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

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In the Matter of)
)
Implementation of Section 9) MD Docket No. 94-19 ✓
of the Communications Act)
)
Assessment and Collection of)
Regulatory Fees for the 1994)
Fiscal Year)

REPORT AND ORDER

Adopted: June 3, 1994;

Released: June 8, 1994

By the Commission: Commissioner Quello issuing a statement;
Commissioners Ness and Chong not participating.

TABLE OF CONTENTS

| | |
|---|-------|
| I. Introduction | 1-2 |
| II. Background | 3-5 |
| III. Discussion | 6-65 |
| A. Assessment of Regulatory Fees for FY 1994 | 6-12 |
| B. Exemptions form Regulatory Fees | 13-28 |
| 1. Governmental Entities | 14-16 |
| 2. Nonprofit Entities | 17 |
| 3. Amateur Licensees | 18-19 |
| 4. Noncommercial Educational Broadcasters | 20-21 |
| 5. Public Safety Entities | 22 |
| 6. Certification of Exempt Status | 23-28 |
| C. Waivers, Reductions and Deferments | 29-35 |
| D. Procedures for Payment | 36-57 |
| 1. Categories of Payors | 36-38 |
| 2. Installment Payments | 39-45 |
| 3. Advance Payments | 46-47 |
| 4. Timing of Payments | 48-49 |
| 5. Method and Location of Payments | 50-52 |
| 6. Multiple Payments | 53-55 |
| 7. Electronic Payments | 56-57 |
| E. Enforcement | 58-65 |
| 1. Penalties for Late Payment | 59 |
| 2. Dismissal of Applications | 60 |
| 3. Revocation | 61-64 |
| 4. Debt Collection Act Remedies | 65 |

| | |
|--|---------|
| IV. Regulatory Fee Categories | 66-101 |
| A. Private Radio Service | 68-76 |
| 1. Exclusive Use | 69-72 |
| 2. Marine Mobile Services | 73-74 |
| 3. General Mobile Radio Services | 75-76 |
| B. Mass Media Services | 77-85 |
| 1. Broadcast Stations | 77-79 |
| 2. Television Stations | 80-83 |
| 3. Broadcast Auxiliary Stations | 84 |
| 4. ITFS and DBS | 85 |
| C. Common Carrier Services | 86-98 |
| 1. Cellular and Public Mobile Licensees | 87-88 |
| 2. Air-Ground Radiotelephone Service | 89 |
| 3. Space Stations | 90-92 |
| 4. Earth Stations | 93-94 |
| 5. Interexchange and Local Exchange Services | 95-97 |
| 6. International Bearer Circuits | 98 |
| D. Cable Services | 99-101 |
| V. Amendments to Application Fee Rules | 102-109 |
| VI. Confidentiality | 110 |
| Final Regulatory Analysis | 111-114 |
| Ordering Clauses | 115-116 |

Appendices

I. Introduction

1. By this Report and Order, the Commission adopts rules to implement section 9 of the Communications Act, as amended, 47 U.S.C. § 159, providing for the annual assessment and collection of regulatory fees by the Commission.¹ The Report and Order establishes the amounts of the regulatory fees for Fiscal Year (FY) 1994 and the rules for the payment of such fees for fiscal years 1994 and thereafter.² Also, we are amending several of the rules governing the collection of the fees to be filed with applications and other filings pursuant to section 8 of the

¹ Section 9 of the Act was added by section 6002(a) of the Omnibus Budget Reconciliation Act of 1993 (hereinafter "1993 Budget Act"). See Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 397 (approved August 10, 1993). Section 9 is codified at 47 U.S.C. § 159.

² As discussed below, we will establish the accounting systems necessary to make adjustments in the Schedule of Regulatory Fees required for the assessment of fees in future years in a subsequent and separate rulemaking proceeding. See 47 U.S.C. § 159(b)(3), (i).

Communications Act, as amended, 47 U.S.C. § 158.³

2. The rules we adopt below are designed to ensure that 1) collection of fees does not adversely affect the Commission's regulatory activities, 2) the most effective means possible are employed in the collection and deposit of fees, and 3) the paperwork (and financial burden) on the public resulting from our collection process is kept to an absolute minimum. To accomplish this goal, we have, to the extent possible, modeled our regulatory fee rules upon the rules that we previously established to govern the collection of fees filed with applications and other filings. See 47 C.F.R. § 1.1101 *et seq.* Moreover, in the course of fashioning rules to govern regulatory fees, we have revised several rules in order to improve the collection process related to these fees and, wherever possible, to ease the burden on those entities subject to the payment of these fees. Implementation of rules governing the collection of regulatory fees also furthers the National Performance Review goals of reinventing government by requiring beneficiaries of the Commission's services to pay the costs associated with these activities.

II. Background

3. Section 9(a) of the Communications Act requires the Commission to collect regulatory fees to recover the annual cost of its enforcement activities, policy and rulemaking activities, user information services, and international activities. 47 U.S.C. § 159(a). 47 U.S.C. § 159(b)(1)(A). The Schedule of Regulatory Charges sets forth in section 9(g) the categories of regulated entities subject initially to the regulatory fee requirement and designates the fees to be collected for each subject category of regulatee. 47 U.S.C. § 159(g). The Schedule of Fees sets forth annual regulatory fees for specific categories of regulatees in Private Radio, Mass Media, Common Carrier and

³ 47 U.S.C. § 158. See generally 47 C.F.R. Part 1, Subpart G; Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947 (1987) (hereinafter "Fees I"), recon. granted in part, 3 FCC Rcd 5987 (1988) (hereinafter "Fees I Reconsideration"); Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1990) (hereinafter "Fees II"), recon. granted in part, 6 FCC Rcd 5919 (1991) (hereinafter "Fees II Reconsideration"). See also section 6003(a)(2) of the 1993 Budget Act, Pub. L. 103-66, Title VI, § 6003(a)(2), 107 Stat. 401 (1993) (making conforming amendments to section 8).

Cable Services.⁴

4. Section 9(f)(1) requires the Commission to adopt rules to implement the assessment and collection of the annual regulatory fees. 47 U.S.C. § 159(f)(1). On March 4, 1994, we adopted a Notice of Proposed Rulemaking ("NPRM") to implement section 9 of the Act.⁵ In the NPRM, we concluded that Congress intended the Commission to rely upon the Schedule of Regulatory Fees enacted in section 9(g) to recover costs for FY 1994.

