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

In the Matter of	)	
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The Commission's Notice of Proposed Rulemaking to Adopt a Forfeiture Policy Statement and to Amend Section 1.80 of the Commission's Rules.	)	CI Docket No. 95-6

DOCKET FILE COPY ORIGINAL

To: The Commission

COMMENTS OF MOBILE PHONE OF TEXAS, INC.

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Filed: March 27, 1995

No. of Copies rec'd 0+5
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Summary

The Commission should substantially revamp its proposed Forfeiture Policy Statement so that the forfeitures imposed would be remedial in nature, rather than punitive. The proposed Forfeiture Policy Statement sets "base amounts" of forfeitures at amounts that will likely drive many small carriers out of business, and discourage other carriers from providing much needed communications services. This is especially true for common carriers, which face fines of up to $80,000 per day for a violation that may be inadvertent. This violates the universal service mandate of Section 1 of the Communications Act of 1934, as amended (the Act), since it does not encourage the establishment of a Nation-wide wire and radio communications service at reasonable charges; nor does it promote the safety of life and property through the use of wire and radio communications. Instead, the proposed Forfeiture Policy Statement endangers the Commission's goal of universal service by imposing an undue burden on small businesses, and threatening their ability to obtain financing and tower rentals at reasonable cost. Further, in some circumstances, the proposed Forfeiture Policy Statement may be tantamount to a license revocation without the safeguards of Section 312 of the Act. For these same reasons, the proposed forfeiture guidelines contravene the small business protections afforded by the Paperwork Reduction Act and the Regulatory Flexibility Act, by needlessly burdening small businesses and discouraging competition.

The inordinately high fines proposed in the Forfeiture Policy Statement, especially for common carriers, are arbitrary and capricious. While Congress increased the maximum amount of permissible forfeitures, there is no Congressional mandate or legislative intent to drastically increase the amount of each and every fine assessed against carriers. The assessment of fines at levels equal to 50 to 80 percent of the statutory maximum assumes aggravated circumstances for even routine violations, without justification. It also represents an unjustified and unreasonable departure from the Commission's longstanding policy (prior to the implementation of the now vacated Forfeiture Policy Statement) of assessing forfeitures in the amount of only a fraction of one to ten percent of the statutory maximum amount, and then only exceeding that range in clearly aggravated circumstances. The Commission has failed to: (1) articulate the reasons for this dramatic departure; (2) identify the significance of crucial facts; (3) provide the necessary explanation that would facilitate judicial review; or (4) put forth reasonably obvious and less draconian alternatives.

The proposed forfeiture guidelines also discriminate between similarly situated licensees, especially with regard to broadcasters and common carriers. The Commission has offered no Congressional mandate, legislative intent, or reasonable basis for fining similarly situated common carrier licensees four times the amount for an identical violation by a broadcaster. The mere fact that Congress authorized a higher maximum fine for common

carriers, to allow for sufficient deterrence to "mega-carriers" such as AT&T and MCI, does not justify quadrupling the fine against a common carrier with the same financial situation, compliance record, and degree of culpability as a broadcaster. This unreasonable distinction also appears to violate the equal protection clause of the U.S. Constitution since it bears no rational relation to a legitimate public purpose for the Commission to treat similarly situated licensees so differently. Thus, the Commission is urged to readjust its proposed forfeiture schedule to eliminate the gross disparities in forfeitures between common carrier and broadcast licensees. In making this adjustment, the Commission should use, at a minimum, the forfeiture base amounts established in its "Other" category for all licensees, unless such base amounts would not, in a particular case, provide sufficient deterrence so as to foster compliance with the Commission's Rules.

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To: The Commission

COMMENTS OF MOBILE PHONE OF TEXAS, INC.

Mobile Phone of Texas, Inc. (Mobile Phone), by its attorneys and pursuant to Section 1.415(a) of the Commission's Rules, hereby submits its comments in the above-captioned proceeding.

I. Statement of Interest.

Mobile Phone is a common carrier providing a variety of common carrier land mobile services to the public. Mobile Phone is a radio station licensee in the Paging and Radiotelephone, and Point-to-Point Microwave Radio Services, and will therefore be affected by the proposed monetary forfeitures, as a "common carrier," as proposed in the captioned Notice of Proposed Rulemaking (NPRM). The imposition of the proposed fines, contained in the proposed Forfeiture Policy Statement, to be appended to Section 1.80 of the Commission's Rules, would threaten Mobile Phone's economic well being, and quite possibly, its very existence.

