The Commission tentatively concludes that each of these provisions should be deleted because the relevant requirements are specified in the FAA determination of no hazard and associated study for each tower, and the separate identification of specific requirements in the Commission's rules is therefore unnecessary and may create ambiguity in cases of conflict. Any antenna structure which is assigned specifications by the FAA for lighting is also assigned Chapter 4 (Lighting Guideline) of FAA Advisory Circular AC 70/7460-1. This chapter details the type of construction lights, both red and white, that should be used during construction. Chapter 4 also details requirements for the inspection, repair and maintenance of lights. Any antenna structure which is assigned red obstruction, high intensity or medium intensity lighting by the FAA is also assigned the applicable chapter (Chapter 5, 6 or 7) of the same FAA Advisory Circular (AC 70/7460-1) on its antenna structure registration. The Commission therefore proposes to delete each of these rule provisions in order to promote clarity and avoid potential conflicts. The Commission seeks comment on this tentative conclusion, and in particular on whether there are any instances in which the FAA would not assign the relevant specifications in its Advisory Circular.

25. The Commission does not agree with the commenters' position that its lighting requirements should include an exception where lights are extinguished due to loss of power beyond the structure owner's control. As discussed above, the Commission is proposing amending § 17.48 to clearly state the basic requirement to maintain the required lighting or, if lights become

extinguished, obtain and maintain a NOTAM. Thus, if lights become extinguished due to loss of power, the structure owner will remain in compliance with the rules if it immediately notifies the FAA and renews the notification every 15 days. The Commission does not believe it is either necessary or consistent with aircraft navigation safety to exempt outages due to loss of power from this process. Moreover, the Commission is not persuaded that the effects of power outages are beyond the control of antenna structure owners, or beyond their ability to remedy. The Commission seeks comment above on whether the Commission should establish time limits for repair or replacement of extinguished lights. Any rules that the Commission might adopt setting such time limits would apply to lights that are off due to a power outage. The Commission seeks comment on this analysis.

### 3. Records of Extinguishment or Improper Functioning of Lights

26. Section 17.49 requires antenna structure owners to maintain a record of observed or otherwise known extinguishments or improper functioning of structure lights. The Commission proposes to amend this provision by adding a requirement to maintain such records for two years and provide the records to the Commission upon request. The Commission tentatively concludes that this retention period best balances the Commission's need to determine the compliance record against the burden of record retention on antenna structure owners. The Commission seeks comment on this tentative conclusion, and in particular on whether two years is the appropriate retention period. The Commission encourages commenters to provide data regarding the burden this record retention would impose on antenna structure owners, and the Commission invites comment on whether the Commission should eliminate the recordkeeping requirement entirely.

### 4. Maintenance of Painting

27. Section 17.50 of the rules specifies that antenna structures requiring painting under part 17 shall be cleaned or repainted as often as necessary to maintain good visibility. In their 2004 Biennial Review Comments, PCIA, CTIA and Cingular argue that the Commission needs an unambiguous standard for measuring good visibility, and suggest that the rule be amended to reflect the standard used by the FAA. In particular, PCIA proposes that the Commission amend § 17.50 to require that the "paint

on the structure must be within the color tolerance depicted on the FAA's 'In Service Aviation Orange Tolerance Chart' as measured against the base of the tower from a distance of one-quarter mile." Cingular states that the current lack of a standard for "good visibility" "leads to the potential for inconsistent enforcement."

28. The Commission requests comment on whether to amend § 17.50 to specifically provide for use of the FAA's 'In Service Aviation Orange Tolerance Chart' to determine whether a structure needs to be cleaned or repainted. In the field, the Commission's Enforcement Bureau currently determines whether a structure needs to be cleaned or repainted by comparing it to the FAA's In Service Aviation Orange Tolerance Chart at the base of the structure and/or by observing the structure at one-quarter mile distance from the structure. The Commission believes that each of these approaches has certain benefits. On one hand, a close inspection of the tower may provide more information about the condition of the paint (e.g., whether it is flaking) and about the actual color and how closely it matches the required parameters. On the other hand, a view from one-quarter mile distance, although subjective, may closely approximate tower visibility and conspicuity that pilots would encounter and therefore may better ensure that towers are visible. However, a view from a distance may be subject to inconsistencies depending upon such factors as direction, time of day, weather conditions, and silhouetting. Adding a specific reference to the color chart in § 17.50 could provide a more objective standard for gauging the condition of required painting and may provide better guidance for antenna structure owners and promote consistent enforcement. The Commission therefore seeks comment on whether to incorporate such a reference.

29. If the Commission does amend the rules to defer to the In Service Aviation Orange Tolerance Chart, the Commission further seeks comment on whether to compare the FAA's In Service Aviation Orange Tolerance Chart to the tower at a distance of one-quarter mile, as PCIA proposes, or at the base of the tower, as is the Enforcement Bureau's practice. The instructions on the FAA chart direct that "to use the charts place each directly over the surface to be examined." However, a more distant view may be most consistent with the FAA's Advisory Circular on Obstruction Marking and Lighting, which indicates that "the color should be sampled on the upper half of

the structure, since weathering is greater there." The Commission seeks comment on which of these methods of using the chart, or both or neither, should be referenced in the rule. The Commission also seeks comment on whether, and if so how, the rule should combine use of the chart with other methods of gauging visibility, as well as any other suggestions on how the rule should be drafted.

### C. Other Matters

#### 1. Definitions

30. Section 17.2(a) of the rules defines an "antenna structure" as including "the radiating and/or receive system, its supporting structures and any appurtenances mounted thereon." Section 17.2(c) defines an "antenna structure owner" as the individual or entity vested with ownership, equitable ownership, dominion, or title to the antenna structure. Commenters argue that because the definition of "antenna structure" includes antennas and other appurtenances, the definition of "antenna structure owner" could be read to include the service providers who own these antennas. Commenters therefore urge the Commission to amend its rules to clarify that the obligations of antenna structure owners fall only on the owner of the underlying structure. Specifically, in their comments to the 2004 Biennial Review, PCIA, CTIA and Cingular urge the Commission to revise the definition of antenna structure so that compliance obligations of infrastructure providers and licensed carriers are not ambiguous. PCIA and Cingular both argue that the definition needs to be revised to reinforce Commission decisions that the antenna structure owner is responsible for marking, lighting and notification responsibilities relating to the structure.

31. The Commission has previously made clear that registration responsibilities fall squarely on the antenna structure owners, and not on the licensees or permittees that are merely tenants of the structures. Nonetheless, the Commission agrees that incorporating a more precise definition into its rules would promote clarity for all parties. The Commission therefore proposes amending § 17.2(c) to provide that the antenna structure owner is the owner of "the underlying structure that supports or is intended to support antennas and other appurtenances." The Commission seeks comment on this proposal, including any unintended consequences that may result from this change.

32. The Commission also tentatively concludes that § 17.2(a) should be

amended to clarify both when a structure becomes, and when a structure ceases to be, an "antenna structure" under its rules. Section 303(q) of the Act provides that "[i]n the event that the tower ceases to be licensed by the Commission for the transmission of radio energy, the owner of the tower shall maintain the prescribed painting and/or illumination of such tower until it is dismantled . \* \* \*". Consistent with this provision, the Commission proposes amending § 17.2(a) to provide that a structure will continue to be considered an antenna structure and subject to its part 17 requirements until such time as that structure is dismantled, regardless of whether the structure continues to be used for the transmission and/or receipt of radio energy. Similarly, the Commission believes it is consistent with the intent of § 303(q) that a structure constructed for the primary purpose of transmitting or receiving radio energy be treated as an antenna structure subject to its rules from the time construction begins, regardless of whether the structure immediately is being used for its intended purpose. The Commission therefore proposes amending § 17.2(a) to reflect this tentative conclusion as well. The Commission seeks comment on these proposals. Finally, the Commission notes that the term "antenna structure" is defined in both §§ 1.907 and 17.2(a) of the Commission's rules. The Commission seeks comment on whether these two definitions should be harmonized.

## 2. Structures Not Requiring Registration

33. Under the Commission's rules, not all antenna structures must be registered with the Commission, only those of certain heights, depending on their location. Despite this limitation, some antenna structure owners have voluntarily registered their structures with the Commission, even though such registration is not required. The Commission seeks comment on whether the rules concerning antenna structures should be enforced against such voluntarily registered structures. In addition, the Commission seeks comment on whether owners of antenna structures that do not require registration should be prohibited from registering their towers, and whether antenna structure owners who have voluntarily registered structures should be required to withdraw their registrations from the Commission's antenna structure database. Such an action could reduce confusion concerning the regulatory status of these structures. The Commission seeks comment on both the benefits and

drawbacks to the Commission and the public of keeping voluntarily registered structures in the database, as well as of permitting additional structures to be voluntarily registered. In this regard, the Commission notes that antenna structure owners often register structures that fall below the Commission's height thresholds in order to file an Environmental Assessment and obtain a Finding Of No Significant Impact under the Commission's environmental rules. The Commission invites comment regarding what changes to its environmental processing may be necessary if antenna structure registration under these circumstances were to be limited.

## 3. Posting of Antenna Structure Registration Number

34. Section 17.4(g) provides: "Except as provided in paragraph (h) of this section, the Antenna Structure Registration [ASR] number must be displayed in a conspicuous place so that it is readily visible near the base of the antenna structure." In its Petition for Rulemaking, PCIA contends that it is not always possible to post the ASR number so that it is both "readily visible" and "near the base" of the tower. PCIA and Cingular both comment that the Commission's "Posting Guidelines" indicate that in such instances an appropriate place to post the ASR number is "along a perimeter fence" or "at the point of entry of the gate." PCIA recommends amendment of the rule to expressly permit posting of the ASR number at a compound fence or gate. Sprint Nextel, Crown Castle, NAB and Cingular concur.

35. The purpose of § 17.4(g) is to ensure that a member of the general public can identify the structure in the event of a light outage or other air safety hazard and report the problem to the Commission and/or the FAA, as well as to ensure that FCC and FAA personnel can readily identify the structure. As currently written, however, the rule does not require that the ASR number be posted in a place that would be visible to the general public. The Commission therefore proposes to modify § 17.4 to require that antenna structure owners display the ASR number so that it would be visible to a member of the general public who reaches the closest publicly accessible location near the base of the antenna structure. Where two or more separate locations of this nature exist for a single antenna structure, such as two roads from different directions to a mountaintop site, the Commission would require posting the Antenna Structure Registration number at each

such location. The Commission tentatively concludes that amending the rule in this manner would both clarify the obligations of antenna structure owners and promote timely remediation when lighting is observed to be malfunctioning or extinguished. The Commission further tentatively concludes that it is unnecessary for the ASR number to be posted both at the base of the tower and at a point that is visible to the general public. The Commission seeks comment on these tentative conclusions, including whether there would be benefits to requiring an additional posting of the ASR number near the base of the tower where that location is not readily visible to the public. The Commission also seeks comment on how the rule should address those situations where two towers having separate ASR numbers may be located within a single fenced area, as well as situations in which an antenna structure is located on a building.