5. In addition, the NPRM proposed rules providing for: 1) exemptions from the regulatory fee requirements for governmental entities, nonprofit entities, amateur licensees, noncommercial educational broadcasters, and licensees in the public safety services, 2) standards for waiver, reduction and deferment of regulatory fees, 3) procedures for the payment of regulatory fees, including the timing and method of payments, and the location for submission of payments, and 4) procedures to assure timely payment of regulatory fees, including announcements in the Federal Register of the filing times for the fee payments, and penalties for late payment and nonpayment of fees.

III. Discussion

A. Assessment of Regulatory Fees for FY 1994

6. The NPRM proposed that for FY 1994, the Commission would utilize the Schedule of Regulatory Fees established by Congress in section 9(g) of the Act. 47 U.S.C. § 159(g). In response to this proposal, several commenters suggest that we amend the Schedule of Fees for FY 1994. They contend that fees in the Schedule are too high, that the schedule provides the wrong mechanism for assessing fees, and that additional services should be included in the fee schedule.

⁴ Congress included the regulatory fees for cable services in the Schedule of Regulatory Fees as a subpart of the fees established to recover appropriations related to the regulation of mass media services. 47 U.S.C. § 159(g). Because we recently established a Cable Services Bureau to administer the regulation of cable television operations, we have amended our rules to set forth separately the regulatory fees applicable to cable services. See section 1.1155, 47 C.F.R. § 1.1155.

⁵ See Notice of Proposed Rulemaking in the Implementation of Section 9 of the Communication Act, FCC 94-46, released March 11, 1994.

7. In particular, Fireweed Communications Corp.⁶ (Fireweed) argues that the regulatory fees impose an unfair and confiscatory financial burden on broadcast stations in small markets, and impinge on the constitutional right of freedom of speech of Fireweed and its listeners. Fireweed contends that the financial burden imposed by the regulatory fee would cause it to reduce its programming or even to cease its operations. The Joint Commenters, consisting of several cable television interests,⁷ argue that we have authority to modify the Fee Schedule for FY 1994, to add classes of services that Congress did not include in section 9(g)'s fee schedule. In addition, the Joint Commenters assert that the Commission is authorized to modify the fee schedule for FY 1994 because section 9(b)(3), which governs permissive adjustments to the fee schedule, including addition of services to the schedule, does not restrict our authority for making changes to fiscal years after 1994. In particular, the Joint Commenters contend that Direct Broadcast Satellite, if available later this fiscal year, Instructional Television Fixed Service, if used for commercial purposes, and Multi-channel Multipoint Distribution Services, because it is not expressly enumerated as a service subject to the fee requirement, should be added to the fee schedule and assessed a fee for FY 1994. The Joint Commenters also assert that adopting a fee requirement for these services in this proceeding will avoid the necessity for immediately initiating a new rulemaking to include these services in the fee schedule for FY 1995 and thereafter.

⁶ Fireweed filed its comments late. It argues that the Commission failed to provide proper notice to interested parties and asserts that we failed to publish the NPRM "in publications likely to be obtained by small entities" or to "conduct open conferences and public meetings" concerning our proposals as provided in 5 U.S.C. § 609(2) and (4). However, section 609 requires only that we "assure that small entities have been given an opportunity to participate in the rulemaking" through means "such as" those enumerated in section 609. 5 U.S.C. § 609. We have met that requirement. The NPRM was published and distributed pursuant to section 1.412 of our rules and was distributed to over 100 members of the trade press, newspapers, wire services, broadcasters, and magazines, including those dealing with consumer, minority and small business issues. In addition, the Commission's Daily Digest, which included notice of the NPRM, was published on Internet. We will also accept and give full consideration to the arguments in Fireweed's comments even though they were untimely filed. Further, we will accept the late filed comments of MCI Telecommunications Corporation.

⁷ The Joint Commenters are Blade Communications, Inc., Cablevision Industries Corp., Crown Media, Inc., Multivision Cable TV Corp., Parcable, Inc., Providence Journal Company, Sammons Communications, Inc., and Star Cable Associates.

8. Other parties including Sprint, the Cellular Telephone Industry Association (CTIA), Comsat, and the Utilities Telecommunications Counsel (UTC), support our conclusion in the NPRM that Congress intended that the Schedule set forth in section 9(g) would govern the assessment and collection of fees for FY 1994. UTC states that Congress' inclusion in section 9(g) of the fee schedule, as well as other language in the Act, clearly demonstrates that Congress did not intend that the Commission revise the fee schedule so soon after its enactment.

9. We are not persuaded by the arguments urging a reduction in the statutory fees or amendment of the service categories subject to the regulatory fees. In the NPRM, we concluded that Congress did not intend that we change the amounts or the services established by the statutory fee schedule for 1994. Our conclusion is supported by the Conference Report, which states that we have authority to review and adjust the fees after one year.⁸ Congress also enacted the fee schedule after reviewing information that we provided concerning the services subject to the fees. We do not believe that Congress would have enacted section 9(g) intending that we immediately amend the service classifications or fee amounts in its schedule.

10. In addition, other provisions of section 9 support our interpretation. Section 9(i) requires that, before making adjustments to the services included in the fee schedule, we must develop accounting systems and provide an opportunity for public comments on proposed cost allocations. NPRM para. 9. Section 9(b)(4)(B) requires that any amendment to the services contained in the statutory fee schedule not be effective until 90 days after Congress is notified of those revisions. See 47 U.S.C. § 159. As a practical matter, the Commission could not possibly meet these requirements in time to permit section 9 fee collections in FY 1994. Given these statutory requirements, we conclude that Congress did not intend that we make any changes to the services subjected to the regulatory fee requirement or the amounts contained in the schedule for FY 94.⁹

11. Also, we do not agree with the Joint Commenters that this is the appropriate proceeding to amend the Schedule of Fees for future years. Such amendments would be premature because we do not now have the information necessary to establish regulatory fees for FY 1995. As we stated in the NPRM, we intend to

⁸ H.R. Rep. No. 213, 103 Cong., 1st Sess. 499 (1993) (Conference Report).

⁹In view of our conclusion that Congress did not intend us to make any changes to its Schedule of Fees for FY 1994, we will not at this time assess fees on lifetime restricted radiotelephone and radio operator applicants and permittees.

commence a separate proceeding in connection with the assessment of fees for FY 1995. We will seek in that proceeding comment concerning the allocation of costs of our enforcement, policy and rulemaking, information services, and international services, including any necessary adjustments to the classes of services set forth in section 9(g)'s fee schedule. See 47 U.S.C. § 159(i).