II. The Commission's Proposed Forfeiture Standard Violates Section 1 of the Act.

By establishing such high forfeitures for common carriers, Mobile Phone submits that the proposed Forfeiture Policy

Statement would create an environment where radio station licensees may suffer substantial economic injury, and may even be driven out of business, as a result of fines assessed for relatively minor violations, which may have resulted through unintentional rather than deliberate acts to violate the Commission's Rules.[1]

Thus, under the Commission's proposed Forfeiture Policy Statement, an inadvertent violation, which goes unnoticed for only several days, could quickly result in a fine that reaches the statutory maximum of $1 million. And while the Commission would consider a licensee's "ability to pay," Mobile Phone notes that the proposed Forfeiture Policy Statement fails to define the term "ability to pay.". However, the Commission's past practice, in considering a licensees "ability to pay," has been to consider not the profit from the station that is in violation, or the profit from all of the carrier's operations earned, but instead,

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[1] See, e.g., Northern States Power Company, 6 FCC Rcd. 1222 (MSD 1991) ("The fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question. . ."). Thus, in the Commission's view, as stated in Northern States and virtually every other case where this has been an issue, a licensee does not have to intend to violate the Commission's Rules (i.e., have the requisite mens rea), it just has to do an act that results in a rule violation. Given the dependence of licensees on others, including engineers, technicians, tower crews, etc., the risk of an inadvertent, unintentional violation is very great. In this regard, it is believed that antenna farm managers, on occasion, have been known to rearrange site user's antennas without notice to or permission from the tenant licensee. Such action by the site manager, without the consent of the tenant licensee, would result, under the Commission's forfeiture policy in a substantial fine for unauthorized operation.

the carrier's gross revenues, as reported on its tax return. See Semo Mobile Communications, Inc. d/b/a Beeptel, 5 FCC Rcd. 4801 (MSD 1990). Thus, even where a licensee has not declared bankruptcy, the fines in the proposed Forfeiture Policy Statement would make the rendition of service so unprofitable, that many carriers would likely terminate service and leave the business upon being fined once.[2]

Mobile Phone submits that the Commission's proposed Forfeiture Policy Statement will, if adopted, continue to wreak havoc on small common carriers, such as itself, in other ways. Lending institutions have made financing more difficult (at a time when credit is tightening during a fragile economic recovery) in light of the Commission's past forfeiture policy. Opinions of counsel are now required to ensure that past operations have been 100 percent in compliance with all of the Commission's rules. Lending agreements require 100 percent compliance with the Commission's Rules at the risk of being declared in default and foreclosed upon. Additionally, the rental of tower space has become more difficult because many tower owners have not been willing to accept responsibility for indemnifying licensees for a violation that is the tower owner's

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[2] Mobile Phone notes that since the Commission first implemented its Forfeiture Policy Statement in 1991, numerous small carriers have either submitted their licenses for cancellation or sold out to larger radio common carriers. In many of these instances, Mobile Phone believes that the mere threat of a fine under the Commission's now vacated Forfeiture Policy Statement may have ultimately had a significant impact on the carriers' decisions to get out of the business since many of these operations are not significant revenue producers.

fault, or the tower owner has significantly increased the rental fee in order to compensate for its assumption of the additional risk.

Section 1 of the Communications Act of 1934, as amended (the Act), provides in pertinent part that the Commission was created "for the purpose of regulating communications so as to make available, so far as possible, to all of the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, . . . for the purpose of promoting safety of life and property through the use of wire and radio communication." The Commission has previously stated that, when establishing its policies and regulations, "we are guided by the mandate and fundamental statutory purpose set out in Section 1 of the Act." Competitive Common Carrier Services (Resale Deregulation), 91 FCC 2d 59, 64 (1982 (emphasis added). By driving small carriers out of business, or by forcing them to terminate low-profit services to the public (e.g., improved mobile telephone service (IMTS) or Basic Exchange Telecommunications Radio Service (BETRS)), as would occur under the proposed Forfeiture Policy Statement, the mandate of Section 1 of the Act is violated, as well as the goal of universal service which underlies that mandate.[3]

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[3] Universal service is "a primary goal of the Federal telecommunications policy." Effects of Federal Decisions on Universal Telephone Service, 57 RR 2d 721, 724-25 (1985). The rationale behind the goal of universal service includes both

(continued...)

