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Before the
Federal Communications Commission
Washington, D.C. 20554

JUN 24 3 01 PM '04

DIVISION OF

In the matter of)
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Assessment and Collection of Regulatory Fees for)
Fiscal Year 2004)
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MD Docket No. 04-73

REPORT AND ORDER

Adopted: June 21, 2004

Released: June 24, 2004

By the Commission: Commissioner Copps concurring and issuing a statement; Commissioner Adelstein approving in part, concurring in part, and issuing statement.

Table of Contents

Heading	Paragraph #
I. INTRODUCTION.....	1
II. DISCUSSION	2
A. Development of FY2004 Fees.....	2
1. Calculation of Revenue and Fee Requirements.....	2
2. Additional Adjustments to Payment Units.....	3
3. Relationship of Regulatory Fees to Costs.....	5
B. Local Multipoint Distribution Service (LMDS).....	13
C. Commercial Mobile Radio Service (CMRS) Messaging and Mobile.....	17
D. Non-Geostationary Orbit Space Stations.....	20
E. International Bearer Circuits.....	26
F. Secondary Broadcast Services.....	31
G. Procedural Changes for Notification, Assessment and Collection of Regulatory Fees...	33
1. Media Services Licensees	36
2. Satellite Space Station Licensees	40
3. Interstate Telecommunications Service Providers	43
4. Commercial Mobile Radio Service Operators	45
5. Cable Television System Operators	52
H. Future Streamlining of the Regulatory Fee Assessment and Collection Process.....	60
I. Procedures for Payment of Regulatory Fees	67
1. De Minimis Fee Payment Liability	67
2. Standard Fee Calculations and Payment Dates	68
J. Enforcement	70
III. PROCEDURAL MATTERS.....	72

Attachment A—Final Regulatory Flexibility Analysis

Attachment B—Sources of Payment Unit Estimates for FY2004

Attachment C—Calculation of Revenue Requirements and Pro-Rata Fees

Attachment D—FY 2004 Schedule of Regulatory Fees

Attachment E—Factors, Measurements, and Calculations that Determine Station Contours and Population Coverages

Attachment F—Parties Filing Comments and Reply Comments

Attachment G—FY 2003 Schedule of Regulatory Fees

I. INTRODUCTION

1. In this *Report and Order* ("R&O"), we conclude a proceeding to collect \$272,958,000 in regulatory fees for Fiscal Year (FY) 2004. These fees are mandated by Congress and are collected to recover the regulatory costs associated with the Commission's enforcement, policy and rulemaking, user information, and international activities.¹

II. DISCUSSION

A. Development of FY2004 Fees

1. Calculation of Revenue and Fee Requirements

2. Each fiscal year, the Commission proportionally allocates the total amount that must be collected via regulatory fees (Attachment C).² For FY2004, this allocation was done using FY2003 revenues as a base. From this base, a revenue amount for each fee category was calculated. Each fee category was then adjusted upward by 1.5 percent to reflect the increase in regulatory fees from FY2003 to FY2004. These FY2004 amounts were then divided by the number of payment units in each fee category to determine the unit fee.³ In instances of small fees, such as licenses that are renewed over a multiyear term, the resulting unit fee was also divided by the term of the license. These unit fees were then rounded in accordance with 47 U.S.C. §159(b)(2).

2. Additional Adjustments to Payment Units

3. In calculating the FY2004 regulatory fees proposed in Attachment D, we further adjusted the FY2003 list of payment units (Attachment B) based upon licensee databases and industry and trade group projections. Whenever possible, we verified these estimates from multiple sources to ensure accuracy of these estimates. In some instances, Commission licensee databases were used, while in other instances, actual prior year payment records and/or industry and trade association projections were used in determining the payment unit counts.⁴ Where appropriate, we adjusted and/or rounded our final estimates

¹ 47 U.S.C. § 159(a).

² It is important to note that the required increase in regulatory fee payments of approximately 1.5 percent in FY 2004 is reflected in the revenue that is expected to be collected from each service category. Because this expected revenue is adjusted each year by the number of estimated payment units in a service category, the actual fee itself is sometimes increased by a number other than 1.5 percent. For example, in industries where the number of units is declining and the expected revenue is increasing, the impact of the fee increase may be greater.

³ In most instances, the fee amount is a flat fee per licensee or regulatee. However, in some instances the fee amount represents a unit subscriber fee (such as for Cable, Commercial Mobile Radio Service (CMRS) Cellular/Mobile and CMRS Messaging), a per unit fee (such as for International Bearer Circuits), or a fee factor per revenue dollar (Interstate Telecommunications Service Provider fee).

⁴ The databases we consulted include, but are not limited to, the Commission's Universal Licensing System (ULS), International Bureau Filing System (IBFS), and Consolidated Database System (CDBS). We also consulted industry sources including but not limited to *Television & Cable Factbook* by Warren Publishing, Inc. and the *Broadcasting and Cable Yearbook* by Reed Elsevier, Inc. as well as reports generated within the Commission such as the Wireline Competition Bureau's *Trends in Telephone Service* and the Wireless Telecommunications Bureau's *Numbering Resource Utilization Forecast*. For additional information on source material, see Attachment B.

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to take into consideration variables that may impact the number of payment units, such as waivers and/or exemptions that may be filed in FY2004, and fluctuations in the number of licensees or station operators due to economic, technical or other reasons. Therefore, for example, when we note that our estimated FY2004 payment units are based on FY2003 actual payment units, we may have rounded that number for FY2004 or adjusted it slightly to account for these variables.