12. Therefore, as we proposed in the NPRM, in order to meet the congressional directive to implement the collection of regulatory fees in Fiscal Year 1994, we are adopting without modification the Schedule of Regulatory Fees enacted by Congress in section 9(g). See 47 U.S.C. § 159(b)(1)(C). The Schedule provides a listing of the specific categories of regulatees in the Private Radio, Mass Media, Common Carrier and Cable Services that are required to pay a regulatory fee. We have incorporated the schedule into our rules and we have established separate sections of the rules to provide the payment schedules for the Private Radio Services (section 1.1152), Mass Media Services (section 1.1153), Common Carrier Services (1.1154) and Cable Services (section 1.1155). In Appendix B of this Report and Order, we have included guidelines for the payment of fees for each service subject to the regulatory fee requirement.

B. Exemptions from Regulatory Fees

13. In the NPRM, we proposed to exempt certain discrete categories of regulatees from the requirement to file annual regulatory fees. Section 9(h) explicitly provides an exemption from the fees for governmental entities, nonprofit entities and amateur radio licensees. 47 U.S.C. § 159(h). We concluded that Congress also intended to exempt all public safety licensees and noncommercial educational broadcasters from the regulatory fee requirements. In the paragraphs below, we review each of these categories and consider the comments that address each exemption.

1. Governmental Entities

14. As provided in section 9(h) and proposed in the NPRM, governmental entities will be exempt from the regulatory fee requirement. As proposed, our rule implementing the governmental exemption will conform to existing section 1.1112(f) of the rules, which provides an exemption for governmental entities from the fee requirements for applications and other filing fees. See 47 C.F.R. § 1.1112(f); see also 47 U.S.C. § 158(d)(1)(A), (B). Section 1.1112(f) broadly defines the term "governmental entity" to include "any state, possession, city, county, town, village, municipal corporation or similar political organization or subpart controlled by publicly elected officials exercising sovereign direction and control over their respective communities or programs." The comments generally support our proposals with

regard to the exemption for governmental entities.

15. Cellular Communications of Puerto Rico (CCPR) contends that we should limit the government exemption so that only usual and customary governmental functions would be exempt. In particular, CCPR argues that the Puerto Rico Telephone Company (PRTC) which is controlled by the Commonwealth of Puerto Rico and operates a cellular telephone system, should be required to pay a regulatory fee to the extent that it engages in for profit or competitive operations. Further, CCPR argues that exempting PRTC from the regulatory fees for cellular telephone systems would give PRTC an unfair competitive advantage. In opposition, PRTC argues that Congress did not distinguish between different activities, and that as a result all of its operations are subject to the governmental exemption.

16. The governmental exemption is mandated by Congress. Congress did not distinguish between various governmental functions, nor did it restrict the exemption's availability for any specific governmental entities. Therefore, we do not accept CCPR's proposal.

2. Nonprofit Entities

17. Section 9(h) also exempts nonprofit entities from the requirement to file regulatory fees. In the NPRM, we tentatively found that Congress intended its exemption for nonprofit entities to cover any entity possessing nonprofit, tax exempt status pursuant to section 501 of the Internal Revenue Code, 26 U.S.C. § 501. Congress' exemption of nonprofit entities from regulatory fees is substantially broader than the limited exemption from the payment of application filing fees that Congress afforded in section 8(d)(1) to nonprofit entities licensed in the Public Safety Radio Services and tax exempt under section 501(c)(3). See 47 U.S.C. § 158(d)(1); see also 47 C.F.R. § 1.1112(b). The comments generally support our interpretation of the exemption, and we will adopt the exemption as proposed in the NPRM. The nonprofit exemption will be available only to those licensees who have established their nonprofit status under section 501.

3. Amateur Licensees

18. Pursuant to section 9(h), we proposed to establish an exemption from regulatory fees for amateur radio operators licensed under part 97 of our rules. However, Congress included in the Schedule of Fees an annual regulatory fee covering vanity call signs, and we proposed to establish a fee for amateur vanity call signs. We proposed that this fee would be assessed if our proposed rules to establish vanity call signs become effective. See Notice of Proposed Rulemaking, 9 FCC Rd 105 (1993).

19. We will adopt the exemption for amateur licensees as set

not qualify for an exemption as a governmental or nonprofit entity. In the NPRM, we noted that the legislative history states that Congress intended to exempt public safety licensees from regulatory fees. APCO, in supporting our proposal, urges that we limit the public safety exemption to entities eligible for Public Safety Radio Service licenses pursuant to the provisions of Part 90, Subpart B, and not exempt licensees merely because they are authorized to operate on a public safety channel. We agree with APCO that only entities eligible to operate as public safety licensees should be entitled to an exemption. Therefore, we will restrict the public safety exemption to entities eligible to operate in the Special Emergency Radio or Public Safety Radio Services.¹¹ Under this definition, the fact that a licensee is authorized to use a frequency allocated to these services is insufficient to gain an exemption as a public safety entity.

6. Certification of Exempt Status

23. In order to implement our congressional mandate concerning exemptions, the NPRM asked the parties to comment on the appropriate method for establishing exemptions from regulatory fees. Our goal is to minimize the burden on applicants and licensees seeking exemption from the regulatory fees. See NPRM at ¶¶ 13, 16, and 21. The commenters supported our efforts and urged reporting and exemption certifications designed to minimize their paperwork burdens.

24. Forest Industries Telecommunications (FIT) proposed that the Commission allow nonprofit entities to establish their exempt status by submitting a Determination Letter issued by the Internal Revenue Service (IRS) stating that the applicant has qualified for tax exempt status under Section 501 of the Internal Revenue Act. The Utilities Telecommunications Council (UTC) urges that we reduce the burden on entities seeking to obtain a nonprofit exemption by requiring only that they file their employer identification numbers (EINs). UCC asserts that EINs are sufficient to permit verification of an entity's nonprofit status. The National Telephone Cooperative Association (NTCA) urges that we also exempt entities that have applied for IRS Determination Letters so that IRS administrative delays do not result in the denial of exemption from the regulatory fee requirement. NTCA requests that our determination of nonprofit status remain effective until a change in such status is determined by the IRS.