## 4. Provision of Antenna Structure Registration to Tenants

36. Section 17.4(f) requires that antenna structure owners immediately provide copies of FCC Form 854R (antenna structure registration) to each tenant licensee and permittee. In their Biennial Review comments, PCIA, CTIA and Cingular propose that the Commission eliminate this requirement altogether, and shift the burden to the Commission's licensees and permittees to obtain a copy of the Form 854R from the Commission's Web site. In its Petition for Rulemaking, PCIA specifically recommends that the rule should instead require antenna structure owners to provide tenants with the ASR number or some indication that the ASR has been changed or updated, so that licensees and permittees may obtain relevant Form 845R (antenna structure registration) information from the FCC's ASR Online System. Sprint Nextel, Cingular, Crown Castle and NAB agree, arguing that the requirement to provide paper copies no longer serves any practical purpose and imposes unnecessary costs.

37. The Commission agrees that antenna structure owners should no longer be required to provide paper copies of the Form 854R to their tenants, as the relevant information and access to the form can ordinarily be provided at least as effectively, and more economically, by electronic means. However, the Commission believes it is essential that the tenant licensees and permittees know when the antenna structure has been registered, and how to access the registration form. The



Commission therefore proposes to amend the relevant rules to allow antenna structure owners, as an alternative to providing a copy of Form 854R, to notify tenant licensees and permittees that the structure has been registered, and give the tenant licensees and permittees the antenna structure's registration number along with the link for the Commission's antenna structure registration Web site. This notification may be done using paper mail or electronic mail. The Commission seeks comment on this proposal.

#### 5. Notification of Construction or Dismantlement

38. Section 17.57 requires that antenna structure owners notify the Commission within 24 hours of construction or dismantlement of an antenna structure, and immediately for changes in height or ownership. In its Biennial Review comments, PCIA recommends changing § 17.57 to harmonize the timing for these requirements with FAA rules. In its Petition for Rulemaking, PCIA indicates specifically that its proposal in this regard would be to change from 24 hours to five days the time for notification of construction or dismantlement, and to change from "immediately" to five days the time for notification of changes in height or ownership. Cingular and NAB support the concept of harmonization of the Commission's rules with FAA rules regarding notification of construction and/or dismantlement.

39. The Commission tentatively concludes that the Commission should not adopt these proposed changes. Initially, the Commission notes that neither PCIA nor Cingular cites the relevant FAA requirements or explains why they are appropriate for the Commission's purposes. In any event, these FCC notification requirements promote accuracy of the Commission's information, and it would not appear to create any conflict for them to be stricter than the FAA's. Given the simple nature of notification filings, commenters have not shown that the time frames are unreasonably burdensome. The Commission seeks comment on this issue, including discussion of any burdens that the existing rule may impose.

#### 6. Facilities on Federal Land

40. Section 17.58 of the Commission's rules provides that any application proposing new or modified transmitting facilities to be located on land under the jurisdiction of the U.S. Forest Service or the Bureau of Land Management shall include a statement that the facilities

will be so located, and that the applicant shall comply with the requirements of § 1.70 of the rules. This rule was adopted in 1967, along with former § 1.70, which prescribed procedures for handling applications involving the use of certain lands and reservations under the jurisdiction of the U.S. Government. Those procedures were abolished in 1977 at the request of the Department of Agriculture and the Department of the Interior, at which point that iteration of § 1.70 was deleted. As § 17.58 was intended to promote compliance with procedures that no longer exist, the Commission now proposes to delete § 17.58. The Commission seeks comment on this proposal, including whether there is any reason to retain a requirement that the Commission be notified of facilities on Forest Service or Bureau of Land Management lands.

### III. Conclusion

41. By this NPRM, the Commission proposes various clarifications and amendments to the part 17 rules, in order to allow antenna structure owners to more efficiently and cost effectively ensure their compliance with those rules. The Commission seeks comment on these proposals.

### IV. Procedural Matters

#### A. Initial Regulatory Flexibility Analysis

42. As required by the Regulatory Flexibility Act of 1980, *see* 5 U.S.C. 603, as amended (RFA), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice of Proposed Rule Making (NPRM). Written public comments are requested on this IRFA. Comments must be specifically identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided in Section V.A. of the item. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

#### 1. Need for and Objectives of the Proposed Rules

43. Section 303(q) of the Communications Act vests in the Commission the authority to require painting and/or lighting of radio towers that may constitute a hazard to air navigation. Part 17 of the Commission's rules sets forth procedures for

identifying those antenna structures that might affect air navigation, consistent with recommendations made by the Federal Aviation Administration (FAA), and for registering such structures with the Commission. The Commission requires owners of antenna structures to register with the Commission those structures that meet the registration criteria and to exercise primary responsibility for the prescribed painting and lighting. The proposed rules seek to achieve the best framework to continue to fulfill the Commission's statutory responsibility to require antenna structure owners, registrants and Commission licensees to do whatever is necessary to prevent antenna structures from being hazards or menaces to air navigation.

44. The Commission proposes to amend § 17.4(a) and §§ 17.21, 17.22 (redesignated as § 17.21(c)), and 17.23 and to delete § 17.17(a) of the Commission's rules regarding antenna structure registration and painting and lighting specifications. The Commission also proposes conforming edits to §§ 1.61(a)(5) and 17.1(b). These proposed changes are intended to clarify the relationship between the Commission's rules and procedures and those of the FAA and to ensure continued consistency in those rules and procedures. The Commission also asks whether to amend § 17.17(b) (redesignated as § 17.24) by providing that a revised FAA Circular does not impose new obligations on already-approved antenna structures.

45. In order to clarify the obligations of antenna structure owners and to conform the Commission's regulations to Commission and FAA practice, the Commission proposes adding new sections to § 17.4 specifying that any change in height of one foot or greater, any change in coordinates of one second or greater, or any change in marking and lighting specifications requires prior approval from the FAA and the Commission. The Commission also proposes to consider whether to specify accuracy standards or survey methods in order to ensure consistency of data.

46. The Commission proposes to delete §§ 17.7 and 17.14 of the Commission's rules, which are restatements of FAA rules, and to substitute cross-references to relevant FAA rules in § 17.4 of the Commission's rules. This change could reduce the risk of confusion in the event the FAA were to change its criteria.

47. The Commission proposes to amend its rules governing inspection and maintenance of lighting by: (1) Amending § 17.47 to eliminate or reduce requirements to perform



inspections of lighting and light monitoring systems; (2) amending § 17.48(a) to require antenna structure owners to provide continuously active notice to the FAA of lighting outages; and (3) deleting vague references to timely repair timeframes in §§ 17.48(b) and 17.56(a). The Commission proposes to consider whether to eliminate § 17.47 in its entirety or to retain modified inspection requirements and whether to substitute more specific repair time limitations. These proposals are intended to relieve unnecessary burdens and reduce confusion while ensuring that aircraft navigation safety is best protected.

48. The Commission proposes to delete §§ 17.45, 17.51, and 17.56(b), which set forth specific requirements for exhibiting and maintaining lights, because they are unnecessary and may create ambiguity in cases of conflict with FAA specifications. This change could reduce the risk of confusion.

49. Section 17.49 requires antenna structure owners to maintain a record of observed or otherwise known extinguishments or improper functioning of structure lights. The Commission proposes to add a requirement to maintain such records for two years and provide the records to the Commission upon request in order to balance the Commission's need to determine the compliance record against the burden of record retention on antenna structure owners.

50. The Commission is considering a proposal to amend § 17.50 to require use of the FAA's 'In Service Aviation Orange Tolerance Chart' to determine whether a structure needs to be cleaned or repainted and to specify how the chart is to be used. These changes may provide more objective standards for gauging visibility.

51. The Commission proposes to amend § 17.2(a) of the Commission's rules to clarify both when a structure becomes, and when a structure ceases to be, an "antenna structure" under our rules. The Commission also proposes to amend § 17.2(c) of the Commission's rules to clarify that the obligations of an "antenna structure owner" fall only on the owner of the underlying structure, and not on tenants, thus promoting clarity for all parties.

52. The Commission also proposes to consider whether the rules concerning antenna structures should be enforced against voluntarily registered structures, whether owners of antenna structures that do not require registration should be prohibited from registering their towers, and whether antenna structure owners who have voluntarily registered structures should be required to

withdraw their registrations from the Commission's antenna structure database. Such action could reduce confusion by clarifying the regulatory status of these structures.

53. The Commission proposes to modify § 17.4(g) to require that antenna structure owners display the Antenna Structure Registration (ASR) number so that it would be visible to a member of the general public who reaches the closest publicly accessible location near each point of access to the antenna structure. The Commission further proposes to delete the requirement that the ASR number be posted near the base of the antenna structure. The Commission tentatively concludes that amending the rule in this manner would clarify the obligations of antenna structure owners, promote timely remediation when lighting is observed to be malfunctioning or extinguished, and eliminate unnecessary postings.

54. Section 17.4(f) requires that antenna structure owners immediately provide copies of FCC Form 854R (antenna structure registration) to each tenant licensee and permittee. Sections 17.4(e) and 17.6(c) impose a similar requirement on the first licensee in cases where the antenna structure owner is unable to file Form 854 because it is subject to a denial of Federal benefits under the Anti-Drug Abuse Act of 1988. The Commission proposes to amend these rules to allow the alternative of providing a link to the Commission's antenna structure registration Web site via paper or electronic mail.

55. The Commission proposes to delete § 17.58, which was intended to promote compliance with procedures that are now obsolete. This change would streamline the antenna structure registration process.

## 2. Legal Basis

56. The legal basis for any action that may be taken pursuant to the Notice is contained in Sections 4(i), 4(j), 11, and 303(q) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) through (j), 161, 303(q).

## 3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules May Apply

57. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by proposed rules.<sup>1</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and

"small governmental jurisdiction."<sup>2</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>3</sup> A "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").<sup>4</sup>

58. The Notice proposes rule changes that would impose requirements on a large number of entities relating to the registration of and maintenance of painting and lighting on antenna structures. Due to the number and diversity of owners of antenna structures and other responsible parties, including small entities that are Commission licensees as well as non-licensee tower companies, the Commission classifies and quantifies them in the remainder of this section.

59. *Cellular Licensees.* The SBA has developed a small business size standard for small businesses in the category "Wireless Telecommunications Carriers (except satellite)."<sup>5</sup> Under that SBA category, a business is small if it has 1,500 or fewer employees.<sup>6</sup> The census category of "Cellular and Other Wireless Telecommunications" is no longer used and has been superseded by the larger category "Wireless Telecommunications Carriers (except satellite)". However, since currently available data was gathered when "Cellular and Other Wireless Telecommunications" was the relevant category, earlier Census Bureau data collected under the category of "Cellular and Other Wireless Telecommunications" will be used here. Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.<sup>7</sup> Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or

<sup>2</sup> 5 U.S.C. 601(6).

<sup>3</sup> 5 U.S.C. 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 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*."

<sup>4</sup> 15 U.S.C. 632.

<sup>5</sup> 13 CFR 121.201, North American Industry Classification System (NAICS) code 517210.

<sup>6</sup> *Id.*

<sup>7</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization," Table 5, NAICS code 517212 (issued Nov. 2005).