4. Additional factors are considered in determining regulatory fees for AM and FM radio stations. These factors are facility attributes and the population served by the radio station. The calculation of the population served is determined by coupling current U.S. Census Bureau data with technical and engineering data, as detailed in Attachment E. Consequently, the population served, as well as the class and type of service (AM or FM), determines the regulatory fee amount to be paid.

3. Relationship of Regulatory Fees to Costs

5. A number of parties challenge the proposed regulatory fees by claiming that the fees are not appropriately based on the Commission's regulatory costs.⁵ They argue, in particular, that the proposed fee for their particular service does not properly reflect the costs for the level of Commission regulatory activity attributable to that service.⁶ For example, they maintain that reduced regulatory oversight of their services should result in reduced fees. Further, CTIA and Tyco claim that the proposed fees for CMRS and international bearer circuits, respectively, are improper because, *inter alia*, the Commission has failed to develop a cost accounting system as required by section 9(i) of the Act.⁷ Verizon, however, disagrees with these contentions, and points out that section 9 does not require the Commission to set fees that are proportional to regulatory burdens on a service by service basis.⁸ Verizon asserts that this would be an "unworkable task" for the Commission.⁹ Verizon further maintains that imposing increased fees on those payers who face increased regulation would amount to a double penalty for those carriers.¹⁰

6. As we have in the past, we again reject arguments that regulatory fees must be precisely calibrated, on a service-by-service basis, to the actual costs of the Commission's regulatory activities for that service.¹¹ We find that parties maintaining that reduced Commission regulatory activity in

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⁵ See e.g., CTIA Comments at n. 4; Globalstar Comments at 3-7; Tyco Comments at 11-13; XO Communications Comments at 2-3; ORBCOMM Replies at 2-3; RTG Replies at 5-6; Space Imaging Replies at 3-4.

⁶ See e.g., Space Imaging Replies at 3-4; Globalstar Comments at 3; FLAG Replies at 3; ORBCOMM Replies at 2-3.

⁷ See CTIA Comments at n.4; Tyco Comments at 5. See also 47 U.S.C. §159(i).

⁸ Verizon Comments at 2.

⁹ *Id.* at 3.

¹⁰ *Id.* at 2.

¹¹ The Commission has consistently interpreted the requirements of Section 9 in this manner. See e.g., *Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, 12 FCC Rcd 17161, 17171-2 (1997)(*1997 Regulatory Fee Report and Order*); *Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, 10 FCC Rcd. 13512, 13524 (1995)(*1995 Regulatory Fee Report and Order*); *Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, Report and Order, MD Docket No. 98-36, FCC 98-115, 1998 WL 320272, para. 15 (1998) (*1998 Regulatory Fee Report and Order*).

connection with any service should equate to a reduction in regulatory fees for that service have misconstrued the requirements of section 9.

7. Pursuant to section 9(a) the Act, 47 U.S.C. § 159(a), the Commission is authorized to collect regulatory fees "to recover the costs of ...enforcement activities, policy and rulemaking activities, user information services, and international activities." Fees are to be derived by determining the full-time equivalent number of employees performing the activities described, "adjusted to take into account factors that are reasonably related to the benefits provided to the payer of the fee by the Commission's activities..." 47 U.S.C. § 159(b)(1)(A). This provision authorizes the Commission to take into account overall staff costs in implementing its continuing obligation to ensure that the fee schedule is consistent with section 9(b)(1)(a), and it also makes clear that the Commission is free to depart from strictly cost-based fees.

8. In this regard, the initial Schedule of Regulatory Fees that Congress enacted in section 9(g) reflects the "costs adjusted for benefits" approach permitted under section 9. For example, Congress required that satellite fees be based on the number of satellites the regulatee has in operation; however, the number of satellites may or may not relate to the actual costs in terms of FTEs of regulating that particular entity. Similarly, the statutory fee schedule generally reflects higher fees for types of regulatees that are authorized to use larger amounts of, or more desirable, spectrum, or that are larger and have more customers. For example, in the statute radio and television fees are based on the size of the markets served and carriers' fees are based on the numbers of subscribers or access lines.

9. Moreover, adjustments to the Fee Schedule authorized by section 9 do not, in every instance, implicate costs. Mandatory adjustments to the congressionally enacted Fee Schedule, as set forth in section 9(b)(2), are "proportionate increases or decreases" to reflect the specific amount required to be collected each year in appropriations Acts, as well as fee adjustments to reflect "unexpected increases or decreases in the numbers of licensees or units subject to payment" of regulatory fees. Section 9(b)(3), "Permitted amendments", requires the Commission to add, delete or reclassify services in the fee schedule to reflect additions, deletions or changes in the nature of its services "as a consequence of Commission rulemaking proceedings or changes in law." Section 9(b)(3) also requires the Commission to amend, by rule, the Fee Schedule "if the Commission determines that the schedule requires amendment to comply with the requirements" of section 9(b)(1)(A), cited above.¹² Neither of these provisions requires amendment of the fee schedule to mirror all changes in regulatory costs.

10. We note further that attempting to adjust fees to mirror exactly the costs of each particular service would be unworkable. The fee process specified by section 9 is by necessity a "zero-sum" proposition, since the reduction of fees in one category must be counterbalanced by increases in other categories to ensure that the total amount specified by Congress is collected. These increases would, of course, not necessarily reflect any increase in the costs related to the other services.