¹¹ Moreover, we will not assess a regulatory fee upon Emergency Broadcast Service (EBS) licenses for auxiliary service facilities that use government-provided equipment because these stations are dedicated for EBS and are used solely for public safety purposes.

forth in NPRM. If our proposal to issue vanity call signs is adopted, we will also assess a regulatory fee in FY 1994 upon persons filing applications, pursuant to the charges listed in Congress' fee schedule.¹⁰

4. Noncommercial Educational Broadcasters

20. In the NPRM, we concluded that regulatory fees are not applicable to noncommercial educational broadcasters. Congress included commercial television and AM and FM radio broadcast licensees and permittees in its Schedule of Fees. In contrast, Congress omitted the noncommercial educational stations from the category of stations subject to the regulatory fee. In addition, and consistent with existing section 1.1112(d) of the rules governing application fees, we proposed to exempt from the regulatory fee requirement any secondary and auxiliary broadcast services, such as low power television ("LPTV") stations, television translators and boosters, remote pickup stations and intercity relay stations and other Mass Media, Common Carrier, and Private Radio facility authorizations used with noncommercial radio, television and instructional services qualifying for the exemption. See 47 C.F.R. § 1.1112(d). The comments supported the exemption for nonprofit educational broadcast stations and we will adopt the exemption as set forth in the NPRM.

21. Further, we affirm the tentative conclusion of the NPRM that noncommercial international short-wave will be subject to the regulatory fees. Congress did not provide an express exemption for these stations and none of the commenters urged us to exempt the international short-wave stations. In addition, unlike noncommercial LPTV and translator stations, the government does not provide financial support to noncommercial international short wave stations through the Corporation for Public Broadcasting (CPB) or the National Telecommunications and Information Administration (NTIA). Thus, the considerations that led us to conclude that Congress intended to exempt noncommercial educational LPTV and translator stations are not present with respect to international short-wave stations. See Fee Collection Program, 6 FCC Rcd 5919, 5925 (1991).

5. Public Safety Services

22. We have received no comments opposing our proposal to exempt all licensees in the Special Emergency Radio and Public Safety Radio services from regulatory fees even where the licensee does

¹⁰ The American Radio Relay League, Incorporated asserts that it has requested Congress to change the vanity call sign annual regulatory fee to a one time application fee. We, of course, will modify our fee schedule to be consistent with any congressional amendment of the fees.

25. PRTC urges us to rely upon existing exemptions from application fee payments held by governmental entities rather than require these entities to provide additional certifications to obtain exemptions from the regulatory fee requirement. Similarly, UCC contends that no additional certification of exempt status should be required from governmental applicants in the Private Radio services since applications for these services require information disclosing their exempt status.

26. We agree with PRTC and UCC that we can rely on the data in private radio service applications and in the Commission's files to determine a regulatee's exempt status. Further, licensees and other regulatees for whom we have such data will not be required to file documentation to support their exempt status. If, after reviewing the information already on file, we are unable to determine a regulatee's exempt status we will issue a request that an applicant or licensee further document its claim of exempt status. With respect to amateur, noncommercial educational broadcast stations and public safety licensees, we do not anticipate any problem in establishing their eligibility for exempt status because their exempt status is based on the nature of their licenses.

27. When our records contain no evidence of a governmental entity's exempt status, we will accept a certification of its governmental status. Nonprofit licensees may submit section 501 Determination Letters. Because these documents are readily available in the files of nonprofit entities, we decline at this time to establish a mechanism to verify nonprofit status through EINs. We will also require that an entity with a pending request for an IRS Determination Letter submit a regulatory fee because the IRS may deny the request for tax exempt status. However, we will refund the fee for the period covered by a subsequently issued Determination Letter.¹²

28. We caution that we expect regulatees to act in good faith. In any instance in which payment is overdue, and the licensee or permittee cannot establish its entitlement to an exemption, we will assess a 25 percent penalty for late payment as authorized by Congress.

C. Waivers, Reductions and Deferments of Regulatory Fees

¹²To obtain a refund a regulatee must demonstrate that the period covered by the Determination Letter's finding of tax exempt status includes the date that we established for the calculation of its fee in the fiscal year for which the refund is requested. Further, an entity will be subject to a regulatory fee for the fiscal year that the IRS terminates its tax exempt status if the termination is made prior to the date for calculating its fees.

29. Section 9(d) provides that "[t]he Commission may waive, reduce, or defer payment of a fee in any specific instance for good cause shown, where such action would promote the public interest." 47 U.S.C. § 159(d). Section 9(d) is similar to, if not identical with section 8(d)(2) of the Act related to waivers and deferments of application fees. 47 U.S.C. § 158(d)(2). Pursuant to section 8(d)(2), we have permitted waivers only on a case-by-case basis following a demonstration that the public interest clearly overrides the private interest of the requester. Thus, in our NPRM, we proposed to restrict similarly waivers to encompass only those requests unambiguously articulating "extraordinary and compelling circumstances" outweighing the public interest in recouping the cost of the Commission's regulatory services from a particular regulatee.

30. For those entities required to file regulatory fees with their applications, such as licensees in the private radio service, we proposed procedures for filing waiver, deferral and reduction requests similar to those we have fashioned for application fee waiver requests. See 47 C.F.R. 1.1115(e). Persons seeking waiver or reduction of a regulatory fee would submit the required fees and forms along with their requests for waiver or reduction. We noted that this procedure assures efficient collection of necessary fees and avoids the possible imposition of a late fee in the event that the licensee's request for waiver or reduction is denied. In the case of standard regulatory fees, we further proposed that the required fee accompany any request for waiver or reduction. In either case, we proposed to return or modify the tendered fee upon grant of the waiver or reduction request. Finally, we proposed that a request for deferred payment of the required fee should be submitted 60 days in advance of the date established for the payment of the fee in order to permit review and action prior to the fee's due date.

31. Several state broadcasting associations (State Broadcasters) in their joint comments, suggest that the public interest would be served by granting permanent or temporary waivers or reduction or deferment of fees to Mass Media licensees who can demonstrate that payment of the fees would impair their service to the public. The State Broadcasters contend that our authority to waive, reduce or defer fee payments in such cases is clear if a showing is made that payment of the fee could result in degradation of service to the public, citing NBC v. United States, 319 U.S. 190 (1943); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). In order to demonstrate financial hardship, the State Broadcasters urge that they be allowed to submit any relevant evidence, including tax records, unaudited balance sheets or any other financial statements. Further, the State Broadcasters argue that the fee should be automatically waived if a Mass Media licensee is in bankruptcy, receivership or trusteeship because this status is a clear signal of financial hardship.

32. The Broadcasters, joined by the National Association of Broadcasters (NAB), contend further that the requirement to file the regulatory fee payment with a request for waiver is irrational where the basis for the waiver request is the financial hardship of the licensee. Further, the NAB states that it will be impossible to dispose of waiver requests before the fee payments are due for FY 1994 because of the short period between the completion of this proceeding and the date for submission of fees. Moreover, the NAB stresses that Congress contemplated that there would be situations where the financial burden imposed by the fee requirement would be so onerous that payment should be waived. According to the NAB, if Congress' purpose in providing for waiver, reduction or deferment is to have any practical effect, according to NAB, we should not require applicants requesting waivers for financial hardship to suffer additional financial burden that they cannot afford.