<sup>1</sup> 5 U.S.C. 604(a)(3).

more.<sup>8</sup> Thus, under this category and size standard, the majority of firms can be considered small.

60. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>9</sup> For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>10</sup> These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.<sup>11</sup> No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the C Block auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.<sup>12</sup> On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.<sup>13</sup> On January 26, 2001, the Commission completed the auction of 422 C and F Block PCS licenses in Auction 35.<sup>14</sup> Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent

events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

61. *Narrowband Personal Communications Service.* The Commission held an auction for Narrowband Personal Communications Service (PCS) licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second commenced on October 26, 1994, and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of \$40 million or less.<sup>15</sup> Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses.<sup>16</sup> To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.<sup>17</sup> A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.<sup>18</sup> A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.<sup>19</sup> The SBA has approved these small business size standards.<sup>20</sup> A third auction commenced on October 3, 2001, and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses.<sup>21</sup> Three of these claimed status

as a small or very small entity and won 311 licenses.

62. *Specialized Mobile Radio.* The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than \$15 million in each of the three previous calendar years.<sup>22</sup> The Commission awards "very small entity" bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years.<sup>23</sup> The SBA has approved these small business size standards for the 900 MHz Service.<sup>24</sup> The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.<sup>25</sup> A second auction for the 800 MHz band was held on January 10, 2002, and closed on January 17, 2002, and included 23 licenses. One bidder claiming small business status won five licenses.<sup>26</sup>

63. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders that won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed "small business" status and won 129 licenses. Thus, combining all

<sup>8</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

<sup>9</sup> 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, 7850–7852 paras. 57–60 (1996); see also 47 CFR 24.720(b).

<sup>10</sup> 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, 7852 para. 60.

<sup>11</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

<sup>12</sup> FCC News, "Broadband PCS, D, E and F Block Auction Closes," No. 71744 (rel. January 14, 1997).

<sup>13</sup> See "C, D, E, and F Block Broadband PCS Auction Closes," *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

<sup>14</sup> See "C and F Block Broadband PCS Auction Closes: Winning Bidders Announced," *Public Notice*, 16 FCC Rcd 2339 (2001).

<sup>15</sup> Implementation of Section 309(j) of the Communications Act—Competitive Bidding Narrowband PCS, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 196 para. 46 (1994).

<sup>16</sup> See "Announcing the High Bidders in the Auction of Ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674," *Public Notice*, PNWL 94–004 (rel. Aug. 2, 1994); "Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787," *Public Notice*, PNWL 94–27 (rel. Nov. 9, 1994).

<sup>17</sup> Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476 para. 40 (2000).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

<sup>21</sup> See "Narrowband PCS Auction Closes," *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

<sup>22</sup> 47 CFR 90.814(b)(1).

<sup>23</sup> *Id.*

<sup>24</sup> See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999.

<sup>25</sup> See "Correction to Public Notice DA 96–586 'FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,'" *Public Notice*, 18 FCC Rcd 18367 (WTB 1996).

<sup>26</sup> See "Multi-Radio Service Auction Closes," *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

64. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$3 million or \$15 million (the special small business size standards), or have no more than 1,500 employees (the generic SBA standard for wireless entities, discussed, *supra*). One firm has over \$15 million in revenues. The Commission assumes, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities.

65. *Advanced Wireless Services*. The *Report and Order* adopting service rules for Advanced Wireless Services (AWS) in the 1710–1755 and 2110–2155 MHz bands<sup>27</sup> affected applicants who wish to provide service in the 1710–1755 MHz and 2110–2155 MHz bands. As discussed in the *AWS-1 Service Rules Order*, the Commission does not know precisely the type of service that a licensee in these bands might seek to provide.<sup>28</sup> Nonetheless, the Commission anticipates that the services that will be deployed in these bands may have capital requirements comparable to those in the broadband Personal Communications Service (PCS), and that the licensees in these bands will be presented with issues and costs similar to those presented to broadband PCS licensees. Further, at the time the broadband PCS service was established, it was similarly anticipated that it would facilitate the introduction of a new generation of service. Therefore, the *AWS-1 Service Rules Order* adopted the same small business size standards that the Commission adopted for the broadband PCS service. In particular, the *Order* defined a “small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, and a “very small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million. The *Order* also provided small

businesses with a bidding credit of 15 percent and very small businesses with a bidding credit of 25 percent. In the auction held August 9 through September 18, 2006, 55% of the winning bidders were small businesses (57 of 104).<sup>29</sup>

66. *Rural Radiotelephone Service*. The Commission uses the SBA small business size standard applicable to Wireless Telecommunications Carriers (except satellite), *i.e.*, an entity employing no more than 1,500 persons.<sup>30</sup> There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

67. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses in the 2305–2320 MHz and 2345–2360 MHz bands. The Commission defined “small business” for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million or less for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million or less for each of the three preceding years.<sup>31</sup> The SBA has approved these definitions.<sup>32</sup> The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997, and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

68. *220 MHz Radio Service—Phase I Licensees*. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently

authorized to operate in the 220 MHz Band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, the Commission applies the small business size standard under the SBA rules applicable to “Cellular and Other Wireless Telecommunications” companies. Note that the census category of “Cellular and Other Wireless Telecommunications” is no longer used and has been superseded by the larger category “Wireless Telecommunications Carriers (except satellite)”. This category provides that a small business is a wireless company employing no more than 1,500 persons.<sup>33</sup> However, since currently available data was gathered when “Cellular and Other Wireless Telecommunications” was the relevant category, earlier Census Bureau data collected under the category of “Cellular and Other Wireless Telecommunications” will be used here. Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.<sup>34</sup> Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.<sup>35</sup> Therefore, the majority of firms can be considered small.

69. *220 MHz Radio Service—Phase II Licensees*. The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. In the *220 MHz Third Report and Order*, the Commission adopted a small business size standard for defining “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>36</sup> This small business standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.<sup>37</sup> A “very small business” is defined as an entity that, together with

<sup>29</sup> See News Release “Statements of FCC Chairman and Commissioners Before the Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, U.S. House of Representatives”, Chairman Martin’s Written Statement, Exhibit 3, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-281580A2.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281580A2.pdf), (4/15/2008).

<sup>30</sup> 13 CFR 121.201, NAICS code 517210.

<sup>31</sup> Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (WCS), *Report and Order*, 12 FCC Rcd 10785, 10879 para. 194 (1997).

<sup>32</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

<sup>33</sup> 13 CFR 121.201, NAICS code 517210.

<sup>34</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517212 (issued Nov. 2005).

<sup>35</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1,000 employees or more.”

<sup>36</sup> 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*, 12 FCC Rcd 10943, 11068–70 paras. 291–295 (1997).

<sup>37</sup> *Id.* at 11068 para. 291.

<sup>27</sup> Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, WT Docket No. 02–353, 18 FCC Rcd 25162 (2003) (*AWS-1 Service Rules Order*).

<sup>28</sup> See *id.*, at para. 144.

its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.<sup>38</sup> The SBA has approved these small size standards.<sup>39</sup> Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.<sup>40</sup> In the first auction, 908 licenses were auctioned in three different-sized geographic areas: Three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.<sup>41</sup> Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.<sup>42</sup> A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.<sup>43</sup>

70. *700 MHz Guard Bands Licenses.* In the *700 MHz Guard Bands Order*, the Commission adopted size standards for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>44</sup> A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>45</sup> Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>46</sup> SBA approval of these definitions is not required.<sup>47</sup> An auction of 52 Major

Economic Area (MEA) licenses for each of two spectrum blocks commenced on September 6, 2000, and closed on September 21, 2000.<sup>48</sup> Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of remaining 700 MHz Guard Bands licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.<sup>49</sup> Subsequently, in the *700 MHz Second Report and Order*, the Commission reorganized the licenses pursuant to an agreement among most of the licensees, resulting in a spectral relocation of the first set of paired spectrum block licenses, and an elimination of the second set of paired spectrum block licenses (many of which were already vacant, reclaimed by the Commission from Nextel).<sup>50</sup> A single licensee that did not participate in the agreement was grandfathered in the initial spectral location for its two licenses in the second set of paired spectrum blocks.<sup>51</sup> Accordingly, at this time there are 54 licenses in the 700 MHz Guard Bands.

71. *700 MHz Band Commercial Licenses.* There is 80 megahertz of non-Guard Band spectrum in the 700 MHz Band that is designated for commercial use: 698–757, 758–763, 776–787, and 788–793 MHz Bands. With one exception, the Commission adopted criteria for defining two groups of small businesses for purposes of determining their eligibility for bidding credits at auction. These two categories are: (1) “Small business,” which is defined as an entity with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years; and (2) “very small business,” which is defined as an entity with attributed average annual gross revenues that do not exceed \$15 million for the preceding three years.<sup>52</sup>

approval before adopting small business size standards).

<sup>48</sup> See “700 MHz Guard Bands Auction Closes: Winning Bidders Announced,” *Public Notice*, 15 FCC Rcd 18026 (2000).

<sup>49</sup> See “700 MHz Guard Bands Auctions Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 4590 (WTB 2001).

<sup>50</sup> See In the Matter of Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, WT Docket 06–150, *Second Report and Order*, 22 FCC Rcd 15289, 15339–15344 paras. 118–134 (2007) (*700 MHz Second Report and Order*).

<sup>51</sup> *Id.*

<sup>52</sup> See Auction of 700 MHz Band Licenses Scheduled for January 24, 2008, AU Docket No. 07–157, *Notice and Filing Requirements, Minimum Opening Bids, Reserve Prices, Upfront Payments, and Other Procedures for Auctions 73 and 76*, DA

In Block C of the Lower 700 MHz Band (710–716 MHz and 740–746 MHz), which was licensed on the basis of 734 Cellular Market Areas, the Commission adopted a third criterion for determining eligibility for bidding credits: an “entrepreneur,” which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.<sup>53</sup> The SBA has approved these small size standards.<sup>54</sup>

72. An auction of 740 licenses for Blocks C (710–716 MHz and 740–746 MHz) and D (716–722 MHz) of the Lower 700 MHz Band commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business, or entrepreneur status and won a total of 329 licenses.<sup>55</sup> A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: Five EAG licenses and 251 CMA licenses.<sup>56</sup> Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.<sup>57</sup>

73. The remaining 62 megahertz of commercial spectrum was auctioned on January 24 through March 18, 2008. As explained above, bidding credits for all of these licenses were available to “small businesses” and “very small businesses.” Auction 73 concluded with 1,090 provisionally winning bids covering 1,091 licenses and totaling \$19,592,420,000. The provisionally winning bids for the A, B, C, and E Block licenses exceeded the aggregate reserve prices for those blocks. The provisionally winning bid for the D Block license, however, did not meet the applicable reserve price and thus did not become a winning bid. Approximately 55 small businesses had

07–4171 at para. 70 (WTB rel. Oct. 5, 2007); Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59), *Report and Order*, 17 FCC Rcd 1022, 1087–88 (2002).

<sup>53</sup> *Id.* at 1088.

<sup>54</sup> See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999.

<sup>55</sup> See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 17 FCC Rcd 17272 (WTB 2002).