11. More generally, section 9 fees are designed to recover the amount that Congress has required us to collect, and include the full amount of specified regulatory costs from regulatees as well as costs not directly related to those entities subject to fees. Regulatory fees recover: a) direct costs, such as salary and expenses; b) indirect costs, such as overhead functions; and c) support costs, such as rent, utilities, or equipment, to name a few. Regulatory fees also recover costs attributable to regulatees that Congress has exempted from the fees as well as costs attributable to licensees granted fee waivers. Regulatory fees take into account as well factors reasonably related to the benefits provided to the payer of the fee by the Commission. We find that Congress intended that the "benefits" to be recovered through fees were not limited strictly to the benefits derived from the Commission regulation of a specific service,

¹² See 47 U.S.C. § 159(b)(3).

or lack thereof, as parties argue. Rather, section 9(b)(1)(A) cites benefits such as service area coverage, shared use versus exclusive use, and "other factors that the Commission determines are necessary in the public interest."¹³ Thus, there is no statutory requirement to tie each fee to the specific costs associated with each service.

12. CTIA and Tyco also object to the proposed fees based on the Commission's failure to develop a cost accounting system.¹⁴ The accounting system requirement set forth in section 9(i) applies when "necessary" to making the limited category of adjustments authorized by section (b)(3), "Permitted amendments". Permitted amendments must be consistent with the "costs adjusted for benefits" approach set out in section 9(b)(1)(A). The Commission has FTE data on a macro-service level by fee activity as required by section 9(b)(1)(A). We find that this cost data, modified by the appropriate "benefits" analysis, results in a regulatory fee schedule that comports with the requirements of section 9, including section 9(i). The Commission has, in the past, attempted to devise and implement a cost accounting system to be used in connection with regulatory fees. In 1997, the Commission developed a cost accounting system that was based on staff reporting of the numbers of hours spent in various activities for each pay period.¹⁵ Reliance on these reports proved problematic.¹⁶ In FY 1999, the Commission discontinued attempts to base the schedule on the available cost data.¹⁷ In later explaining the decision to abandon the cost-based methodology, the Commission stated that it "found that developing a regulatory fee structure based on available but insufficiently detailed cost information sometimes did not permit us to recover the amount that Congress required us to collect. In some instances, the large increases in the cost of regulation could not be adjusted to an acceptable and balanced level."¹⁸ Nevertheless, we find that the macro-level FTE data available is sufficient to inform the cost basis portion of our regulatory fees. We therefore reject CTIA's and Tyco's arguments. And, as noted above, the Commission is authorized to make permitted amendments to bring the Fee Schedule into compliance with section 9(b)(1)(A), a provision that clearly permits the Commission to depart from strictly cost-based fees. Going forward, we will continue to use Permitted amendments to amend the fee schedule, as appropriate, where our cost data or benefits analysis, or both, require us to do so to comply with the requirements of section 9(b)(1)(A).

B. Local Multipoint Distribution Service (LMDS)

13. In the FY2003 NPRM,¹⁹ we sought comment on the appropriate fee classification of the

¹³ See 47 U.S.C. § 159(b)(1)(A).

¹⁴ CTIA Comments at n. 4; Tyco Comments at 5.

¹⁵ See *1997 Regulatory Fee Report and Order*, 12 FCC Rcd. at 17165-70; *Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, MD Docket No. 96-186, FCC 97-49, Notice of Proposed Rulemaking, 1997 WL 90978, paras. 9, 15-16 (adopted Feb. 17, 1997; released Mar. 5, 1997) (*1997 Regulatory Fee NPRM*).

¹⁶ In the FY 1997 proceeding, the Commission determined that some fee categories, especially those for small regulatees, received disproportionately high cost allocations. The Commission adjusted for these high cost allocations by redistributing the costs among fee categories, and established a 25 percent limit on the amount by which fee categories could be increased. See *1997 Regulatory Fee Report and Order* at 17175-77. For FY 1998, the Commission continued to rely on cost accounting data to identify its regulatory costs and to develop fees based on these costs, and retained the 25 percent limit on the amount by which fee categories could be increased. See *1998 Regulatory Fee Report and Order*, at para. 8.

¹⁷ See *Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, Report and Order, 14 FCC Rcd. 9868 (1999) (*1999 Regulatory Fee Report and Order*).

¹⁸ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2002*, 17 FCC Rcd 13203, 13206 (2002).

¹⁹ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2003*, Notice of Proposed Rulemaking, 18 FCC Rcd 6088-89 ¶¶ 6-9 (2003) (*FY 2003 NPRM*).

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Local Multipoint Distribution Service (LMDS).²⁰ Some commenters urged that LMDS be classified in the microwave fee category. We declined to do so because technological developments and emerging commercial applications suggested that usage of LMDS could evolve differently than services in the microwave fee category.²¹ We recognized, however, that “substantive distinctions exist between MDS and LMDS, and that they should not be placed in the same fee category.”²² Therefore, we created a separate LMDS fee category and stated that we would “initiate a specific proceeding that addresses the policies and fee structure governing LMDS and other wireless services.” In the FY2004 NPRM, we again sought comment on the appropriate fee classification for LMDS. We received comments from XO Communications, Inc. (“XO”), and reply comments from Rural Telecommunications Group, Inc. (“RTG”).

14. XO makes two primary arguments and one alternative request. First, it claims that the proposed regulatory fees imposed on LMDS are disproportionate to the costs associated with regulating the service and that they are too high in relationship to the FCC’s administrative burden in overseeing LMDS service.²³ As we explained, *supra* at Section II.A.3., we reject arguments that regulatory fees must be precisely calibrated, on a service-by-service basis, to the actual costs of the Commission’s regulatory activities for that service.