33. We are not persuaded that we should modify our proposal to generally require the filing of the regulatory fee with each waiver or reduction request. Rather, we continue to believe that our current procedure will help ensure efficient collections.

34. Nevertheless, we recognize that there may be exceptional instances in which requiring payment of the regulatory fee along with a waiver or reduction request could result in the reduction of service to a community or other financial hardship to the licensee or other regulatee. In those instances, the licensee should submit, together with its waiver request, a petition to defer payment until the waiver request is resolved. In order to reduce the burden on regulatees, we will accept petitions for waiver, reduction and deferment so long as they are filed no later than by the date payment is due. The filing of the deferment request will toll the requirement to pay the regulatory fee until disposition of the deferment request.¹³

35. Petitioners seeking a waiver, deferral or reduction of a regulatory fee based upon financial hardship may submit any relevant information in support of their request. We will review the supporting documents and base our ruling upon the information submitted and any additional information available in our records. If a petitioner presents a compelling case of financial hardship, no payment of the regulatory fee will be due. If the supporting materials do not present sufficient evidence of hardship, we will deny the petition. If the fee has not already

¹³ We deny NABER's request that we modify the fee that Congress required for filing a petition for waiver of a private radio service rule. Section 8 of the Communications Act empowers us only to adjust fees for applications and other filings based upon changes in the Consumer Price Index.

been submitted, the petitioner will then have 30 days to file its regulatory fee in order to avoid the assessment of penalty charges and the invocation of any other available remedy. The filing of a petition for reconsideration will not toll this 30-day period.

D. Procedures for Payment of Regulatory Fees

1. Categories of Payors

36. Pursuant to section 9(f), we proposed to establish three classes of regulatory fee payments, standard, small and large, based upon the size of the payment required by the Schedule. The time for submitting the fee would be determined by the class of fee payment. Persons making "large" fee payments for Fiscal Year 1994 would be eligible to complete their fee payment in two installments. Moreover, we stated that consideration would be given to allowing four installment payments for Fiscal Year 1995 and thereafter. We proposed, however, that small fee payments, be remitted when an application for a license of a facility subject to the fee is filed and the payment amount is the fee due for the entire term of the license or other authorization. We proposed that regulatees subject to a standard fee are to submit the fee in a single, annual payment. The specific date for the payment of a standard fee would be announced by public notice and published in the Federal Register well before the payment's due date.¹⁴

37. Brown and Schwaninger (B&S) states that Congress intended to establish only two, not three, categories of regulatory fees - large fees and small fees - because section 9(f) enumerates only two such categories of fee payments. B&S contends that Congress would have included in section 9 explicit authority to establish a third category if it had intended to provide such authority. In the absence of any language in section 9 indicative of a third category, B&S contend that we are precluded from adopting a standard fee category and collecting standard fees. Instead, B&S reasons that our authority under section 9 is limited to determining that a particular fee is either large, and establishing an installment plan, or the fee is small and

¹⁴ GTE has urged that we allow licensees that transfer or assign licenses during FY 1994 to pro-rate their fee payments for the subject licenses on the basis of the amount of time the license was held by each party. The law authorizing section 9 was enacted in August 1993 and we believe that the negotiation between the parties to a transfer or assignment that occurred this fiscal year would ordinarily have included consideration of expenses related to the payment of regulatory fees. The party holding the license on the date the fees are due will be the party responsible for its payment.

collecting it in advance for a number of years not to exceed the term of the license.

38. We reject B&S's interpretation of section 9(f). In section 9(a), the general authority provision, Congress broadly empowered us "to assess and collect regulatory fees...." Subsection 9(f) requires only that our rules include specific provisions providing for advance payments in the case of small fees and installment payments for larger ones. Nothing in that section, or in logic, compels a conclusion that every fee must necessarily fall within a category of either "large" or "small." Section 9(f) is simply silent regarding any other substantive aspect of our fee collection system, including whether other categories of fee payments may be established. Moreover, our conclusion that some regulatees are subject to payment of neither large nor small fees and, consequently, are only subject to a single annual regulatory "standard" fee payment, in no way conflicts with Congress' directive to include specific consideration of those payors of large and small fees. Therefore, we adopt our proposal to establish three categories of regulatory fees.

2. Installment Payments for Large Fees

39. In the NPRM, we proposed that some fees would be classified as "large" fees and, therefore, eligible for payment by installment. For FY 1994, we identified the following fee amounts in the specified categories as eligible for payment on the installment plan.

| <u>Regulatory Fee Category</u> | <u>Large Fee</u> |
|---|------------------|
| VHF and UHF Commercial Television Station | above \$12,000 |
| Cable Television System | above \$18,500 |
| Inter-Exchange Carrier | above \$500,000 |
| Local Exchange Carrier | above \$700,000 |

40. Several parties urge that we expand significantly our proposed installment payment eligibility standards. GTE and Sprint request that we establish an installment fee benchmark of \$250,000 for all classes of services that are not allowed to make installment payments under our proposal. The Broadcasting Associations argues that all mass media licensees should be eligible for installment payments and the New Jersey Broadcasting Association (New Jersey Association) argues that all radio broadcasting licensees, or in the alternative, licensees encountering financial hardship should be permitted to make installment payments. GE American Communications, Inc. contends that licensees of satellite space stations should be afforded installment payment eligibility.

41. For FY 1994, we intend to permit installment payments by a

reasonable number of regulatees whose fees greatly exceed the average fee in a particular service category. Through this means we can ensure that we are able to structure a fee collection system that can be fairly and efficiently administered, given our available resources and our relative inexperience with the regulatory fee program and its installment component.¹⁵

42. Since little time is left in which to collect fees for FY 1994, the practical impact of permitting licensees to make installment payments this year should be minimal in any event. In these circumstances, we thus find it both fair and prudent to decline to expand significantly installment payment eligibility for FY 1994. Also, we decline to permit installment payments for radio licensees, since no fee greater than \$900.00 is imposed on these licensees.

43. As we gain experience with the regulatory fee program and, in particular, with its installment payment component, we will consider increasing eligibility to make installment payments. Therefore, with a limited exception, we will adopt our proposed installment fee standards. As discussed above, if a licensee concludes that payment of a fee in its entirety would constitute a financial hardship or if it cannot otherwise submit a full payment, the licensee may submit a partial payment of the fee with a petition to defer payment of the remaining portion of the fee. Interested parties may renew their arguments for increased installment opportunities in their comments concerning the assessment and collection of regulatory fees for 1995.