<sup>56</sup> See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

<sup>57</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

<sup>40</sup> See generally “220 MHz Service Auction Closes,” *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

<sup>41</sup> See “FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made,” *Public Notice*, 14 FCC Rcd 1085 (WTB 1999).

<sup>42</sup> See “Phase II 220 MHz Service Spectrum Auction Closes,” *Public Notice*, 14 FCC Rcd 11218 (WTB 1999).

<sup>43</sup> See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

<sup>44</sup> See Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, 15 FCC Rcd 5299 (2000).

<sup>45</sup> *Id.* at 5343 para. 108.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 5343 para. 108 n.246 (for the 746–764 MHz and 776–704 MHz bands, the Commission is exempt from 15 U.S.C. 632, which requires Federal agencies to obtain Small Business Administration

winning bids.<sup>58</sup> Currently, the 10 remaining megahertz associated with the D block have not yet been assigned.<sup>59</sup>

**74. Private and Common Carrier Paging.** The SBA has developed a small business size standard for wireless firms within the broad economic census category of "Paging".<sup>60</sup> However, the census category "Paging" is no longer used and has been superseded by the larger category "Wireless Telecommunications Carriers (except satellite)."<sup>61</sup> Under that SBA category, a business is small if it has 1,500 or fewer employees.<sup>62</sup> However, since currently available data was gathered when "Paging" was the relevant category, earlier Census Bureau data collected under the category of "Paging" will be used here. Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.<sup>63</sup> Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.<sup>64</sup> Thus, under this category, the majority of firms can be considered small.

**75. In the *Paging Third Report and Order*,** the Commission developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>65</sup> A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, 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 preceding three years.<sup>66</sup> The SBA has approved these small business size standards.<sup>67</sup> An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.<sup>68</sup> Of the 2,499 licenses auctioned, 985 were sold.<sup>69</sup> Fifty-seven companies claiming small business status won 440 licenses.<sup>70</sup> An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.<sup>71</sup> 132 companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.<sup>72</sup> Currently, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the Commission's *Trends in Telephone Service*, 375 such carriers reported that they were engaged in the provision of either paging or "messaging service."<sup>73</sup> Of these, the Commission estimates that 370 are small, under the SBA-approved small business size standard.<sup>74</sup> The Commission estimates that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

**76. Air-Ground Radiotelephone Service.** The Commission uses the SBA definition of small business size applicable to Wireless Telecommunications Carriers (except satellite), *i.e.*, an entity employing no more than 1,500 persons.<sup>75</sup> There are

approximately 100 licensees in the Air-Ground Radiotelephone Service, and the Commission estimates that almost all of them qualify as small under the SBA small business size standard.

**77. Aviation and Marine Radio Services.** Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite), which is 1,500 or fewer employees.<sup>76</sup> Most applicants for recreational licenses are individuals. Approximately 47,750 ship station licensees, who hold approximately 56,250 ship station licenses, and approximately 27,700 aircraft station licensees, who hold approximately 32,000 aircraft station licenses, operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, the Commission estimates that there are up to approximately 75,450 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$15 million. In addition, a "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$3 million.<sup>77</sup> There are approximately 6,100 Marine Coast Service licenses, held by approximately 3,600 licensees, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards.

**78. Fixed Microwave Services.** Fixed microwave services include common

<sup>58</sup> See "Auction of 700 MHz Band Licenses Closes," *Public Notice*, 23 FCC Rcd 4572 (WTB 2008).

<sup>59</sup> See <http://www.fcc.gov> Web site at [http://wireless.fcc.gov/auctions/default.htm?job=auction\\_summary&id=73](http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=73).

<sup>60</sup> 13 CFR 121.201, NAICS code 517211.

<sup>61</sup> 13 CFR 121.201, North American Industry Classification System (NAICS) code 517210.

<sup>62</sup> *Id.*

<sup>63</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 517211 (issued Nov. 2005).

<sup>64</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1,000 employees or more."

<sup>65</sup> *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*, PR Docket No. 89–552, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068–70, paras. 291–295 (1997).

<sup>66</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (Dec. 2, 1998) (SBA Dec. 2, 1998 Letter).

<sup>67</sup> *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, paras. 98–107 (1999).

<sup>68</sup> *Id.* at 10085, para. 98.

<sup>69</sup> See "929 and 931 MHz Paging Auction Closes," *Public Notice*, 15 FCC Rcd 4858 (WTB 2000).

<sup>70</sup> *See id.*

<sup>71</sup> See "Lower and Upper Paging Band Auction Closes," *Public Notice*, 16 FCC Rcd 21821 (WTB 2002).

<sup>72</sup> See "Lower and Upper Paging Bands Auction Closes," *Public Notice*, 18 FCC Rcd 11154 (WTB 2003).

<sup>73</sup> See *Trends in Telephone Service*, Industry Analysis Division, Wireline Competition Bureau, Table 5.3 (Number of Telecommunications Service Providers by Size of Business) (June 2005).

<sup>74</sup> 13 CFR 121.201, NAICS code 517210.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92–257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

carrier,<sup>78</sup> private operational-fixed,<sup>79</sup> and broadcast auxiliary radio services.<sup>80</sup> At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category “Wireless Telecommunications Carriers (except satellite),” which provides that a small business is a wireless company employing no more than 1,500 persons.<sup>81</sup> The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA’s small business size standard. Consequently, the Commission estimates that there are up to 31,428 common carrier fixed licensees and up to 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. The Commission notes, however, that the common carrier microwave fixed licensee category includes some large entities.

79. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.<sup>82</sup> There is presently one

licensee in this service. The Commission uses the SBA definition applicable to Wireless Telecommunications Carriers (except satellite), *i.e.*, an entity employing no more than 1,500 persons.<sup>83</sup> The Commission is unable to estimate at this time the number of licensees that would qualify as small entities under the SBA definition. The Commission assumes, for purposes of this analysis, that the licensee is a small entity, as that term is defined by the SBA.

80. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses—an entity that has average gross revenues of \$40 million or less in the three previous calendar years.<sup>84</sup> An additional size standard for “very small business” is: an entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>85</sup> The SBA has approved these small business size standards.<sup>86</sup> The auction of the 2,173 39 GHz licenses began on April 12, 2000, and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and policies adopted herein.

81. *Broadband Radio Service and Educational Broadband Service.* The Broadband Radio Service (“BRS”), formerly known as the Multipoint Distribution Service (“MDS”),<sup>87</sup> and the Educational Broadband Service (“EBS”), formerly known as the Instructional Television Fixed Service (“ITFS”),<sup>88</sup> use 2 GHz band frequencies to transmit video programming and provide

broadband services to residential subscribers.<sup>89</sup> These services, collectively referred to as “wireless cable,” were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services.<sup>90</sup> The Commission estimates that the number of wireless cable subscribers is approximately 100,000, as of March 2005. The SBA small business size standard for the broad census category of Cable and Other Program Distribution, which consists of such entities generating \$13.5 million or less in annual receipts, appears applicable to MDS and ITFS.<sup>91</sup> Note that the census category of “Cable and Other Program Distribution” is no longer used and has been superseded by the larger category “Wireless Telecommunications Carriers (except satellite).” This category provides that a small business is a wireless company employing no more than 1,500 persons.<sup>92</sup> However, since currently available data was gathered when “Cable and Other Program Distribution” was the relevant category, earlier Census Bureau data collected under the category of “Cable and Other Program Distribution” will be used here. Other standards also apply, as described.

82. The Commission has defined small MDS (now BRS) entities in the context of Commission license auctions. In the 1996 MDS auction,<sup>93</sup> the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.<sup>94</sup> This definition of a small entity in the context of MDS auctions has been approved by the SBA.<sup>95</sup> In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are hundreds of MDS licensees and wireless cable operators that did not receive their

<sup>83</sup> 13 CFR 121.201, NAICS code 517210.

<sup>84</sup> See *Amendment of the Commission’s Rules Regarding the 37.0–38.6 GHz and 38.6–40.0 GHz Bands*, ET Docket No. 95–183, Report and Order, 63 FR 6079 (Feb. 6, 1998).

<sup>85</sup> *Id.*

<sup>86</sup> See Letter to Kathleen O’Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998).

<sup>87</sup> See 47 CFR part 21, subpart K; Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150–2162 and 2500–2690 MHz Bands; Part 1 of the Commission’s Rules—Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission’s Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, 19 FCC Rcd 14165 (2004) (“*MDS/ITFS Order*”).

<sup>88</sup> See 47 CFR part 74, subpart I; *MDS/ITFS Order*, 19 FCC Rcd 14165 (2004).

<sup>89</sup> See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report*, 20 FCC Rcd 2507, 2565 para. 131 (2006) (“*2006 Cable Competition Report*”).

<sup>90</sup> *Id.*

<sup>91</sup> 13 CFR 121.201, NAICS code 515210.

<sup>92</sup> 13 CFR 121.201, NAICS code 517210.

<sup>93</sup> MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996. (67 Bidders won 493 licenses.)

<sup>94</sup> 47 CFR 21.961(b)(1).

<sup>95</sup> See *ITFS Order*, 10 FCC Rcd at 9589.

<sup>78</sup> See 47 CFR 101 *et seq.* (formerly, part 21 of the Commission’s Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

<sup>79</sup> Persons eligible under parts 80 and 90 of the Commission’s Rules can use Private Operational-Fixed Microwave services. See 47 CFR parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee’s commercial, industrial, or safety operations.

<sup>80</sup> Auxiliary Microwave Service is governed by part 74 of Title 47 of the Commission’s rules. See 47 CFR part 74. This service is 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 service also includes mobile television pickups, which relay signals from a remote location back to the studio.

<sup>81</sup> 13 CFR 121.201, NAICS code 517210.

<sup>82</sup> This service is governed by Subpart I of Part 22 of the Commission’s rules. See 47 CFR 22.1001 through 22.1037.



licenses as a result of the MDS auction and that fall under the former SBA small business size standard for Cable and Other Program Distribution.<sup>96</sup> Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$13.5 million annually. Therefore, the Commission estimates that there are approximately 850 of these small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

83. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).<sup>97</sup> The Commission estimates that there are currently 2,452 EBS licenses, held by 1,524 EBS licensees, and all but 100 of the licenses are held by educational institutions. Thus, the Commission estimates that at least 1,424 EBS licensees are small entities.

84. *Local Multipoint Distribution Service*. Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.<sup>98</sup> The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998, and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>99</sup> An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>100</sup> The SBA has approved these small business size standards in the context of LMDS

auctions.<sup>101</sup> There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders.

85. *218–219 MHz Service*. The first auction of 218–219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas ("MSAs").<sup>102</sup> Of the 594 licenses, 567 were won by 167 entities qualifying as small businesses. For that auction, the Commission defined a small business as an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.<sup>103</sup> In the *218–219 MHz Report and Order and Memorandum Opinion and Order*, the Commission defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding \$15 million for the preceding three years.<sup>104</sup> A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding \$3 million for the preceding three years.<sup>105</sup> The SBA has approved of these definitions.<sup>106</sup> A subsequent auction is not yet scheduled. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, the Commission assumes for purposes of this analysis that in future auctions,

many, and perhaps most, of the licenses may be awarded to small businesses.