15. Second, XO argues that we should, for purposes of establishing regulatory fees, group like services under the same classification or impose similar regulatory fees.²⁴ Specifically, it proposes that we classify LMDS as a microwave service, to which the proposed \$50 per license per year fee applies, rather than subjecting LMDS licensees to the proposed \$270 per license per year fee applicable to the Multipoint Distribution Service (“MDS”).²⁵ XO states that, contrary to the assertions in the *FY2003 Report and Order*, LMDS is not different than other microwave services and that it is operationally, functionally, and legally similar to the 24 and 39 GHz services.²⁶ The upperband services, according to XO, are also competitive substitutes for one another and can be used to “complement” one another.²⁷ In the alternative, XO requests that if we retain a separate fee category for LMDS, we should strive to create

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²⁰ In both 2001 and 2002, we denied requests to move LMDS from the Multipoint Distribution Service (MDS) fee category to the microwave fee category. See *Assessment and Collection of Regulatory Fees for Fiscal Year 2001, Report and Order*, 16 FCC Rcd 13525 (2001); *Assessment and Collection of Regulatory Fees for Fiscal Year 2001, Memorandum Opinion and Order*, 17 FCC Rcd 24920 (2002) (*FY 2001 Memorandum Opinion and Order*).

²¹ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2003, Report and Order*, 18 FCC Rcd 15988 ¶ 9 (2003) (*FY 2003 Report and Order*).

²² *Id.* Although we separated MDS and LMDS into separate fee categories, we set the regulatory fee amounts for both services at \$265 per license.

²³ XO Comments at 2-3.

²⁴ XO Comments at 4-5.

²⁵ *Id.* at 5. XO mistakenly asserts that the fees imposed on LMDS licenses are assessed on a “per station” basis. *Id.* In fact, these fees are assessed on a “per call sign” basis. See *NPRM Attachment D, “FY2004 Schedule of Regulatory Fees.”*

²⁶ *Id.* at 4.

²⁷ *Id.*

regulatory parity and competitive neutrality in our regulations by imposing the same regulatory fees as are imposed on other microwave licensees.²⁸ RTG, in its reply comments, supports XO's contentions and adds that by assessing the same fee on the LMDS and MDS categories, the Commission effectively requires LMDS licensees to pay regulatory fees more than five times those of other upperband services.²⁹ RTG also notes that because many LMDS licensees are small and rural companies that utilize this spectrum for point-to-point links and for CMRS backhaul, the assessment of higher annual regulatory fees (when compared to similar services) will unduly harm such licensees.³⁰

16. We find no basis for changing our proposed fee schedule to reduce the annual LMDS fee by more than 80 percent, thereby requiring a proportional increase in the fees for all other fee payors. First, as a matter of statutory interpretation, section 9 does not require that competitive services be assessed comparable regulatory fees. Second, LMDS licenses are, as a factual matter, quite different than other Part 101 fixed microwave services in the upper frequency bands (above 15 GHz), except for those in the 24 and 39 GHz bands that will be or have been auctioned.³¹ While these three services are licensed on a geographic basis allowing licensees to place multiple stations within the authorized service areas, most microwave stations are currently licensed on a site-by-site basis thereby requiring, depending on the frequency band, multiple individual licenses to serve a particular geographic area or multiple points therein. Third, even when the fees for LMDS licensees are compared with the fees for licensees in the 24 and 39 GHz bands, we do not find that the current assessments result in disproportionate burdens for LMDS licensees. LMDS Block A licensees are authorized for 1150 MHz of spectrum, more than 10 times the amount of spectrum authorized with an individual 24 and 39 GHz license. Using the authorized bandwidth for each license as a proxy, we note that the LMDS fee for Block A licenses is actually lower on a per megahertz basis than 24 and 39 GHz licenses under both the FY2003 and proposed FY2004 fee schedules. We note that under this method of analysis, LMDS Block B licenses, authorized for 150 MHz in the 31,000-31,075/31,225-31,300, pay \$1.85 per MHz under the proposed schedule. We will address this anomaly in our next year's regulatory fee proceeding. Accordingly, we are maintaining the current fee categories and assessing the proposed amounts for the current fiscal year.

²⁸ Id. at 5.

²⁹ Replies of RTG at 5.

³⁰ Replies of RTG at 5-6.

³¹ The auction of 24 GHz Service licenses (Auction No. 56) is scheduled to begin July 28, 2004. See *Public Notice*, DA 04-1271 (rel. May 5, 2004); see also Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to Licensed Fixed Services at 24 GHz, WT Docket No. 99-327, *Report and Order*, 15 FCC Rcd 16934 (2000). The Commission auctioned 39 GHz licenses in Auction No. 30. See "39 GHz Band Auction Closes," *Public Notice*, 15 FCC Rcd 13648 (WTB 2000); see also Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd 18600 (1997). We also note that most Multiple Address Systems spectrum (MAS) licenses were licensed by auction and on a geographic area basis, but in the lower 900 MHz band. See "Multiple Address Systems Spectrum Auction Closes," *Public Notice*, 16 FCC Rcd 21011 (WTB 2001); Amendment of the Commission's Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Report and Order*, 15 FCC Rcd 11956, *Erratum*, 15 FCC Rcd 16415 (2000) (designating certain MAS spectrum to be licensed by auction and on a geographic basis). Additional information regarding Commission auctions may be obtained via the FCC's Web Site at <http://wireless.fcc.gov/auctions/>.

C. Commercial Mobile Radio Service (CMRS) Messaging and Cellular/Mobile Service Providers

17. In the *FY2004 NPRM*, we proposed to maintain the CMRS Messaging subscriber regulatory fee rate at the FY 2003 level to avoid further contributing to the financial hardships associated with a declining subscriber base. We received no comments or reply comments on this matter. Consequently, we will maintain the CMRS messaging regulatory fee rate in FY2004 at \$0.08 per subscriber, the same level as in FY2003.