Mobile Phone notes that the Commission has recognized, due to the high cost of constructing and maintaining wire plant to provide local exchange telephone service to sparsely populated, rural areas, that the use of radio is an integral part of providing basic exchange telephone service throughout the country. Thus, the Commission created BETRS[4] to help carriers provide local exchange telephone service and thereby bring the universal telephone service goal to fruition. See Report and Order (BETRS), 3 FCC Rcd. 214, 219 (1988).

Because of the high cost of operation and low population density, IMTS and BETRS are often only marginally, if at all, profitable. If the rural IMTS and BETRS service providers are subject to substantial fines at rates set forth in the proposed Forfeiture Policy Statement, these low-profit services will, in all likelihood, be either eliminated or sharply curtailed. This is especially true where the services are provided by a carrier, as an adjunct to its other operations. Since the other operations may generate larger revenues, the licensee would not qualify for mitigation under the "ability to pay" criterion. The threat of severe fines related to the provision of marginally

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[3] (...continued)
societal benefits (such as the importance of a nation-wide network to the economy and our quality of life) as well as a individual benefits (such as the ability to reach an ambulance, the police or the fire department in an emergency). See Id. at 726.

[4] BETRS is most often provided by small rural telephone cooperatives and commercial companies, as an adjunct to their land line telephone service.

profitable services will make such operations difficult to finance, and likely to result in the permanent discontinuance of service to the public if a substantial fine is levied.

Thus, Mobile Phone submits that the proposed forfeiture standard is inimical to the universal service mandate of Section 1 of the Act. Given the use of cellular, IMTS, paging, and BETRS as the means for reaching help in the event of a life-safety emergency, the detrimental impact of the Commission's proposed Forfeiture Policy Statement on these services (especially in rural areas) likewise frustrates the Act's "purpose of promoting safety of life and property through the use of wire and radio communication." And, while Section 303(r) of the Act empowers the Commission to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act," (emphasis added), Mobile Phone can only conclude that the proposed Forfeiture Policy Statement is "inconsistent with law," in that it violates perhaps the most important provision of the Act -- Section 1. Accordingly, Mobile Phone urges the Commission not to adopt the proposed Forfeiture Policy Statement.

III. The Proposed Forfeiture Policy Statement Contravenes Policies Protecting Small Businesses.

Congress and the Commission have long recognized that small businesses make up an important element of the U.S. economy.[5]

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[5] A decade ago, small businesses produced 43% of the Gross National Product and provided 55% of the nation's jobs. "[B]etween 1969 and 1976, small business created almost two

(continued...)

Congress has passed legislation designed to protect small businesses, because of their contributions to universal service and their role in the economy. By imposing an undue burden on small carriers, Mobile Phone believes that the proposed Forfeiture Policy Statement would frustrate the Congressional goals underlying this legislation.

This legislation includes the Paperwork Reduction Act of 1980, 44 U.S.C. §3501(1) (Supp. V 1987), the purpose of which is to "minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons."[6] Mobile Phone submits that while the proposed forfeiture scheme does not directly violate the provisions of the Paperwork Reduction Act, since the Forfeiture Policy Statement is not an

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[5](...continued)
thirds of all new jobs in the national economy." Regulatory Reform: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Part 3, 96th Cong., 1st Sess. 343, 344-45 (1979). (Small Business: A Critical Element of the American Economy, Remarks of Alfred Dougherty, Jr., Director, Bureau of Competition, Federal Trade Commission) [hereinafter "Dougherty Remarks"]). In the communications industry, small businesses are the largest provider of rural telecommunications, especially in those places where larger carriers find that the population and the terrain do not justify their investment. This is evidenced by the recent sale of a number of telephone exchanges by U S WEST to various small telephone companies, including subscriber-owned cooperatives.

[6] In recommending passage of this law, the Senate Committee on Governmental Affairs acknowledged that Governmental requests for information imposed a great burden, both time-wise and financially, on small businesses, such that many small businesses were not able to expand and a large percentage of monies were spent on administrative costs related to providing requested information to the government. See S. Rep. No. 96-930, 96th Cong., 2d Sess. 1, 2-4, reprinted in 1980 U.S. Code Cong. & Admin. News 6241, 6242-44.