86. *24 GHz—Incumbent Licensees*. This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard was formerly that of "Cellular and Other Wireless Telecommunications" companies. Note that the census category of "Cellular and Other Wireless Telecommunications" is no longer used and has been superseded by the larger category "Wireless Telecommunications Carriers (except satellite)." This category provides that a small business is a wireless company employing no more than 1,500 persons.<sup>107</sup> However, since currently available data was gathered when "Cellular and Other Wireless Telecommunications" was the relevant category, earlier Census Bureau data collected under the category of "Cellular and Other Wireless Telecommunications" will be used here. The Commission believes that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent<sup>108</sup> and TRW, Inc. It is our understanding that Teligent and its related companies have fewer than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

87. *24 GHz—Future Licensees*. With respect to new applicants in the 24 GHz band, the small business size standard for "small business" is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of \$15 million.<sup>109</sup> "Very small business" in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.<sup>110</sup> The SBA has approved these small business size standards.<sup>111</sup> These size standards will apply to the future auction, if held.

<sup>96</sup> Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for "Cable and Other Program Distribution" (annual receipts of \$13.5 million or less). See 13 CFR 121.201, NAICS code 515210.

<sup>97</sup> In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. 601(4) through (6). The Commission does not collect annual revenue data on EBS licensees.

<sup>98</sup> See *Local Multipoint Distribution Service, Second Report and Order*, 12 FCC Rcd 12545 (1997).

<sup>99</sup> *Id.*

<sup>100</sup> See *id.*

<sup>101</sup> See Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

<sup>102</sup> See "Interactive Video and Data Service (IVDS) Applications Accepted for Filing," *Public Notice*, 9 FCC Rcd 6227 (1994).

<sup>103</sup> *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, PP Docket No. 93–253, Fourth Report and Order, 9 FCC Rcd 2330 (1994). 59 FR 24947 (May 13, 1994).

<sup>104</sup> *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218–219 MHz Service*, WT Docket No. 98–169, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 64 FR 59656 (Nov. 3, 1999).

<sup>105</sup> *Id.*

<sup>106</sup> See Letter from Aida Alvarez, Administrator, SBA, to Daniel Phythyon, Chief, WTB, FCC (Jan. 6, 1998) ("Alvarez to Phythyon Letter 1998").

<sup>107</sup> 13 CFR 121.201, NAICS code 517210.

<sup>108</sup> Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

<sup>109</sup> *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, Report and Order, 15 FCC Rcd 16934, 16967 (2000); see also 47 CFR 101.538(a)(2).

<sup>110</sup> *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, Report and Order, 15 FCC Rcd 16934, 16967 (2000); see also 47 CFR 101.538(a)(1).

<sup>111</sup> See Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division,



88. *Private Land Mobile Radio*. Private Land Mobile Radio ("PLMR") systems serve an essential role in a 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. The SBA has not developed a definition of small entity specifically applicable to PLMR licensees due to the vast array of PLMR users. Therefore, solely for purposes of citing to currently available data, the Commission will use a superseded SBA definition applicable to Cellular and Other Wireless Telecommunications. Note that the census category of "Cellular and Other Wireless Telecommunications" is no longer used and has been superseded by the larger category "Wireless Telecommunications Carriers (except satellite)." This category provides that a small business is a wireless company employing no more than 1,500 persons.<sup>112</sup> However, since currently available data was gathered when "Cellular and Other Wireless Telecommunications" was the relevant category, earlier Census Bureau data collected under the category of "Cellular and Other Wireless Telecommunications" will be used here.

89. The Commission is unable at this time to estimate the number of small businesses which could be impacted by the rules. The Commission's 1994 Annual Report on PLMRs<sup>113</sup> 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. Because any entity engaged in a commercial activity is eligible to hold a PLMR license, the revised rules in this context could potentially impact every small business in the United States.

90. *Public Safety Radio Services*. Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services. There are a total of approximately 44,083 licensees within these services. Governmental entities<sup>114</sup> as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.<sup>115</sup>

91. *Location and Monitoring Service ("LMS")*. Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$15 million.<sup>116</sup> A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$3 million.<sup>117</sup> These definitions have been approved by the SBA.<sup>118</sup> An auction for LMS licenses commenced on February 23, 1999, and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses. The Commission concludes that the number of LMS licensees affected by this *Report and Order* includes these four entities. The Commission cannot accurately predict the number of remaining licenses that could be awarded to small entities in future LMS auctions. In addition, there are numerous site-by-site non-multilateration licensees, and the Commission does not know how many of these providers have annual revenues of no more than \$15 million. The Commission assumes, for purposes of this analysis, that all of these licenses are held by small entities, as that small business size standard is established by the SBA.

92. *Multiple Address Systems*. Entities using Multiple Address Systems (MAS) spectrum, in general, fall into two categories: (1) Those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, the Commission defines "small entity" for MAS licensees as an entity that has average gross revenues of less than \$15 million in the three previous calendar years.<sup>119</sup> "Very small business" is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$3 million for the

preceding three calendar years.<sup>120</sup> The SBA has approved of these definitions.<sup>121</sup> The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of April 16, 2010, there were a total of 11,653 site-based MAS station authorizations. Of these, 58 authorizations were associated with common carrier service. In addition, the Commission's licensing database indicates that, as of April 16, 2010, there were a total of 3,330 EA market area MAS authorizations.

93. With respect to the second category, which consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definitions developed by the SBA would be more appropriate than the Commission's definition. The applicable definition of small entity in this instance appears to be the "Wireless Telecommunications Carriers (except satellite)" definition under the SBA rules.<sup>122</sup> Under that SBA category, a business is small if it has 1,500 or fewer employees.<sup>123</sup> The Commission's licensing database indicates that, as of April 16, 2010, of the 11,653 total MAS station authorizations, 10,773 authorizations were for private radio service.

94. *Television Broadcasting*. The proposed rules and policies apply to television broadcast licensees and potential licensees of television service. The SBA defines a television broadcast station as a small business if such station has no more than \$14 million in annual receipts.<sup>124</sup> Business concerns included in this industry are those "primarily engaged in broadcasting

<sup>116</sup> Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order*, 13 FCC Rcd 15182 para. 20 (1998); see also 47 CFR 90.1103.

<sup>117</sup> *Id.*

<sup>118</sup> See Letter to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration (Feb. 22, 1999).

<sup>119</sup> See Amendment of the Commission's Rules Regarding Multiple Address Systems, *Report and Order*, 15 FCC Rcd 11956, 12008 para. 123 (2000).

<sup>120</sup> *Id.*

<sup>121</sup> See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated June 4, 1999.

<sup>122</sup> 13 CFR 121.201, North American Industry Classification System (NAICS) code 517210.

<sup>123</sup> *Id.*

<sup>124</sup> See 13 CFR 121.201, NAICS Code 515120.

Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

<sup>112</sup> 13 CFR 121.201, North American Industry Classification System (NAICS) code 517210.

<sup>113</sup> Federal Communications Commission, 60th Annual Report, Fiscal Year 1994, at paragraph 116.

<sup>114</sup> 47 CFR 1.1162.

<sup>115</sup> 5 U.S.C. 601(5).

images together with sound.”<sup>125</sup> The Commission has estimated the number of licensed commercial television stations to be 1,392.<sup>126</sup> According to Commission staff review of the BIA/Kelsey, MAPro Television Database (“BIA”) as of April 7, 2010, about 1,015 of an estimated 1,380 commercial television stations<sup>127</sup> (or about 74 percent) have revenues of \$14 million or less and thus qualify as small entities under the SBA definition. The Commission has estimated the number of licensed non-commercial educational (NCE) television stations to be 390.<sup>128</sup> The Commission notes, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations<sup>129</sup> must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

95. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimates of small businesses to which rules may apply do not exclude

any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

96. *Class A TV, LPTV, and TV translator stations.* The rules and policies proposed in this Notice include licensees of Class A TV stations, low power television (LPTV) stations, and TV translator stations, as well as potential licensees in these television services. The same SBA definition that applies to television broadcast licensees would apply to these stations. The SBA defines a television broadcast station as a small business if such station has no more than \$14 million in annual receipts.<sup>130</sup> Currently, there are approximately 537 licensed Class A stations, 2,386 licensed LPTV stations, and 4,359 licensed TV translators.<sup>131</sup> Given the nature of these services, the Commission will presume that all of these licensees qualify as small entities under the SBA definition. The Commission notes, however, that under the SBA’s definition, revenue of affiliates that are not LPTV stations should be aggregated with the LPTV station revenues in determining whether a concern is small. Our estimate may thus overstate the number of small entities since the revenue figure on which it is based does not include or aggregate revenues from non-LPTV affiliated companies. The Commission does not have data on revenues of TV translator or TV booster stations, but virtually all of these entities are also likely to have revenues of less than \$14 million and thus may be categorized as small, except to the extent that revenues of affiliated non-translator or booster entities should be considered.

97. *Radio Broadcasting.* The proposed rules and policies could apply to radio broadcast licensees, and potential licensees of radio service. The SBA defines a radio broadcast station as a small business if such station has no more than \$7 million in annual receipts.<sup>132</sup> Business concerns included in this industry are those primarily engaged in broadcasting aural programs by radio to the public.<sup>133</sup> According to

Commission staff review of the BIA/Kelsey Master Access Radio Analyzer Database on April 7, 2010, about 10,900 of 11,200 commercial radio stations (or about 97 percent) have revenues of \$7 million or less and thus qualify as small entities under the SBA definition. The Commission notes, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations<sup>134</sup> must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

98. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the estimates of small businesses to which rules may apply do not exclude any radio station from the definition of a small business on this basis and therefore may be over-inclusive to that extent. Also as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

99. *FM translator stations and low power FM stations.* The proposed rules and policies could affect licensees of FM translator and booster stations and low power FM (LPFM) stations, as well as potential licensees in these radio services. The same SBA definition that applies to radio broadcast licensees would apply to these stations. The SBA defines a radio broadcast station as a small business if such station has no more than \$7 million in annual receipts.<sup>135</sup> Currently, there are approximately 6,155 licensed FM translator and booster stations and 864 licensed LPFM stations.<sup>136</sup> Given the nature of these services, the Commission will presume that all of

<sup>125</sup> *Id.* This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.” Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

<sup>126</sup> See News Release, “Broadcast Station Totals as of December 31, 2009,” 2010 WL 676084 (F.C.C.) (dated Feb. 26, 2010) (“*Broadcast Station Totals*”); also available at <http://www.fcc.gov/mb/>.

<sup>127</sup> The Commission recognizes that this total differs slightly from that contained in *Broadcast Station Totals*, *supra* note 446; however, the Commission is using BIA’s estimate for purposes of this revenue comparison.

<sup>128</sup> See *Broadcast Station Totals*, *supra* note 126.

<sup>129</sup> “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both.” 13 CFR 121.103(a)(1).

<sup>130</sup> See 13 CFR 121.201, NAICS Code 515120.

<sup>131</sup> See *Broadcast Station Totals*, *supra* note 126.

<sup>132</sup> See 13 CFR 121.201, NAICS Code 515112.

<sup>133</sup> *Id.*

<sup>134</sup> “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 CFR 121.103(a)(1).