18. The Rural Cellular Association ("RCA") filed comments addressing the proposed rate of \$0.26 per unit subscriber fee for CMRS Cellular/Mobile service providers. RCA contends that the proposed per unit fee is the same as in FY2003, despite a 6.5 percent increase in CMRS cellular and mobile units from 141.8 million to 151.0 million.³² RCA maintains that although the congressional revenue requirement has increased by 1.5 percent, the per unit subscriber fee should go down because the number of CMRS units has grown. In its reply comments, Verizon Wireless agrees with RCA and proposes a reduction in the proposed fee to \$0.25 per subscriber unit.³³

19. Since preparing the *FY2004 NPRM*, we have received revised CMRS cellular and mobile unit estimates that result in a reduction in the per unit fee from \$0.26 to \$0.25. Based on our revised estimate of 153.0 million units, the CMRS cellular and mobile fee rate will be \$0.25 per subscriber unit.

D. Non-Geostationary Orbit Space Stations

20. New Operating Globalstar LLC ("Globalstar"), Space Imaging LLC ("Space Imaging") and ORBCOMM LLC ("ORBCOMM") filed comments asking the Commission to reduce the proposed FY2004 regulatory fee for non-geostationary orbit ("NGSO") satellite system licensees.³⁴ Globalstar maintains that the Commission has proposed a nearly 50% increase in the FY2004 fee for NGSO satellite systems of the FY2003 fee, a result of the decrease from seven to five in the number of estimated payment units calculated by the Commission between FY2003 and FY2004.³⁵ Globalstar argues that the smaller number of NGSO operators in FY2004 should reduce the level of Commission regulatory activity relating to NGSOs and should therefore result in a reduced regulatory fee.³⁶ Globalstar argues further that the 50% increase in fees for NGSO satellite licensees is not proportionate to the increase in appropriations or to the increase in fees charged in other fee categories.³⁷ Globalstar urges the Commission to revise the NGSO satellite regulatory fees downward by reducing the revenue requirement for NGSOs, combining the revenue requirements for GSO and NGSO satellite licensees, or maintaining the FY2003 regulatory fee for NGSOs.³⁸ Satellite Imaging and ORBCOMM support Globalstar's arguments.

21. The increase in the NGSO satellite system fee is the direct result of a decrease from seven

³² Rural Cellular Association Comments at 2-3.

³³ Verizon Wireless Replies at 4.

³⁴ Comments of Globalstar at 1; Space Imaging at 1; ORBCOMM at 1.

³⁵ Globalstar Comments at 1-2.

³⁶ *Id.*, at 4.

³⁷ *Id.*, at 5.

³⁸ *Id.*, at 7-8.

to five in the number of estimated payment units calculated by the Commission between FY2003 and FY2004. As we explained, *supra* at n. 2, because the annual expected revenue is adjusted each year by the number of estimated payment units, the actual fee may increase by a number other than the 1.5%. Moreover, as we discussed, *supra* at Section II.A.3., section 9 does not require that regulatory fees be precisely calculated, on a service-by-service basis, to the actual costs of the Commission's regulatory activities for that service.³⁹

22. Our procedures for determining the annual regulatory fee amounts for each of our fee categories is detailed in the Discussion section of this *Report and Order*. We recognize that annual fee amounts in categories populated by small numbers of payment units can fluctuate considerably when payment units enter or exit the fee service category. We remind regulatees of this fact in our regulatory fee proceedings each year.⁴⁰

23. Nonetheless, we recognize that a 43% fee increase is significant, especially considering the absolute dollar amount of the NGSO category's per-unit fee. An unexpected fee increase of 43% introduces an aspect of financial uncertainty in any industry, regardless of its financial state.

24. Given the small number of licenses in this fee category, we therefore conclude that relief is warranted for NGSO licensees. In FY2003, the fee assessed per operational system in non-geostationary orbit (NGSO) was \$108,375. In our *FY2004 NPRM*, we proposed a per unit fee of \$154,425. Because we have concluded that relief for this fee category is warranted, we will assess a FY2004 fee of \$131,400 per license.⁴¹ This will provide a financially challenged industry some relief.

25. The FY2004 NGSO per-system regulatory fee is therefore set at \$131,400, rather than the \$154,425 amount that was in the proposed FY2004 fee schedule. We will revise the fee schedule so that the lost revenue from the NGSO category is recouped by allocating a very small assessment across all regulatory fee categories.

E. International Bearer Circuits

26. Tyco Telecommunications (U.S.) Inc. ("Tyco") challenges the regulatory fee for the international bearer circuit category and the manner in which the Commission determines the fee rate for this category. Tyco argues: (1) the Commission's capacity-based methodology for determining regulatory fees for international bearer circuits favors older, lower-capacity systems to the detriment of newer, higher-capacity systems; (2) the current methodology does not account for the reduced regulation of private submarine cable operators; and (3) the Commission's method of imposing fees on a company's "buy and sold" (also known as "active") bearer circuit capacity is at odds with how private submarine cable operators actually sell capacity today, thereby requiring operators to expend time to determine whether

³⁹ Moreover, we find that a number of ongoing or recently completed activities at the Commission in FY2004 have an impact on the NGSO fee category, including: (1) rulemaking proceedings concerning (a) NGSO spectrum, (b) realignment of big low earth orbit ("Big LEO") satellite systems, (c) space station licensing reform, (d) bond issuances, (e) E911 Call Center Reporting Requirements—primarily affecting NGSOs in the mobile satellite service; (2) satellite milestone reviews for 2 GHz systems, (3) orbital debris matters, and (4) U.S. representation and participation in International Telecommunications Union ("ITU") Working Groups and Study Groups regarding shared spectrum policy.

⁴⁰ See footnote 2 of this *Report and Order*.