"information collection" measure, its adverse impact on small businesses nonetheless clearly contravenes the Congressional policy underlying the enactment of this legislation. Because of the risk of tremendous forfeitures, as evidenced by the recent $3 million forfeiture assessed against a cellular carrier, Mobile Phone believes that small businesses will be forced to: (1) log all construction and maintenance activities so that they can demonstrate compliance (despite the deletion of this requirement from the Commission's Rules as an unnecessary paperwork burden), and (2) hire more personnel to double and triple check all aspects of radio operations, and consult attorneys, engineers and other professionals at every turn. And because of the risk that revenues from other unrelated activities (e.g., local exchange telephone service, telephone answering service, radio sales and service, etc.) will have to be used to pay a forfeiture incurred by the radiotelephone or paging part of the business, small carriers may be forced to set up separate corporations for each of these ventures, which will only add to their administrative and financial burdens.

Congress also passed the Regulatory Flexibility Act, Pub. L. No. 96-354, 194 Stat. 1164 (1980), for the reason that "unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes." §2(a)(5). In passing this legislation, Congress found that the harmful effect of unnecessarily burdensome Federal Regulations on small businesses

disserves the public interest.[7] This finding is buttressed by the Republican Party's "Contract with America," under which Congress has proposed to freeze new federal regulatory initiatives, such as this one, pending a review of the regulatory impact on the U.S. economy. Because the proposed Forfeiture Policy Statement would disproportionately impact small businesses by causing them to discontinue radio services to the public, Mobile Phone submits that the Commission's proposed forfeiture guidelines would contravene the legislative policy underlying the Regulatory Flexibility Act by decreasing competition in the market place.[8]

Thus, since the Forfeiture Policy Statement, as proposed, would contravene the small business protections of the Paperwork Reduction Act and the Regulatory Flexibility Act, the Commission should significantly reduce the economic burdens proposed for common carrier licensees.

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[7] "The public interest lies directly in two areas: (1) the disproportionate impact of governmental regulation on small businesses reduces the competitive capacity of small business, thereby placing Government in the strange position of encouraging economic concentration, and (2) consumers, to a large extent, must pay the cost of regulation in the form of higher prices. Thus, while the most immediate and visible impact may fall to the small [business], the public shares the burden" in the form of higher prices. 126 Cong. Rec. 24,575, 24,588.

[8] The proposed forfeiture guidelines would have a disparate impact on small business for two reasons: First, even if the regulatory cost is the same for both large and small businesses, smaller firms have smaller units of output over which to spread the cost. Second, even if the regulatory costs are less for small businesses, they cannot take advantage of the economies of scale of regulatory compliance that large businesses can. See Dougherty Remarks at 351; S. Rep. No. 96-878, 96th Cong. 2d Sess. 5, reprinted in 1980 U.S. Code Cong. & Admin News 2788, 2792.

IV. The Severity of the Proposed Fines is Arbitrary and Capricious.

Mobile Phone urges the Commission to revamp its proposed Forfeiture Schedule to make any fines remedial, rather than punitive, in order to deter noncompliance with the Commission's rules and regulations. It is well settled that the Commission is only to use forfeitures to "impel . . . licensees to become familiar with the terms of their licenses and the applicable rules, and to adopt procedures, including periodic review of operations, which will ensure that stations will be operated in substantial compliance with their licenses and the Commission's rules." Crowell-Collier Broadcasting Corp., 44 FCC 2444, 2449-50 (1961) (emphasis added).

Prior to the Commission's establishment of its 1991 Forfeiture Policy Statement, fines historically had been assessed against common carrier radio licensees at the rate of $10.00 per day of violation. See Sugarland Telephone Company, CC Mimeo No. 5780, released July 15, 1986; Pond Branch Telephone Company, Inc., 53 RR 2d 803 (1983) (failure to file covering license application); Tri-County Telephone, Inc., 54 RR 2d 1065 (CCB 1983) (operation without renewal of license). Since the statutory maximum at that time was $2,000 per day for each violation, most common violations were fined at a rate of 0.05 percent of the maximum. This $10.00 per day fine had been in use as recently as 1990 (several months after the effective date of the Omnibus Budget Reconciliation Act of 1989 (Pub. L. No. 101-239, 103 Stat. 2131), which amended Section 503(b) of the Act in