44. Notwithstanding our decision not to expand significantly installment payment eligibility this year, we have decided to permit space station and system licensees to submit their fees in installments. These licensees are relatively few in number, and the uniform fee structure for this service does not lend itself to the mechanism we used to establish installment payments in categories of services with progressive fee structures. Thus, we will permit licensees of geosynchronous satellite space stations and low earth orbit satellite systems to file their fee payments in installments.

45. As proposed, regulatees qualifying for installment payments for FY 1994 may make their fee payments in two separate and equally divided payments with the first payment due on the date set for paying standard annual fees. The date for each installment will be announced by Public Notice and in the Federal Register. For future fiscal years, we plan to permit four

¹⁵ Because our fee collection program is not yet capable of accounting for installment payments aggregated on other than a single service basis, regulatees must pay their fee payments on a service by service basis.

installments annually. We have decided not to impose an administrative fee with each installment payment. However, any late filed installment payment will be subject to a 25 percent late fee and the payment of interest for the delinquent amount. Further, any regulatee paying its fees by installment will automatically lose its eligibility to pay by installments if it fails to make any of its payments in a timely fashion.

3. Advance Payments

46. FIT and UTC support our proposal to require that regulatory fee payments in the Private Radio services be made in advance. We will require that full payment for Private Radio service regulatory fees due over the entire term of the authorization be submitted at the time an applicant in the Private Radio service submits its new, renewal or reinstatement application.¹⁶ For example, regulatees in the private, shared use services would submit a one time regulatory fee of \$35.00 per license to cover the entire five-year term of their license or authorization. Moreover, until expiration of that authorization, we will not subject regulatees submitting advance fee payments to submit another (supplementary) fee payment for the same authorization until expiration of that authorization, notwithstanding any subsequent increase in the applicable annual fee. In instances in which a license is transferred to another service and, therefore, becomes subject to a different annual fee, as in the case of Private Radio licensees as they become Commercial Mobile Radio Service licensees, we have generally decided to apply any advance payment to the new annual fee requirement resulting from that reclassification. Thus, the licensee would become subject to payment of the difference between its initial fee payment and the amount required under the fee schedule for its new service.

47. For FY 1994, no Mass Media or Common Carrier regulatory fees will be subject to collection as small fees. However, in future years, we may decide to collect advance payments of fees in these services in the event that we conclude that the fee required is small and our experience shows that it is inefficient to collect the fee on an annual basis.

4. Timing Of Payment

48. As noted, the date for payment of standard fees will be announced by public notice and published in the Federal Register. For licensees, permittees and holders of other authorizations in the Common Carrier, Mass Media and Cable Services whose fees are

¹⁶ Regulatory fee payments submitted with applications that are subsequently dismissed or denied will be returned upon request.

not based on a subscriber, line or circuit count, fees should be submitted for any authorization held as of October 1, 1993. We have selected October 1 as the date for calculating these fees since October 1 is the first day of the fiscal year and, therefore, current licensees subject to the fees would have benefited from our regulatory activities since the beginning of the period covered by their payment.¹⁷

49. In the case of regulatees whose fee payments are based upon a subscriber, line or circuit count, we have decided that the number of a regulatee's subscribers, lines or circuits on December 31, 1993 will be used to calculate the fee. We have selected the last date of the calendar year because many of these entities file reports with us as of that date. Others calculate their subscriber numbers as of the last day of the calendar year for internal purposes. Therefore, calculation of the subscriber fee as of that date will facilitate both an entity's computation of its fee payment and our verification that the correct fee payment has been submitted. Cable systems should calculate their FY 1994 regulatory fees using the subscriber data that was provided to the Commission for the 1993 Annual Report of Cable Television Systems (FCC Form 325A) submission. Accordingly, the number of subscribers will not necessarily be based on December 31, 1993, but rather on "a typical day in the last full week of December 1993." (See FCC Form 325 Instructions at page 1). Finally, since entities in the Private Radio services pay their fees when applying for an new, renewal or reinstatement license, we will require Private Radio applicants to submit a regulatory fee with new, renewal and reinstatement applications filed following the effective date of these rules.

5. Method and Location of Payment

50. We proposed to adopt generally the same methods of payment for regulatory fees as we established for application fees. See 47 C.F.R. S 1.1108(a). In addition, we proposed to establish a process to permit the electronic filing of fee payments, initially on an experimental basis. Further, we proposed to permit payment of fees by credit card (VISA and Mastercard) in some circumstances subject to the requirement that, when a credit card payment is made, the entire fee payment must be made in a single credit card transaction.

51. Several parties have requested clarification of our requirements for multiple fee payments by Private Radio

¹⁷ In light of this decision, the comments by Orbital Communications Corporation, GE American Communications, Inc. and Starsys Global Positioning, Inc. concerning appropriate payments for satellites that became operational after commencement of the fiscal year are moot.

licensees.¹⁸ Other parties support our proposals concerning payment methods, particularly our decision to accept credit cards and electronic payments.¹⁹

52. We have designed FCC Forms 159 (Remittance Advice) and 159-C (Continuation sheet) to replace Form 155. We are satisfied that the forms, and our rules, provide sufficient clarification of our requirements concerning multiple fee payments. These forms are to be submitted with any regulatory fee payment in the mass media, common carrier and cable services. Payors, in the Private Radio services making a single regulatory fee payment, other than by electronic means or credit card, are not required to file a Form 159 as long as their accompanying application form provides the information necessary to accomplish the payment.

6. Multiple Payments

53. Generally, we will permit any entity, including licensees in the private radio services, to make multiple section 9 regulatory (and section 8 application) fee payments within the same lockbox, including, where applicable, installment payments. Under this procedure, a single payment form and a single instrument of payment may be used to cover multiple regulatory fee payments.²⁰ A multiple regulatory fee payment also may cover payments by more than a single regulatee. Regulatees making combined payments of regulatory fees and application fees within the same lockbox for the Private Radio services may make payment with a single payment instrument and are to submit with the multiple payment a Form 159 and, if needed, a Form 159-C. Also, any regulatee making payment by credit card, including licensees in the private radio services, must submit a Form 159. See Appendix D for specific instructions concerning the use of Forms 159 and 159-C.

54. Each regulatee will remain solely responsible for assuring that its applications and authorizations are properly accounted for and listed, and for submitting the full, cumulative payment covering each of its licenses and authorizations.²¹ As described below, payment deficiencies could lead to penalty charges, dismissal of applications and revocation of authorizations.