⁴¹ This is an amount roughly halfway between the FY2003 regulatory fee for NGSO satellite systems (\$108,375) and the initial fee amount in our proposed FY2004 Fee Schedule (\$154,425).

and when fees apply based to them based on the Commission's definition of "active."⁴²

27. Tyco proposes that the following changes be made to the regulatory fee regime: (1) separate the private submarine cable operator subcategory from the existing international bearer circuit fee category by creating a new private submarine cable operator category; (2) allocate the revenue requirement now proposed for all international bearer circuit operators between the two new fee categories by determining the respective regulatory burden caused by the two new categories of payees; and (3) adopt a flat, per-cable-landing-license fee for private submarine cable operators.

28. The Satellite Industry Association ("SIA") and FLAG Telecom Group Limited ("FLAG") support Tyco's position. SIA notes that satellite operators also provide international circuits on a non-common carrier basis and requests that the Commission reform its international bearer circuit regulatory fee regime to reflect the disparate regulatory costs generated by common carriers and non-common carriers.⁴³ Specifically, SIA states that the new fee category proposed by Tyco should include non-common carrier satellite providers as well as private submarine cable providers.⁴⁴ FLAG supports the imposition of a flat regulatory fee on cable landing licensees.⁴⁵

29. We conclude that the legal arguments made by Tyco, SIA and FLAG warrant further consideration. However, we did not solicit comment in our *FY2004 NPRM* on the many complex issues raised by the commenters concerning our international bearer circuit fee category. We therefore do not have a record to take action on these issues at this time. We agree with the commenters that the use of a fee system based on licenses, rather than circuits, would be administratively simpler for both the Commission and carriers.⁴⁶ We are also concerned that basing the fees on the active circuits may provide disincentives to carriers to initiate new services and to use new facilities efficiently.⁴⁷ A more complete record on these issues is needed. Consequently, we plan to raise these issues and seek comment in our *FY2005 NPRM* on possible changes to the circuit-based fees structure for international carriers.

30. Commenters also raised procedural issues concerning the calculation and obligation to pay regulatory fees. For example, FLAG states that it is difficult for private submarine cable operators to price their offerings to customers because it is frequently difficult to determine with certainty which party—operator or customer—in a particular transaction is responsible for paying the necessary regulatory fees.⁴⁸ Upon the release of our *FY2004 Report and Order*, we will issue a Public Notice that provides further guidance on the procedural points raised by the commenters with regards to regulatory

⁴² Tyco Comments at pages i-ii and 13-14.

⁴³ SIA Replies at 4.

⁴⁴ Id. at 3.

⁴⁵ FLAG Replies at 3.

⁴⁶ Tyco Comments at 15-17, 23-24; FLAG Replies at 1-2.

⁴⁷ Tyco Comments at 10.

⁴⁸ Id. at 1-2. Tyco also argues that the calculation used to derive bearer circuit fees may systematically underestimate the amount of active capacity subject to regulatory fees, because, currently, only U.S.-licensed common carriers and common carrier satellite operators are required to file circuit status reports. We find that circuit status reports as well as the actual payments from the previous year provide a reasonable basis for our estimates. We note that in a separate proceeding the Commission has sought comment on whether non-common carriers should also be required to file circuit status reports. See Reporting Requirements for U.S. Providers of International Telecommunications Service; Amendment of Part 43 of the Commission's Rules, *Notice of Proposed Rulemaking*, IB Docket No. 04-112, FCC 04-70, released April 12, 2004.

fee payments for international bearer circuits.

F. Secondary Broadcast Services

31. Mr. Chris Kidd submitted comments regarding the proposed regulatory fees for secondary broadcast services, such as FM boosters and translators. Mr. Kidd states that FM translators should be placed in a distinct fee category rather than sharing a fee category with FM Boosters and argues that FM boosters should be added to the fee category with low power television ("LPTV"), TV Translators and TV Boosters.⁴⁹ According to Mr. Kidd, FM translators have a higher degree of business and programming restrictions placed on them than do TV translators, as well as an effective radiated power ("ERP") restriction, making them a less desirable license to hold and therefore warranting a lower regulatory fee.⁵⁰

32. We find that there is an inadequate record to warrant revising our two existing fee categories for secondary broadcast services. We originally devised these categories on the basis of the nature of service (a category for television and a category for FM radio) due to differing characteristics of these services. We have no reason to change this finding at this time. Further, we note that the need for some of the restrictions placed on FM translators is the direct result of their tendency to interfere with the operation of other services within their range of signal reach. Despite the restrictions, FM translators are still subject to interference complaints, all of which must be addressed and resolved by the Commission. For these reasons, we do not find a basis to make changes to our existing fee categories for secondary broadcast services.

G. Procedural Changes for Notification, Assessment and Collection of Regulatory Fees

33. Last year, we proposed that we would not disseminate general public notices to regulatees through surface mail informing them of when regulatory fees are due. We explained that with the widespread use of the Internet, we believe that disseminating public notices through surface mail is not an efficient use of our time and resources. We believe we can better serve the public by providing this type of general information on our website, while exploring ways to disseminate specific regulatory fee bills or assessments through surface mail. We made the same proposal this year in our *FY2004 NPRM* and received no comments on the matter.

34. Accordingly, we will provide public notices, fact sheets and all necessary regulatory fee payment procedure information on our website at <http://www.fcc.gov/fees>, just as we have for the past several years; but we will no longer disseminate public notices through surface mail. In the event that regulatees do not have access to the Internet, hardcopies of public notices and other relevant materials will be mailed upon request to anyone who contacts the FCC Consumer Center at (888) 225-5322.