order to raise the maximum forfeitures that could be assessed.) See Bart Gonzales d/b/a Digital Paging, 5 FCC Rcd. 4800 (MSD 1990). For more serious violations involving aggravated circumstances, such as the intentional unlicensed relocation of a station, the Commission fined at the rate of $100.00 per day (or 5 percent of the $2,000 statutory maximum). See Dover Radio Page, Inc., 2 FCC Rcd. 3181 (MSD 1987). It was only more recently, in the mid-to-late 1980s, that the Commission appeared to make an exception for cellular telephone carriers, in recognition of the higher revenues generated by these operations, by assessing steeper forfeitures. Thus, in Yankee Cell Tel Company, Mimeo No. 3002, released March 7, 1986, a cellular licensee was fined at the rate of $500.00 per day (or 25 percent of the $2,000 statutory maximum) for knowingly constructing and operating an additional cell site without any authority whatsoever. In other instances, the Commission has fined ongoing violations at a flat rate, without using the per diem approach.[9] Thus, the Commission fined a common carrier licensee that had engaged in an ongoing, intentional misrepresentation (one of the most serious offenses a licensee can commit) at $1,000 (or 5 percent of the $20,000 statutory maximum), rather than assessing a per diem forfeiture. Page America of Maryland, Inc., 3 FCC Rcd. 4848 (CCB 1988).

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[9] The Commission has continued to utilize the flat-rate approach for violations which include unauthorized transfers of control and assignments of license.

Even after Congress raised the statutory maximum for forfeitures in 1989, fines against common carriers were assessed for greater amounts, but still at a relatively low percentage of the statutory maximum. In Yavapai Telephone Exchange, 5 FCC Rcd. 4625 (CCB 1990), the Commission fined a common carrier reseller $1,000 for each ongoing violation of failing to respond to an informal complaint. The Commission found that the reseller had ignored nine separate requests (clearly an aggravated circumstance), and yet only assessed the forfeiture at the rate of 0.1 percent of the new statutory maximum of $1 million. And in Northern States Power Company, 6 FCC Rcd. 1222 (MSD 1991), a PLMS licensee was fined $5,000 for the ongoing operation of its station after its license had lapsed nearly two year prior. This "flat rate" $5,000 fine represents 0.5 percent of the $1 million statutory maximum.

The proposed Forfeiture Policy Statement does an about face from this long established history of assessing reasonable forfeitures. Under the proposed Forfeiture Policy Statement, the Commission would assess forfeitures at the rate of 40 to 80 percent of the statutory maximum for most violations, even before any consideration of aggravating circumstances is given. This results in 10 to 20 times the percentage of the maximum fine formerly imposed, and thus, produces fines that accumulate in staggering amounts. Fines of this magnitude will clearly be financially ruinous for many small common carriers, and may be sufficient to persuade other carriers that entry into a

particular radio service (e.g., IMTS, BETRS, and paging) would be imprudent. Further, the Commission has advanced no valid justification for the severity of the fines contained in its proposed Forfeiture Policy Statement. The only justification offered by the Commission is the fact that Congress raised the statutory maximums. However, neither the Omnibus Reconciliation Act of 1989 nor its legislative history mentions any desire on the part of Congress to dramatically increase the fines assessed against licensees. Additionally, there has been no finding by either Congress or the Commission that violations among common carriers and other licensees are rampant, or that the fines assessed prior to the implementation of the Commission's original August 1, 1991 Forfeiture Policy Statement did not achieve compliance with the Commission's Rules or act as an adequate deterrent. Instead, the only intent on the part of Congress that Mobile Phone can divine is the Congressional intent to "update the existing penalties that have been unchanged since the Communications Act was enacted in 1934. The increases stipulated in this subsection represent adjustments based on increases in the Consumer Price Index since 1934." Omnibus Budget Reconciliation Act of 1989, Sec. 4702(a).[10] Since the Congressional intention was merely to update the amount of the

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[10] Congress' intent to update the penalties in the Act appears to have been based upon the erroneous impression that the penalties had not been changed since 1934. In fact, the penalty provision was not enacted until 1960, and this provision was updated and expanded by the Communications Amendment Act of 1978 (Pub. L. No. 95-234).

maximum permissible fine, Mobile Phone submits that the fines should still be assessed at only a fraction of one-to-ten percent of the current statutory maximum, except in the presence of clearly aggravating circumstances. Instead, the Commission has departed from this longstanding approach by assessing fines for numerous violations at amounts that approach the statutory maximum.