<sup>135</sup> See 13 CFR 121.201, NAICS Code 515112.

<sup>136</sup> See News Release, “Broadcast Station Totals as of December 31, 2009” (rel. Feb. 26, 2010) ([http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296538A1.pdf269784A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296538A1.pdf269784A1.doc)).

these licensees qualify as small entities under the SBA definition.

100. *Cable Television Systems.* The proposed rules and policies could affect cable television systems. Cable television systems fall within the SBA standard for Wired Telecommunication Carriers, and in this category a business is small if it has 1500 or fewer employees.<sup>137</sup> This category includes, among others, cable operators, direct broadcast satellite services, fixed-satellite services, home satellite dish services, multipoint distribution services, multichannel multipoint distribution service, Instructional Television Fixed Service, local multipoint distribution service, satellite master antenna television systems, and open video systems.<sup>138</sup> Since currently available data was gathered when “Cable and Other Program Distribution” was the relevant category, earlier Census Bureau data collected under the category of “Cable and Other Program Distribution” will be used here. According to Census Bureau data, there are 1,311 total cable and other pay television service firms that operate throughout the year of which 1,180 have less than \$10 million in revenue.<sup>139</sup> Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. The Commission addresses below each service individually to provide a more precise estimate of small entities.

101. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers

nationwide.<sup>140</sup> As of 2008, out of 814<sup>141</sup> cable operators all but 10, that is 804, qualify as small cable companies under this standard.<sup>142</sup> In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.<sup>143</sup> Current Commission records show 6000 cable systems. Of these 726 have 20,000 subscribers or more, based on the same records. The Commission estimates that there are 5,000 small systems based upon this standard.

102. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, 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.”<sup>144</sup> There are approximately 63.7 million cable subscribers in the United States today.<sup>145</sup> Accordingly, an operator serving fewer than 637,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>146</sup> Based on available data, the Commission finds that the number of cable operators serving 637,000 subscribers or less is also 804.<sup>147</sup> The Commission notes that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.<sup>148</sup> Although it

seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, the Commission is 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.

103. *Satellite Telecommunications.* The category of Satellite Telecommunications “comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”<sup>149</sup> The category has a small business size standard of \$15 million or less in average annual receipts, under SBA rules.<sup>150</sup> For this category, Census Bureau data for 2002 show that there were a total of 371 firms that operated for the entire year.<sup>151</sup> Of this total, 307 firms had annual receipts of under \$10 million, and 26 firms had receipts of \$10 million to \$24,999,999.<sup>152</sup> Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by its action.

104. *All Other Telecommunications.* Satellite-related businesses within this category include “establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.”<sup>153</sup> For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year.<sup>154</sup> Of this total, 303

<sup>137</sup> 13 CFR 121.201 (NAICS Code 517110). This NAICS Code applies to all services listed in this paragraph.

<sup>138</sup> Those MVPDs relying primarily or exclusively on satellite transmission could also be considered to fall under the “Satellite Telecommunications” category. 13 CFR 121.201 (NAICS Code 517410).

<sup>139</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series—Establishment and Firm Size, Information Sector 51, Table 4 at 50 (2000). The amount of \$10 million was used to estimate the number of small business firms because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$1412.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

<sup>140</sup> 47 CFR 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. 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. See Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

<sup>141</sup> Cable MSO Ownership, A Geographical Analysis, 2009 Edition, 14–31, SNL Kagan (June 2009).

<sup>142</sup> *Id.* at 12.

<sup>143</sup> 47 CFR 76.901(c).

<sup>144</sup> 47 U.S.C. 543(m)(2); see 47 CFR 76.901(f) & nn. 1–3.).

<sup>145</sup> See Cable TV Investor: Deals & Finance, No. 655, SNL Kagan, March 31, 2009, at 6.

<sup>146</sup> 47 CFR 76.901(f); see Public Notice, FCC Announces New Subscriber Count for the Definition of Small Cable Operator, DA 01–158 (Cable Services Bureau, Jan. 24, 2001).

<sup>147</sup> Cable MSO Ownership at 12.

<sup>148</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small

cable operator pursuant to Section 76.901(f) of the Commission’s rules. See 47 CFR 76.901(f).

<sup>149</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517410 Satellite Telecommunications”; <http://www.census.gov/naics/2007/def/ND517410.HTM>.

<sup>150</sup> 13 CFR 121.201, NAICS code 517410.

<sup>151</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 517410 (issued Nov. 2005).

<sup>152</sup> *Id.* An additional 38 firms had annual receipts of \$25 million or more.

<sup>153</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517919 All Other Telecommunications”; <http://www.census.gov/naics/2007/def/ND517919.HTM#N517919>.

<sup>154</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and

firms had annual receipts of under \$10 million and 15 firms had annual receipts of \$10 million to \$24,999,999.<sup>155</sup> Consequently, the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by its action.

105. *Non-Licensee Tower Owners.* The Commission's rules require that any entity proposing to construct an antenna structure over 200 feet or within the glide slope of an airport must register the antenna structure with the Commission on FCC Form 854.<sup>156</sup> Thus, non-licensee tower owners may be subject to any new or additional requirements adopted in this proceeding. As of April 14, 2010, there were 103,444 registration records in a 'Constructed' status and 13,291 registration records in a 'Granted, Not Constructed' status in the Antenna Structure Registration (ASR) database. This includes both towers registered to licensees and towers registered to non-licensee tower owners. The Commission does not keep information from which the Commission can easily determine how many of these towers are registered to non-licensees or how many non-licensees have registered towers.<sup>157</sup> In addition, the Commission does not keep data on businesses with annual revenue over \$25 million. Moreover, the SBA has not developed a size standard for small businesses in the category "Tower Owners." Therefore, the Commission is unable to estimate the number of non-licensee tower owners that are small entities. However, because these regulations impact tower owners, the Commission is choosing a category related to our jurisdiction because of the nexus between our regulatory function and telecommunications with respect to towers. The Commission will assume that nearly all non-licensee tower companies are small businesses under the SBA's definition for "All Other Telecommunications."<sup>158</sup>

#### 4. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

106. This NPRM proposes to amend § 17.4(g) by requiring that the Antenna Structure Registration Number be

displayed so that it is conspicuously visible and legible from every point of ingress/egress to the publicly accessible area nearest the base of the antenna structure, instead of only near the base of the structure as before. If § 17.4(g) is amended, the owner of the structure would have to display the Antenna Structure Registration Number so that it is conspicuously visible and legible from potentially multiple locations near the base of the antenna structure instead of only at one location.

107. The NPRM proposes to amend § 17.48 by requiring antenna structure owners to provide continuously active notice to the FAA of lighting outages to allow the FAA to timely maintain Notices to Airmen (NOTAMs) or issue new NOTAMs, as necessary. Specifically, if the lights cannot be repaired within 15 days, the owner shall notify the FAA to extend the outage date and report a return to service date. The owner will repeat this process every 15 days until the lights are repaired. If the amendment to § 17.48 is adopted, the owner of the structure would have to provide continuously active notice to the FAA of lighting outages, instead of the one time notice currently required.

108. Although § 17.49 of the rules requires antenna structure owners to maintain a record of observed or otherwise known extinguishments or improper functioning of structure lights, it does not currently specify how long the record should be kept or what is to be done with it. The Notice proposes that the record be kept for two years and that it be provided to the Commission upon request. If adopted, antenna structure owners would be required to keep their records for two years and provide them to the Commission upon request.

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

109. The Commission proposes to amend § 17.4(a) and §§ 17.21, 17.22 (redesignated as § 17.21(c)), and 17.23 and delete § 17.17(a) of the Commission's rules regarding antenna structure registration and painting and lighting specifications. The Commission also proposes conforming edits to §§ 1.61(a)(5) and 17.1(b). These proposed changes are intended both to promote aircraft navigation safety and also to reduce regulatory burdens on small entities by clarifying the relationship between the Commission's rules and procedures and those of the FAA and ensuring continued consistency in those rules and procedures. The Commission asks commenters to suggest alternatives that

may further reduce the impact on small entities while achieving the above intended goals. The Commission specifically seeks comment on whether to further reduce regulatory burdens on small entities by amending § 17.17(b) (redesignated as § 17.24) to provide that a revised FAA Circular does not impose new obligations on already-approved antenna structures. The Commission seeks comment on whether such deregulatory action would unduly limit the Commission's flexibility and whether it would afford appropriate deference to the FAA's expertise and how possible alternatives could further lessen the burden on small businesses while achieving these goals.

110. In order to clarify the obligations of antenna structure owners and conform the Commission's regulations to Commission and FAA practice, the Commission proposes adding new sections to § 17.4 specifying that any change in height of one foot or greater, any change in coordinates of one second or greater, or any change in marking and lighting specifications requires prior approval from the FAA and the Commission. These proposed changes are intended both to promote aircraft navigation safety and to ease regulatory burdens by streamlining regulations and reducing confusion. The Commission also proposes to consider whether to specify accuracy standards or survey methods in order to ensure consistency of data. The Commission seeks to hear about alternative rules that would achieve the same goals while reducing burdens to small business.

111. The Commission proposes to delete §§ 17.7 and 17.14 of the Commission's rules, which are restatements of FAA rules, and to substitute cross-references to relevant FAA rules in § 17.4 of the Commission's rules. This change could ease burdens on regulated entities, including small businesses, by reducing the risk of confusion in the event the FAA were to change its criteria. The Commission seeks any alternatives to these proposed changes that would further reduce burdens on small business while achieving these goals.

112. The Commission proposes to amend its rules governing inspection and maintenance of lighting by: (1) Amending § 17.47 to eliminate or reduce requirements to perform inspections of lighting and light monitoring systems; (2) amending § 17.48(a) to require antenna structure owners to provide continuously active notice to the FAA of lighting outages; and (3) deleting vague references to timely repair timeframes in §§ 17.48(b) and 17.56(a). The Commission seeks to

Firm Size Including Legal Form of Organization)," Table 4, NAICS code 517910 (issued Nov. 2005).

<sup>155</sup> *Id.* An additional 14 firms had annual receipts of \$25 million or more.

<sup>156</sup> 47 CFR 17.4(a), 17.7(a).

<sup>157</sup> The Commission notes, however, that approximately 13,000 towers are registered to 10 cellular carriers with 1,000 or more employees.

<sup>158</sup> 13 CFR 121.201, North American Industry Classification System (NAICS) code 517919. Under this category, a business is small if it has 1,500 or fewer employees.

receive suggestions as to possible alternatives in this area that would best balance the goal of eliminating unnecessary regulatory burdens with the imperative to preserve aircraft navigation safety, while reducing the burden on small entities.

113. The Commission proposes to delete §§ 17.45, 17.51, and 17.56(b), which set forth specific requirements for exhibiting and maintaining lights, because they are unnecessary and may create ambiguity in cases of conflict with FAA specifications. These proposed changes are intended both to promote aircraft navigation safety and to ease regulatory burdens on all regulated entities by streamlining regulations and reducing confusion. The Commission determined not to propose an exception to lighting requirements where lights are extinguished due to a loss of power beyond the owner's control because such an exception appears inconsistent with aircraft navigation safety. The Commission seeks alternative proposals, if any such proposals would reduce the burden on small entities.