¹⁸ See comments filed by FIT, Naber and UTC.

¹⁹ See comments filed by SWB and Bell Atlantic.

²⁰ Payors of regulatory fees for vanity call signs must submit a Form 159 with their applications.

²¹ Payment of a regulatory fee may be made by a third party, as NABER and NECA request. However, the entity subject to the requirement to pay the fee will remain responsible for ensuring correct and timely payment.

55. As proposed in our NPRM, we are establishing a single lockbox at our lockbox bank for the receipt of mass media, common carrier and cable regulatory fees. The single lockbox will accept Mass Media, Common Carrier and Cable Services regulatory fee payments and will enable regulatees to submit fee payments for these services to the same lockbox and to combine their fee payments for these service categories. However, Private Radio fees will not be accepted at this lockbox and, instead, should be submitted to the lockbox designated for application fees covering the category of license or authorization for which the payment is made. See sections 1.1152 through 1.1155 for the address, including lockbox number regarding payment of regulatory fees for the specific categories of service.

7. Electronic Payments

56. We have decided to proceed cautiously with our implementation of electronic fee payments. We require that regulatees intending to make fee payments electronically submit a written request to the Managing Director and obtain his written authorization or that of his designee prior to making their initial electronic payment.²² Following authorization by the Office of the Managing Director, a payor may either instruct its bank to make payment of a regulatory fee directly to our lockbox bank or authorize us to direct our lockbox bank to withdraw funds directly from the payor's bank account. It is the responsibility of the entity subject to the regulatory fee payment to assure compliance with our electronic payment procedures. We will announce specific procedures for electronic payment by public notice. Failure to comply with these procedures will result in the return of the fee payment and a penalty of 25 percent if the subsequent refiling of the payment is late. Any late payment resulting from a failure to comply with our electronic fee payment procedures will also subject the payor to the penalties set forth in section 1.1163 of the rules.

57. Credit card payments may be made only with Mastercard and Visa since at this time these are the only credit cards authorized for payments to the United States Treasury. Credit

²² NYNEX has suggested that responsibility for recommending rules and procedures relating to the electronic payment of regulatory fees by common carriers be given to the proposed advisory committee that would be established to assist the Common Carrier Bureau in the development and implementation of an electronic filing system. See Public Notice, 9 FCC Rcd 1293 (1994). Since our system for the electronic payment of fees will soon be operational, we decline to combine these tasks into a single project. However, the Commission staff involved in these undertakings will closely coordinate their activities.

card payments must be accompanied by a Form 159. Failure to accurately enter an authorized signature and the credit card name, number and date of expiration in blocks 22 and 23 of Form 159 will result in the return of the credit card payment and any associated filing.

E. Enforcement of Regulatory Fees Statute and Regulations

58. As provided in section 9(c) of the Act, we proposed to enforce payment of regulatory fees by: 1) assessing monetary penalties for late payment, 2) dismissal of applications and, 3) in egregious cases, revocation of existing licenses and authorizations. 47 U.S.C. § 159(c). In addition, we proposed to pursue delinquent regulatees under the Debt Collection Act, 31 U.S.C. § 3711 *et seq.*, and related statutory provisions.

1. Penalties for Late Payment

59. Any regulatee that fails timely to pay its regulatory fee or make an installment payment shall be assessed a 25 percent penalty. See 47 U.S.C. § 159(c)(1). A regulatory fee is untimely paid when it is not received at the lockbox bank by the date we establish for payment.²³ A fee payment is also considered late filed if an instrument of payment is not collectible. A 25 percent penalty will be assessed against any outstanding amount due on a fee, including any amount past due on an installment payment.

2. Dismissal of Application

60. We will dismiss any application, group of applications or other filings in the private radio services when a regulatee fails timely to submit any regulatory fee or associated penalty. 47 U.S.C. § 159(c)(2). A fee payment will be considered to be late filed if a timely filed instrument of payment is uncollectible and the deficiency is not the result of bank error.²⁴ Thus, an application required to be submitted with a

²³ The NAB and the Society of Broadcast Engineers have proposed that we consider a regulatory fee payment to be timely submitted if the payment is postmarked by the date it is due. At least for FY 1994, we have decided to continue our practice of requiring fee submissions to be received by the date due. We believe retention of this practice for regulatory fee payments for FY 1994 is necessary to enable us to process these payments efficiently.

²⁴ As noted in the NPRM, we will not accept instruments of payment other than cashier's checks for payors who are notified that payment will not be accepted by other payment methods. Of course, while we discourage the use of cash for the payment of

regulatory fee will be returned without action if the fee is not filed with the application. Moreover, if the returned application is mutually exclusive and must be filed by a date certain (or is required to be filed by a date certain for any other reason), the application will be dismissed as untimely if resubmitted subsequent to the filing deadline.²⁵

3. Revocation

61. Section 9(c)(3) provides the Commission with authority to revoke an existing license or other authorization for nonpayment of a regulatory fee. 47 U.S.C. § 159 (c)(3). We proposed to reserve our revocation remedy for egregious cases of nonpayment. Section (9)(c)(3) does not require a finding of "willful or repeated" failure to make payment before a license or authorization may be revoked. Further, the section affords the right to a hearing only if a regulatee's response to our notice of revocation presents a "substantial and material question of fact."

62. Consistent with the statutory framework for revocation, any revocation hearing will be resolved by written evidence only and the burden of proceeding and the burden of proof will be on the respondent. As proposed, we will provide a period of 60 days for a regulatee to respond to our notice of revocation in order to assure that the subject regulatee will have a full opportunity to obtain the funds needed to make payment and to prepare its case. Further, we will assess the regulatee for the costs for the conduct of any revocation proceeding unless the regulatee "substantially" prevails at the hearing. 47 U.S.C. § 159(c)(3). Finally, pursuant to section 9(c)(3), an order of revocation will not become final until the respondent regulatee has had an opportunity to exhaust its rights to judicial review under section 402(b)(5) of the Act. 47 U.S.C. § 402(b)(5).

63. MCI recognizes that we should use our authority to revoke licenses and assess penalties as tools to enforce payment of fees. However, MCI urges that we restrict their use to cases where a licensee "willfully" has acted in bad faith in not paying the required fee. MCI states that this is particularly important for licensees with large and complex operations in services where licensing information currently is not included in our records

fees generally, payment by cash is permissible. See 31 U.S.C. § 5193. We will not be responsible for cash lost or stolen in the process of delivery to our lockbox bank.