Mobile Phone submits that the purpose of a "maximum" fine is to set an amount that will be an adequate sanction for the most egregious of all violations, i.e., the most blatant and aggravated course of conduct by a licensee who has committed a major violation. Where the "average" violation (without consideration of aggravating circumstances) is fined at 80 percent of the $80,000 daily statutory maximum, then the maximum penalty for the most egregious and aggravating actions by the offending licensee is only 20 percent greater, before the statutory maximum is reached. This provides little additional deterrence that would encourage a licensee to mitigate a violation by, e.g., remedying the problem and making voluntary disclosure to the Commission.

Mobile Phone believes that such large fines are grossly unfair to the licensee whose violation was not egregious. Rather, it appears that the Commission, in the proposed Forfeiture Policy Statement, assumes that every violation is almost a "worse-case-scenario." This, Mobile Phone believes, is an unwarranted and unfair assumption, which turns the

Commission's forfeitures from remedial to punitive. The arbitrariness of this approach is shown by the fact that, when most of the fines listed in the proposed Forfeiture Policy Statement are increased in light of aggravating circumstances (by up to 90 percent), they would far exceed the statutory maximum.

In determining whether an agency action (or in this case, whether a proposed agency action) is arbitrary and capricious, the function of the reviewing court has been described in Greater Boston Television Corp. v. FCC, 444 F. 2d 841, 851 (D.C. Cir. 1970):

> The function of the court is to assure that the agency has given reasoned consideration to all of the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of crucial facts, a course that tends to ensure that the agency's policies effectuate general standards, applied without unreasonable discrimination.

The supervisory functions of the court calls on it to detect procedural inadequacies and the "bypassing of the mandate in the legislative charter," and to review for other "danger signals" that the agency has not taken a "hard look" at the problem and has not genuinely engaged in reasoned decision making. Id. When an agency changes a long standing policy, review of its action is "heightened." See NAACP v. FCC, 682 F. 2d 993, 998 (D.C. Cir. 1982).[11]

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[11] The requirement for an agency to provide reasons for its action "fulfills the duty of fairness and justice owed by the agency to the party or parties 'victimized' by the agency's

(continued...)

Thus, the Commission's proposed Forfeiture Policy Statement represents a sharp change in its longstanding policy for assessing forfeitures, in effect prior to the Commission's unlawful 1991 Forfeiture Policy Statement, by dramatically increasing the amounts of the fines, and by approaching each violation as an aggravated one. The proposed Forfeiture Policy Statement is thus arbitrary and capricious under the standards described above, since the Commission has not articulated in its NPRM, "with reasonable clarity its reasons for the [proposed Forfeiture Policy Statement,]" or identified the significance of any crucial facts that would justify such stiff penalties, or provided any explanation that would ultimately facilitate judicial review. Greater Boston Television Corp., 444 F. 2d at 851. The Commission's proposal is also arbitrary and capricious because the fines are out of line with the severity of the offenses, and in some cases, these fines will be tantamount to license revocation. As discussed above, this constitutes a "bypassing of the mandate in the legislative charger" [i.e., Section 1 of the Act, as well as the safeguards of Section 312]. Id.

Mobile Phone believes that the proposed Forfeiture Policy Statement is also arbitrary and capricious because the Commission has failed to consider less draconian alternatives. For

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[11] (...continued)
decision to shift its course, and more importantly facilitates judicial review." Baltimore and Annapolis Railroad Company v. Washington Metropolitan Area Transit Commission, 642 F. 2d 1365, 1370 (D.C. Cir. 1980).

instance, the Commission could (1) drastically reduce the base amount of the fines to be in line with those previously assessed; (2) warn licensees and allow them to remedy any violation before assessing a monetary forfeiture, and (3) consider a multi-tiered approach, based upon the size of the common carrier licensee. The courts have "demanded that the Commission consider reasonably obvious alternative . . . rules, and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review." Telocator Network of America v. FCC, 691 F. 2d 525, 537 (D.C. Cir. 1982). Rather than exploring these reasonable alternatives in the first instance, the Commission has proposed a forfeiture policy statement that imposes a superhuman standard of compliance on licensees.