114. § 17.49 requires antenna structure owners to maintain a record of observed or otherwise known extinguishments or improper functioning of structure lights. The Commission proposes to add a requirement to maintain such records for two years and provide the records to the Commission upon request in order to balance the Commission's need to determine the compliance record against the burden of record retention on antenna structure owners. The Commission tentatively concludes that this proposal best balances the Commission's need for a compliance record against the burden of record retention. The Commission seeks to receive alternative proposals based on data regarding the burden this record retention would impose on antenna structure owners, including the alternative of eliminating the recordkeeping requirement entirely. Such alternative proposals should address the issue of reducing burdens on small business.

115. The Commission requests comment on whether to amend § 17.50 to require use of the FAA's "In Service Aviation Orange Tolerance Chart" to determine whether a structure needs to be cleaned or repainted and to specify how the chart is to be used. These changes may provide more objective standards for gauging visibility. The Commission seeks alternative proposals that would achieve this goal while further reducing the burden on small business.

116. The Commission proposes to amend § 17.2(a) of the Commission's rules to clarify both when a structure becomes, and when a structure ceases to be, an "antenna structure" under its rules. The Commission also proposes to amend § 17.2(c) of the Commission's rules to clarify that the obligations of an "antenna structure owner" fall only on the owner of the underlying structure, and not on tenants, thus promoting clarity for all parties. The Commission seeks to receive alternate proposals that address the effects of these proposed rule changes in general, and more specifically on small entities.

117. The Commission asks commenters to address alternatives regarding whether the rules concerning antenna structures should be enforced against voluntarily registered structures, whether owners of antenna structures that do not require registration should be prohibited from registering their towers, and whether antenna structure owners who have voluntarily registered structures should be required to withdraw their registrations from the Commission's antenna structure database. Such action could reduce confusion by clarifying the regulatory status of these structures. The Commission seeks to receive alternate proposals addressing the benefits and drawbacks of such action, particularly with respect to its impact on antenna structure owners that are small businesses.

118. The Commission proposes to modify § 17.4(g) to require that antenna structure owners display the ASR number so that it would be visible to a member of the general public who reaches the closest publicly accessible location near each point of access to the antenna structure. The Commission further proposes to delete the requirement that the ASR number be posted near the base of the antenna structure. The Commission tentatively concludes that amending the rule in this manner would clarify the obligations of antenna structure owners, promote timely remediation when lighting is observed to be malfunctioning or extinguished, and eliminate unnecessary postings. The Commission seeks alternate proposals that would best achieve these goals while reducing the burdens on small business.

119. Section 17.4(f) requires that antenna structure owners immediately provide copies of FCC Form 854R (antenna structure registration) to each tenant licensee and permittee. Sections 17.4(e) and 17.6(c) impose a similar requirement on the first licensee where the antenna structure owner is unable to file Form 854 because it is subject to a

denial of Federal benefits under the Anti-Drug Abuse Act of 1988. The Commission proposes to amend these rules to allow the alternative of providing a link to the Commission's antenna structure registration Web site via paper or electronic mail. The Commission tentatively concludes that this proposal would best reduce the burden on regulated entities, including small businesses, while ensuring that tenant licensees and permittees remain informed. Thus, the Commission determined not to propose eliminating this requirement altogether or simply requiring antenna structure owners to provide their tenants with the ASR number. The Commission seeks alternative proposals that would achieve its goals.

120. The Commission determined not to propose eliminating § 17.57 to increase to five days the time period for notifying the Commission of construction, dismantlement, and changes in height or ownership. The Commission notes that the existing time periods have not been shown to be inconsistent with FAA requirements and that they promote the accuracy of the Commission's information. The Commission seeks discussion of alternate proposals that will reduce burdens on small business, including discussion of any burdens the existing rule may impose.

121. The Commission proposes to delete § 17.58, which was intended to promote compliance with procedures that are now obsolete. This change would streamline the antenna structure registration process, thereby easing the burden on regulated entities. The Commission seeks discussion of any alternative proposals that would also reduce burdens on small entities.

122. For each of the proposals in the Notice, the Commission seeks discussion, and where relevant, alternative proposals, on the effect that each prospective new requirement, or alternative rules, might have on small entities. For each proposed rule or alternative, the Commission seeks discussion about the burden that the prospective regulation would impose on small entities and how the Commission could impose such regulations while minimizing the burdens on small entities. For each proposed rule, the Commission asks whether there are any alternatives the Commission could implement that could achieve the Commission's goals while at the same time minimizing the burdens on small entities. For the duration of this docketed proceeding, the Commission will continue to examine alternatives with the objectives of eliminating

unnecessary regulations and minimizing any significant economic impact on small entities.

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

123. None.

#### B. Initial Paperwork Reduction Act

124. This document contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due July 20, 2010.

125. *Comments should address:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

126. *OMB Control Number:* None.

127. *Title:* Part 17 Construction, Marking, and Lighting of Antenna Structures.

128. *Form No.:* None.

129. *Type of Review:* New collection.

130. *Respondents:* Business or other for-profit; Not-for-profit institutions; and State, Local or Tribal Governments.

131. *Number of Respondents:* 22,000.

132. *Number of Responses:* 258,570.

133. *Estimated Time per Response:* .1 hr. to 3 hrs. on average.

134. *Frequency of Response:* On occasion reporting requirement, recordkeeping requirement and third party disclosure requirement.

135. *Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this information collection is contained in sections 4(i), 4(j), 11 and 303(q) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) through (j), 161, and 303(q).

136. *Total Annual Burden:* 378,027 hours.

137. *Total Annual Costs:* \$1,287,000.

138. *Privacy Act Impact Assessment:* No impact.

139. *Nature and Extent of Confidentiality:* There is no need for confidentiality.

140. *Needs and Uses:* The Commission is requesting OMB approval for disclosure, reporting, and record keeping requirements pertaining to part 17 of the Commission's rules. In order to clarify the obligations of antenna structure owners and conform the Commission's regulations to Commission and FAA practice, the Commission proposes changes to certain sections of the Commission's part 17 rules. These proposed changes are intended both to promote aircraft navigation safety and to ease regulatory burdens by streamlining regulations and reducing confusion. The new information collection requirements contained in the proposed part 17 amendments are necessary to implement a uniform registration process as well as safe and effective lighting procedures for owners of antenna structures. The following are the information collection requirements:

- 17.4(j)—Antenna structure owners must display the Antenna Structure Registration (ASR) number so that it would be visible to a member of the general public who reaches the closest publicly accessible location near each point of access to the antenna structure;

- 17.48—Antenna structure owners must provide continuously active notice to the FAA of antenna structure lighting outages;

- 17.49—Antenna structure owners must maintain a record of observed or otherwise known extinguishments or improper functioning of structure lights for two years and provide the records to the Commission upon request.

141. The Commission tentatively concludes that these collections are necessary to effectuate the above rule changes that clarify the obligations of antenna structure owners, ensure aircraft navigation safety when lighting is observed to be malfunctioning or extinguished, and eliminate unnecessary postings.

#### C. Other Procedural Matters

##### 1. Ex Parte Presentations

142. The rulemaking shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries

of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required. Other requirements pertaining to oral and written presentations are set forth in § 1.1206(b) of the Commission's rules.

##### 2. Comment Filing Procedures

143. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. All filings related to this Notice of Proposed Rulemaking should refer to WT Docket No. 10–88. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the Web site for submitting comments.

- ECFS filers must transmit one electronic copy of the comments for WT Docket No. 10–88. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, SW., Room TW–A325, Washington, DC 20554. The filing hours

at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

144. Parties should send a copy of their filings to John Borkowski, Federal Communications Commission, Room 6404, 445 12th Street, SW., Washington, DC 20554, or by e-mail to [John.Borkowski@fcc.gov](mailto:John.Borkowski@fcc.gov). Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, (202) 488-5300, or via e-mail to [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com).

145. Documents in WT Docket No. 10-88 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY-A257, Washington, DC 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com).

### 3. Accessible Formats

146. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY).

### V. Ordering Clauses

147. Accordingly, *it is ordered*, pursuant to sections 4(i), 4(j), 11 and 303(q) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) through (j), 161, 303(q), that this Notice in WT Docket No. 10-88 *is adopted*.

148. *It is further ordered* that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

### List of Subjects

#### 47 CFR Part 17

Reporting and recordkeeping requirements.

#### 47 CFR Part 17

Aviation safety; Communications equipment; Reporting and recordkeeping requirements.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

### Proposed Rules

For the reason discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 1 and 17 as follows:

### PART 1—PRACTICE AND PROCEDURE

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

**Authority:** 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(j), 155, 157, 225, and 303(r).

2. Section 1.61 is amended by revising paragraph (a)(5) to read as follows:

#### § 1.61 Procedures for handling applications requiring special aeronautical study.

(a) \* \* \*

(5) Upon receipt of FCC Form 854, and attached FAA final determination of "no hazard," the Bureau may prescribe antenna structure painting and/or lighting specifications or other conditions in accordance with the FAA airspace recommendation. Unless otherwise specified by the Bureau, the antenna structure must conform to the FAA's painting and lighting recommendations set forth in the FAA's determination of "no hazard" and the associated FAA study number. The Bureau returns a completed Antenna Structure Registration (FCC Form 854R) to the registrant. If the proposed structure is disapproved the registrant is so advised.

\* \* \* \* \*

### PART 17—CONSTRUCTION, MARKING, AND LIGHTING OF ANTENNA STRUCTURES

3. The authority citation for part 17 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303.

4. Section 17.1 is amended by revising paragraph (b) to read as follows:

#### § 17.1 Basis and purpose.

\* \* \* \* \*

(b) The purpose of this part is to prescribe certain procedures for antenna structure registration and standards with respect to the Commission's consideration of proposed antenna structures which will serve as a guide to antenna structure owners.

5. Section 17.2 is amended by revising paragraphs (a), (b) and (c) to read as follows:

#### § 17.2 Definitions.

(a) *Antenna structure.* The term antenna structure means a structure that is constructed or used for the primary purpose of supporting antennas to transmit and/or receive radio energy, and any antennas and other appurtenances mounted thereon, from the time construction of the supporting structure begins until such time as the supporting structure is dismantled.

(b) *Antenna farm area.* A geographical location, with established boundaries, designated by the Federal Communications Commission, in which antenna towers with a common impact on aviation may be grouped.

(c) *Antenna structure owner.* For the purposes of this part, an antenna structure owner is the individual or entity vested with ownership, equitable ownership, dominion, or title to the underlying structure that supports or is intended to support antennas and other appurtenances. Notwithstanding any agreements made between the owner and any entity designated by the owner to maintain the antenna structure, the owner is ultimately responsible for compliance with the requirements of this part.

\* \* \* \* \*

6. Revise § 17.4 to read as follows:

#### § 17.4 Antenna structure registration.

(a) The owner of any proposed or existing antenna structure that requires notice of proposed construction to the Federal Aviation Administration (FAA) must register the structure with the Commission. (See 14 CFR 77.13 for FAA notification requirements.) This includes those structures used as part of stations licensed by the Commission for the transmission of radio energy, or to be used as part of a cable television head end system. If a Federal Government antenna structure is to be used by a Commission licensee, the structure must be registered with the Commission. If the FAA exempts an antenna structure from notification, it is exempt from registration with the Commission. (See 14 CFR 77.15 for FAA exemptions to its notification requirements.)