²⁵ In any case in which a fee payor believes that a monetary or other penalty has been wrongfully imposed, the fee payor may file a petition requesting that the penalty be set aside.

since licensees with numerous authorizations may have no other way to confirm existing licenses. In these instances, according to MCI, we should attempt to resolve nonpayment issues informally since most fee payment disputes should be quickly and easily resolved.

64. We agree with MCI that our revocation powers should not be lightly invoked. We stated in the NPRM that we would reserve the right to revoke licenses held by a delinquent regulatee, but that we did not foresee the need for revocation, except in egregious circumstances. We will not consider a failed payment to be egregious as long as the regulatee demonstrates that its deficiency was not due to gross neglect in maintaining its records or in preparing to meet its obligation to make the fee payments. However, we intend to automatically assess delinquent payors a 25 percent penalty for late or missing payments, and such assessments will be strictly enforced.

4. Debt Collection Act Remedies

65. In addition to those specific remedies for nonpayment or untimely payment of regulatory fees provided in section 9, we will invoke our powers under the Debt Collection Act against any regulatee failing to pay a regulatory fee. See 31 U.S.C. § 3711 et seq. We will afford a regulatee a 30 day period to respond to our notice of delinquency before invoking the procedures provided in the Debt Collection Act. Moreover, when necessary, we will refer outstanding debts of delinquent regulatees to the Internal Revenue Service for offset. See 31 U.S.C. § 3720A. Included in the recovery of any delinquent fee will be an assessment of interest on the debt due, a penalty for nonpayment, and the allowable cost incurred due to the federal government in the collection process. See 31 U.S.C. § 3717.

IV. Regulatory Fee Categories

66. In our NPRM, we provided an explanation of the regulatory fee categories subject to the payment of a fee under the schedule established by Congress. 47 U.S.C. § 159(g). Where a regulatory fee category required additional interpretation or clarification, we relied on the legislative history of section 9 and our experience in establishing and regulating the various services. The categories and amounts set out in the schedule may, by the next fiscal year and in subsequent fiscal years, be amended, adjusted, or modified to reflect changes in our appropriations, costs and changes in the nature of our regulated services. See 447 U.S.C. § 159(b)(2), (3).

67. Several parties have submitted comments regarding the regulatory fee categories. Generally, the comments addressed issues concerning possible adjustment of the required fees, the absence of certain services from the fee schedule, and

definitions of terms important to payment of the fees. We address these comments below. In certain instances, we have clarified our explanation of a fee category based upon the comments of the parties. See Appendix B.

A. Private Radio Bureau

68. The two basic levels of statutory fees allocated for Private Radio Services, exclusive use and shared use services, were established on the premise that those licensees who generally receive a higher quality communications channel, due to exclusive or lightly shared frequency assignments, will pay a higher fee than those who share channels of marginal quality.²⁶ House Report at 17. In addition, because of the relatively small fee amounts levied in the Private Radio Services, as we proposed in the Notice, applicants for new licenses, reinstatement and renewal licenses will be required to pay a regulatory fee covering an entire license term. Applications for modification or assignment of an existing authorization do not require payment of a regulatory fee since the expiration date of modified or assigned licenses will not reflect a new license term.

1. Exclusive Use

69. B&S disputes our interpretation of the fee schedule's requirement for Private Radio Service fees. Essentially, B & S contends that the term "shared use services," as it appears in the Schedule of Regulatory Fees, applies to systems that share use of their licensed facilities with others. According to B&S, an 800 MHz Specialized Mobile Radio Service licensee providing service to end users is an example of a shared use service because the SMRs customers are sharing the same base station facility. B&S argues that their analysis is consistent with 47 C.F.R. § 90.179 and precedent interpreting that provision of our rules. According to B&S, it follows that "exclusive use services" are comprised of licensed facilities that are used only by the licensee. An example of what B&S considers an exclusive use service is a licensee in the Taxicab Radio service that operates an internal communications system in the 470-512 MHz band.

70. B&S confuses the concept of shared use of a particular licensed facility with that of shared channel assignments. Under 47 C.F.R. § 90.179, a licensee or group of licensees may choose to share base station facilities on a non-profit or not-for-profit basis. In contrast, shared channel assignments require

²⁶ As noted, for FY 1994, we will not impose a regulatory fee upon applicants for lifetime restricted radiotelephone permits and radio operator licenses.

licensees to be licensed for the same channel for the same geographic area, and it is this latter concept that the Schedule of regulatory fees clearly addresses. As we have recently explained in our Notice of Proposed Rulemaking in PR Docket No. 92-235,²⁷ the private land mobile radio services licensed below 470 MHz²⁸ do not enjoy exclusive use of their channel assignments in a particular geographic area, and must accept a greater degree of co-channel interference.²⁹ In contrast, channel assignments above 470 MHz, including the SMR service, are granted on either an exclusive basis, with no other co-channel use authorized in a geographic area, or are licensed on an "earned exclusivity" basis, where co-channel use is capped. Thus, licensees of services above 470 MHz enjoy a lesser degree of interference than those below 470 MHz than those below 470 MHz, and, accordingly, are required to pay the higher regulatory fee. To accept B&S's interpretation would ignore the established demarcation point between "shared" and "exclusive" channel assignments that 470 MHz represents.

71. RAM Mobile Data USA Limited Partnership (RMD) states that 900 MHz SMR licensees should be required to pay a fee based upon their total number of licensed Designated Filing Areas (DFA) rather than their number of base station and frequencies individually licensed with a DFA. RMD contends that an assessment based upon total DFAs licensed is more consistent with Congress' intention that regulatory fees be "reasonably related to the benefits provided to the payor of the fee by the Commission's activities." 47 U.S.C. § 159(b)(1)(A). Further, RMD states that section 9(g)'s fee requirements will compel a consolidation of its licenses in order to minimize its fee payments. Similarly, the Utilities Telecommunications Council (UTC) objects to the requirement that 220 MHz licensees submit fees on a per license basis.

72. We decline to consider amending the section 9(g) fee schedule for FY 1994. As we have stated, Congress did not intend that we adjust any aspect of the fee schedule for FY 1994. RMD and UTC may submit their proposals for amending the fee schedule

²⁷ 8 FCC Rcd 8105, paras 11-13 (1992).

²⁸ The 220-222 MHz band is the sole exception, where we have created exclusive use channels below 470 MHz.

²⁹ While there may be rare instances where a particular licensee below 470 MHz does not share its channel assignment with other licensees in a geographic area, these licensees have no ability to preclude new licensees from requesting the same channel assignment.