35. In our *FY2004 NPRM*, we also proposed to disseminate fee assessments to five categories of licensees: media services licensees, satellite space station licensees, interstate telecommunications service providers, cable television system operators and commercial mobile radio service operators. We stated that we were making these proposals and exploring options for these service categories in an effort to improve the efficacy of our fee collection process. Based on comments received in this proceeding and the current resources available to the Commission, we set forth below how we will proceed with these service categories.

⁴⁹ Mr. Chris Kidd Comments at 4-5.

⁵⁰ Mr. Chris Kidd Comments at 4.

1. Media Services Licenses

36. In FY2003, the Commission mailed fee assessment notifications to media services licensees for the first time.⁵¹ We propose to repeat this endeavor this year in the same or similar fashion. We received no comments specific to our proposal to repeat the mail out. Therefore, we will repeat the endeavor this year with one exception. Last year, we sent two separate mailings of postcards on a facility ID basis, thereby giving licensees two opportunities to update or correct information. Because of our success with last year's fee assessment postcard initiative, we will only mail a single round of postcards on a facility ID basis this year.

37. As was the case last year, we will mail the postcards to licensees and any of their other points of contact on file (the actual payers of their prior year regulatory fees, such as their corporate headquarters, legal representatives, etc.). By doing so, licensees and their other points of contact will all be furnished with the same information for each facility ID in question so that they can designate among themselves the payer of this year's fee. Mailing postcards to different addresses on file for each facility ID also enables parties for each facility ID the opportunity to visit a Commission-authorized web site to (1) update or correct information on the postcard, and (2) certify their fee-exempt status, if any. The web site will be made available this summer. In addition to the postcards directing parties to a web site to make updates or corrections to information, the postcards will also include the telephone number for the FCC CORES Help Desk at (877) 480-3201, Option 4, which can be called to obtain clarification on procedures.

38. We stress to media services licensees that assessment postcards are being mailed to these licensees to assist them in completing the Form 159, and that this form must accompany the fee payment. The postcard is not intended to be a substitute for a Form 159. Media services licensees must still submit a completed Form 159 with their fee payments, despite having received an assessment postcard. We are unable to process regulatory fee payments submitted without a completed Form 159.

39. We also emphasize that the most important data element to include on the Form 159 is the station's facility ID. The facility ID is a unique identifier that never changes over the course of a station's existence. Despite the Form 159 filing instructions that call for each station's call sign and facility ID to be provided, we received many Form 159s from media services entities that provided only a station's call sign.

2. Satellite Space Station Licensees

40. Last year, we mailed regulatory fee assessment letters for the first time to satellite space station licensees. In our *FY2004 NRPM*, we proposed to repeat this mailing again this year.

41. Despite our original proposal, we will not send assessment letters to satellite licensees this year. Rather, our experience with last year's fee assessment effort has given us the ability to mail regulatory fee bills through surface mail to licensees in our two satellite space station service categories. Specifically, geostationary orbit space station ("GSO") and direct broadcast satellite ("DBS") service licensees will receive bills requesting regulatory fee payment for satellites that (1) were licensed by the Commission and operational on or before October 1, 2003; and (2) were not co-located with and technically identical to another operational satellite on October 1, 2003 (i.e., were not functioning as a spare satellite). NGSO licensees will receive bills requesting regulatory fee payment for systems that

⁵¹ Fee assessments were issued for AM and FM Radio Stations, AM and FM Construction Permits, FM Translators/Boosters, VHF and UHF Television Stations, VHF and UHF Television Construction Permits, Satellite Television Stations, Low Power Television (LPTV) Stations, and LPTV Translators/Boosters. Fee assessments were not issued for broadcast auxiliary stations in FY2003, nor will they be issued for them in FY2004.

were licensed by the Commission and operational on or before October 1, 2003. It is important to note that a "bill" is distinct from an "assessment" in that a "bill" is automatically entered into the agency's financial system as a fee obligation owed to the Commission. The Accounts Receivable, or bill, will reflect the estimated amount for each license and will have a due date of the last day of the filing window. The Commission is taking this step as part of its efforts to modernize its financial practices. Having the bill's obligation already entered as an Accounts Receivable makes the agency's process of determining penalties or denial-of-service due to non-payment quicker and more efficient than making similar determinations for those who receive assessments, which are not automatically entered into the agency's Accounts Receivable system. The Commission intends to eventually bill all fee payers.

42. Note that bills sent to GSO, DBS and NGSO licensees will only be for the satellite or system aspects of their respective operations. These licensees may have regulatory fee obligations in other service categories (such as earth stations, broadcast facilities, etc.) and are expected to meet their full fee obligations for their entire portfolio of licensees held.

3. Interstate Telecommunications Service Providers

43. In our *FY2004 NPRM*, we stated that we will continue to generate and send pre-completed Form 159-W assessments to Interstate Telecommunications Service Providers ("ITSP") to assist them in their payment of regulatory fees. We received no comments or reply comments on this matter.

44. In FY2001, the Commission began sending pre-completed FCC Form 159-W assessments to carriers in an effort to assist them in paying the Interstate Telecommunications Service Provider (ITSP) regulatory fee.⁵² The fee amount on FCC Form 159-W was calculated from the FCC Form 499-A report, which carriers are required to submit by April 1st of each year. Subsequently, in FY2002 and FY2003, the FCC Form 159-W was refined to simplify the regulatory fee payment process.⁵³ Although in FY 2004 we will continue to generate and mail pre-completed FCC Form 159-W's, this year we will also consider these mailings as "bills" rather than assessments. Other than the distinction that these "bills" will be entered into the Commission's financial system, there will be no procedural changes in using FCC Form 159-W to submit payment of FY2004 ITSP regulatory fees.