(1) For a proposed antenna structure or alteration of an existing antenna structure, the owner must register the structure prior to construction or alteration.

(2) For a structure that did not originally fall under the definition of "antenna structure," the owner must



register the structure prior to hosting a Commission licensee.

(b) Except as provided in paragraph (i) of this section, each owner must file FCC Form 854 with the Commission. Additionally, each owner of a proposed structure referred to in paragraph (a) of this section must submit a valid FAA determination of “no hazard.” In order to be considered valid by the Commission, the FAA determination of “no hazard” must not have expired prior to the date on which FCC Form 854 is received by the Commission. The height of the structure will include the highest point of the structure including any obstruction lighting or lightning arrester.

(c) Absent Commission specification, the painting and lighting specifications recommended by the FAA are mandatory (see § 17.23 of this chapter). However, the Commission may specify painting and/or lighting requirements for each antenna structure registration in addition to or different from those specified by the FAA.

(d) Any change in the overall height of one foot or greater or coordinates of one second or greater in longitude or latitude of an antenna structure requires prior approval from the FAA and the Commission.

(e) Any change in the marking and lighting specifications described on any antenna structure registration requires prior approval from the FAA and the Commission.

(f) If an Environmental Assessment is required under § 1.1307 of this chapter, the Bureau will address the environmental concerns prior to processing the registration.

(g) If a final FAA determination of “no hazard” is not submitted along with FCC Form 854, processing of the registration may be delayed or disapproved.

(h) The Commission shall issue, to the registrant, FCC Form 854R, Antenna Structure Registration, which assigns a unique Antenna Structure Registration Number. The structure owner shall immediately provide to all tenant licensees and permittees notification that the structure has been registered, along with either a copy of Form 854R or the Antenna Structure Registration Number and a link to the FCC antenna structure Web site <http://wireless.fcc.gov/antenna/>. This notification may be done electronically or via paper mail.

(i) If the owner of the antenna structure cannot file FCC Form 854 because it is subject to a denial of Federal benefits under the Anti-Drug Abuse Act of 1988, 21 U.S.C. 862, the first tenant licensee authorized to locate on the structure (excluding tenants that

no longer occupy the structure) must register the structure using FCC Form 854, and provide a copy of the Antenna Structure Registration (FCC Form 854R) to the owner. The owner remains responsible for providing to all tenant licensees and permittees notification that the structure has been registered, consistent with paragraph (h) of this section, and for posting the registration number as required by paragraph (j) of this section.

(j) Except as described in paragraph (k) of this section, the Antenna Structure Registration Number must be displayed so that it is conspicuously visible and legible from the publicly accessible area nearest the base of the antenna structure along the publicly accessible roadway or path. If the base of the antenna structure has more than one point of ingress/egress, the Antenna Structure Registration Number must be posted at the publicly accessible area nearest each such point of ingress/egress. Materials used to display the Antenna Structure Registration Number must be weather-resistant and of sufficient size to be easily seen at the base of the antenna structure or at a publicly accessible location.

(k) The owner is not required to post the Antenna Structure Registration Number in cases where a Federal, State, or local government entity provides written notice to the owner that such a posting would detract from the appearance of a historic landmark. In this case, the owner must make the Antenna Structure Registration Number available to representatives of the Commission, the FAA, and the general public upon reasonable demand.

7. Section 17.6 is amended by revising the section heading and paragraph (c), to read as follows:

**§ 17.6 Responsibility for painting and lighting compliance.**

\* \* \* \* \*

(c) If the owner of the antenna structure cannot file FCC Form 854 because it is subject to a denial of federal benefits under the Anti-Drug Abuse Act of 1988, 21 U.S.C. 862, the first licensee authorized to locate on the structure must register the structure using FCC Form 854, and provide a copy of the Antenna Structure Registration (FCC Form 854R) to the owner. The owner remains responsible for providing to all tenant licensees and permittees notification that the structure has been registered, consistent with § 17.4(h), and for posting the registration number as required by § 17.4(j).

8. Revise the heading to subpart B of part 17 to read as follows:

**Subpart B—Antenna Farm Areas**

**§ 17.7 [Removed and Reserved]**

9. Remove and reserve § 17.7.

**§ 17.14 [Removed and Reserved]**

10. Remove and reserve § 17.14.

**§ 17.17 [Removed and Reserved]**

11. Remove and reserve § 17.17.

12. Section 17.21 is amended by revising the introductory text, revising paragraph (a) and adding paragraph (c) to read as follows:

**§ 17.21 Painting and lighting, when required.**

Antenna structures shall be painted and lighted when:

(a) Their height exceeds any obstruction standard requiring notification to the FAA (see § 17.4(a)).

\* \* \* \* \*

(c) If an antenna installation is of such a nature that its painting and lighting specifications in accordance with the FAA airspace recommendation are confusing, or endanger rather than assist airmen, or are otherwise inadequate, the Commission will specify the type of painting and lighting or other marking to be used in the individual situation.

**§ 17.22 [Removed and Reserved]**

13. Remove and reserve § 17.22.

14. Section 17.23 is revised to read as follows:

**§ 17.23 Specifications for painting and lighting antenna structures.**

Unless otherwise specified by the Commission, each new or altered antenna structure must conform to the FAA's painting and lighting specifications set forth in the FAA's final determination of “no hazard” and the associated FAA study for that particular structure. For purposes of this part, any specifications, standards, and general requirements set forth by the FAA in the structure's determination of “no hazard” and the associated FAA study are mandatory. Additionally, each antenna structure must be painted and lighted in accordance with any painting and lighting requirements prescribed on the antenna structure's registration, or in accordance with any other specifications provided by the Commission.

15. Add § 17.24 to read as follows:

**§ 17.24 Existing structures.**

No change to painting or lighting criteria or relocation of airports shall at any time impose a new restriction upon any then existing or authorized antenna structure or structures.

**§ 17.45 [Removed and Reserved]**

16. Remove and reserve § 17.45.

17. Section 17.48 is revised to read as follows:

**§ 17.48 Notification of extinguishment or improper functioning of lights.**

The owner of any antenna structure that requires registration of the structure with the Commission and has been assigned lighting specifications referenced in this part shall report immediately to the Federal Aviation Administration, by means acceptable to the Federal Aviation Administration, any observed or otherwise known extinguishment or improper functioning of any top steady burning light or any flashing obstruction light, regardless of its position on the antenna structure, not corrected within 30 minutes. If the lights cannot be repaired within 15 days, the owner shall notify the FAA to extend the outage date and report a return to service date. The owner will repeat this process every 15 days until the lights are repaired. Such reports shall set forth the condition of the light or lights, the circumstances which caused the failure, the probable date for restoration of service, the FCC Antenna Structure Registration Number, the height of the structure (AGL and AMSL if known) and the name, title, address, and telephone number of the person making the report. Further notification to the Federal Aviation Administration by means acceptable to the FAA shall be given immediately upon resumption of normal operation of the light or lights.

18. Section 17.49 is amended by revising the introductory text to read as follows:

**§ 17.49 Recording of antenna structure light inspections in the owner record.**

The owner of each antenna structure which is registered with the Commission and has been assigned lighting specifications referenced in this part must maintain a record of any observed or otherwise known extinguishment or improper functioning of a structure light. This record shall be retained for a period of two years and provided to the FCC or its agents upon request. The record shall include the following information for each such event:

\* \* \* \* \*

**§ 17.51 [Removed and Reserved]**

19. Remove and reserve § 17.51.

**§ 17.56 [Removed and Reserved]**

20. Remove and reserve § 17.56.

**§ 17.58 [Removed and Reserved]**

21. Remove and reserve § 17.58.

[FR Doc. 2010-12142 Filed 5-20-10; 8:45 am]

BILLING CODE 6712-01-P

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 665**

**RIN 0648-AX76**

**Fisheries in the Western Pacific; Community Development Program Process**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of availability of fishery ecosystem plan amendments; request for comments.

**SUMMARY:** NMFS announces that the Western Pacific Fishery Management Council (Council) proposes to amend the fishery ecosystem plans (FEPs) for American Samoa, Hawaii, Marianas, and western Pacific Pelagics. If approved by the Secretary of Commerce (Secretary), the amendments would establish requirements and procedures for reviewing and approving community development plans for access to western Pacific fisheries. The intent of the amendments is to promote the participation of island communities in fisheries that they have traditionally depended upon, but may not have the capabilities to support continued and substantial participation in, possibly due to economic, regulatory, or other constraints.

**DATES:** Comments on the amendments must be received by July 20, 2010.

**ADDRESSES:** Comments on the amendments, identified by 0648-AX76, may be sent to either of the following addresses:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal [www.regulations.gov](http://www.regulations.gov); or
- Mail: Mail written comments to William L. Robinson, Regional Administrator, NMFS, Pacific Islands Region (PIR), 1601 Kapiolani Blvd, Suite 1110, Honolulu, HI 96814-4700.

Instructions: Comments must be submitted to one of these two addresses to ensure that the comments are received, documented, and considered by NMFS. Comments sent to any other address or individual, or received after the end of the comment period, may not be considered. Comments will be posted for public viewing after the comment period has closed. All comments received are a part of the public record and will generally be posted to [www.regulations.gov](http://www.regulations.gov) without change.

All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the commenter may be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the amendments (which are identical for all four FEPs) containing background information on the issue are available from [www.regulations.gov](http://www.regulations.gov) and from the Council, 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808-522-8220, fax 808-522-8226, or web site [www.wpcouncil.org](http://www.wpcouncil.org).

**FOR FURTHER INFORMATION CONTACT:** Jarad Makaiau, NMFS PIR Sustainable Fisheries, 808-944-2108.

**SUPPLEMENTARY INFORMATION:** This document is also available at [www.gpoaccess.gov/fr](http://www.gpoaccess.gov/fr).

Section 305(i)(2) of the Magnuson-Stevens Act authorizes the Council and the Secretary, through NMFS, to establish a community development program for western Pacific fisheries. The intent of the program is to provide western Pacific communities access to fisheries that they have traditionally depended upon, but may not have the capabilities to support continued and substantial participation in, possibly due to economic, regulatory, or other constraints.

In 2002, NMFS announced the eligibility criteria for participating in the program (67 FR 18512; April 16, 2002). To participate in the program, communities are required to develop and submit a development plan, but there is currently no mechanism to solicit, review, and approve these plans. To address this issue, the Council developed and submitted to NMFS for review, amendments to the FEPs for American Samoa, Hawaii, the Mariana Archipelago, and western Pacific Pelagics to establish such a mechanism. The amendments are identical for each FEP.

To be eligible for the community development program, a community must:

1. Be located in American Samoa, Guam, Hawaii, or the Northern Mariana Islands (collectively, the western Pacific);
2. Consist of community residents descended from aboriginal people indigenous to the western Pacific area who conducted commercial or subsistence fishing using traditional