Mobile Phone submits that the Commission's proposal to consider mitigating factors under its proposed Forfeiture Policy Statement does not remedy its arbitrary nature. As discussed above, the "ability to pay" criterion is vague, and has been interpreted in the past as a carrier's "gross income." Semo Mobile Communications, Inc., 5 FCC Rcd. at 4801. Given that carriers must provide for future equipment purchases and other expenditures which must be made out of the previous year's revenues, a substantial fine could prevent a licensee from properly maintaining its system, forcing it to either operate out of compliance with the Commission's rules, or having to shut down altogether in order to avoid another fine. With regard to other mitigating criteria, a licensee may take little comfort in hoping

that the Commission will classify the violation as "minor." The other two criteria allow only limited mitigation (up to 50 percent), and are likewise within the Commission's discretion. Thus, Mobile Phone urges the Commission to reevaluate its proposed Forfeiture Policy Statement and consider alternatives that would more equitably ensure compliance with its rules.

V. The Proposed Forfeiture Policy Statement Discriminates Between Similarly Situated Licensees.

By basing forfeitures on a percentage of the maximum statutory fine contained in the 1989 amendment to Section 503(b) of the Act, the Commission has proposed a formula by which every common carrier violation is fined at four times the amount of the same violation by a broadcaster or a cable operator.

The resulting discrimination between common carriers and broadcasters in the proposed Forfeiture Policy Statement is arbitrary and capricious, and is based on an erroneous assumption that Congress intended to treat every violation committed by a common carrier as warranting a penalty four times as severe as the fine for a broadcaster committing the same offense. Mobile Phone submits that the 1989 amendment to Section 503(b) created a difference only in the maximum fine that could be assessed against broadcasters versus common carriers. Further, there is no discussion of this difference in the statute or in the legislative history that would support the Commission's proposal that common carrier licensees be treated, in all instances, more severely than broadcasters, who also operate their stations on a for-profit basis. Thus, Mobile Phone believes that there is no

basis for the Commission to infer that Congress viewed all common carrier violations as being four times more serious than those committed by broadcasters and cable operators, regardless of the size and financial resources of the carrier.[12]

Thus, there is no basis to infer any finding by Congress that common carriers have four times the income of broadcasters, thereby justifying the quadrupled fine. To the contrary, the 1995 edition of the Television and Cable Fact Book (Volume 63, pp. A-1396 through A-1428) reflects that most television stations sold within the past several years have garnered a purchase price of millions of dollars per station. On the other hand, most IMTS, paging, BETRS, and microwave systems would only be valued at a small fraction of the price of most television stations. Simply put, the Commission should not treat all carriers as if they had the resources of AT&T or MCI.

If Congress intended the discriminatory impact of the Commission's proposed forfeiture standard, then that portion of the Omnibus Budget Reconciliation Act would appear to be violative of the equal protection clause of the United States Constitution. But the more logical explanation for Congressional

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[12] In this regard, most broadcasters operate at much higher power than common carrier licensees -- so much higher, that broadcasters are subject to the Commission's harmful radiation evaluation requirements, whereas common carrier radio operations are exempt from this standard due to their low power. See Report and Order, Gen Docket No. 79-144, 100 FCC 2d 543 (1985); Second Report and Order, 2 FCC Rcd. 2064 (1987). Thus, in most instances, a radio-related violation by a broadcaster will have a far more serious effect on the public than a common carrier radio violation, both in terms of interference and health effects.

action in approving a significantly higher maximum forfeiture for common carriers is to provide a meaningful deterrent for those very few common carriers (such as AT&T and MCI) that have such high earnings that an extremely steep forfeiture is necessary to have a deterrent effect.[13] However, this does not mean that all common carriers, regardless of their earnings, should be subjected to such severe fines. In essence, it appears this approach would build in the aggravating factor of "ability to pay/relative disincentive" into each and every common carrier fine, before the facts of the situation are assessed. This, Mobile Phone submits, is an unwarranted assumption, since the vast majority of common carrier radio licensees (including independent telephone companies) earn significantly less than most television stations.

In order to meet the requirements of administrative fairness, Mobile Phone urges that similarly situated common carrier radio licensees and broadcast licensees be fined in the same amounts (which amounts should be drastically reduced from those proposed in the proposed Forfeiture Policy Statement), to be more in line with those proposed in the "Other Category" for private radio licensees. Both categories are limited to licensees, operating radio facilities under Title III of the Act. The Commission has never explained the significance to the fact

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[13] As discussed above, even the largest carriers should not be fined at the extremely high percentages of the maximum fine set forth in the proposed Forfeiture Policy Statement, unless aggravating circumstances exist.