4. Commercial Mobile Radio Service (CMRS) Cellular and Mobile Services

45. In our *FY2004 NPRM*, we proposed to mail assessments to Commercial Mobile Radio Services (CMRS) cellular and mobile service providers using information from the Numbering Resource Utilization Forecast (NRUF) report. We proposed that subscriber data from the NRUF report be used to compute and assess a regulatory fee obligation. We solicited comments on the feasibility of this assessment proposal. CTIA and the Rural Cellular Association (RCA) request clarification of our proposal to send assessment letters to CMRS providers based on Numbering Resource Utilization Forecast (NRUF) reports.⁵⁴ Cingular and Dobson oppose the use of NRUF data.⁵⁵ For the reasons stated

⁵² See Assessment and Collection of Regulatory Fees for Fiscal Year 2001, *Report and Order*, 16 FCC Rcd 13590 (2001) at 67. See also FCC Public Notice – Common Carrier Regulatory Fees (August 3, 2001) at 4.

⁵³ Beginning in FY2002, Form 159-W included a payment section at the bottom of the form that allowed carriers the opportunity to send in Form 159-W in lieu of completing Form 159 Remittance Advice Form.

⁵⁴ CTIA and RCA Comments.

⁵⁵ Cingular Wireless LLC Comments and Dobson Communications Corporation Replies.

below, we will use NRUF "assigned" telephone number counts⁵⁶ reported for the period ending December 31, 2003.⁵⁷ We note that the use of December 31 is consistent with our past practice of requiring regulatory fee payments to be based on subscriber counts as of December 31.

46. Cingular states that NRUF assigned number counts do not reflect porting and therefore may be an inaccurate subscriber count proxy.⁵⁸ We find that Cingular's concern is valid and we will therefore adjust the NRUF "assigned" number counts to net Type 0 ports ("in" and "out") so that our assessment will more accurately reflect a carrier's actual subscriber count. Cingular also notes that, as a result of number pooling, many wireless carriers receive their new numbers as thousand-number blocks and that, within each block, up to 100 numbers can be retained by the donating carrier.⁵⁹ Retained numbers, however, are reported in the NRUF as assigned to the holder of the thousand block thereby resulting in an undercount for the donating carrier and an overage for the recipient. At this time, we are unable to address this issue. CMRS providers, however, may correct our estimated counts and therefore will not be harmed should their actual subscriber count be lower than their NRUF assigned count (netted for porting).

47. Accordingly, we will use NRUF report data and our Local Number Portability (LNP) database to compile an estimated subscriber count of active, assigned telephone numbers, net of ported numbers. The proposed regulatory fee payment will be based on this net figure. We will send out two assessment letters to CMRS Cellular and Mobile providers using data from the NRUF report. The first assessment letter will include assigned number counts (netted for porting), which will include a list of the carrier's Operating Company Numbers (OCNs) upon which the assessment is based. The letters will not include assigned number counts by OCNs, but rather an aggregate of assigned numbers for each carrier.

48. If a carrier determines that there is a discrepancy between the number of estimated subscribers we have calculated using the NRUF and LNP databases and what the carrier believes to be its total, the carrier may correct our estimate of the aggregate total directly on the letter and state a reason for the discrepancy. If the OCNs identified on the accompanying letter do not belong to the carrier, the OCNs which do not belong on the list should be indicated, and the total number of subscribers as of December 31, 2003 should be provided. If some of the subscribers are no longer customers, but have been assigned to another company, please indicate the company which has acquired these subscribers. This information, including any changes in the estimated aggregate total (carrier must provide a reason for the change), changes in OCNs, and the name of the company that has acquired some of the subscribers, should be mailed to: Federal Communications Commission, 445 12th Street, S.W., Room 1-C848, Washington D.C. 20554 by July 21, 2004. We will review the letters, and decide whether to accept the revised totals. Based upon this feedback, we will send out a second assessment letter that will coincide with the payment period of regulatory fees. This second assessment letter with aggregate totals will constitute the basis upon which FY2004 regulatory fees will be paid. Carriers will not have an opportunity to correct the aggregate subscriber count on the second assessment letter. When making the

⁵⁶ "Assigned numbers are numbers working in the Public Switched Telephone Network under an agreement such as a contract or tariff at the request of specific end users or customers for their use, or numbers not yet working but having a customer service order pending. Numbers that are not yet working and have a service order pending for more than five days shall not be classified as assigned numbers." 47 CFR § 52.15(f)(iii).

⁵⁷ For most entities, this submission was due February 1, 2004.

⁵⁸ Cingular Comments at 3-4.

⁵⁹ *Id.* at 4-5. Cingular states that in two populous California codes (310 and 909), the "contamination threshold" has been increased to 25%, so that, in each thousand block a carrier receives, up to 250 numbers already may be retained.

regulatory fee payment by mail, carriers must include the second assessment letter along with FCC Form 159 Remittance Advice. Of course, paying electronically using Fee Filer, carriers will not have to send in the second assessment letter.

49. Letters of assessment, with assigned number counts (netted for porting), will be mailed to carriers that filed an NRUF report. Since not all carriers are required to file NRUF reports, it is conceivable that some carriers will not be sent a letter of assessment. For those carriers, the current methodology⁶⁰ in place for CMRS Wireless services will apply. They should use their subscriber count as of December 31, 2003 and submit payment accordingly on FCC Form 159. However, whether a carrier receives a letter of assessment or computes the subscriber count itself, the Commission reserves its right, under the Communications Act, to audit the number of subscribers upon which regulatory fees were paid. In the event that the Commission determines that the number of subscribers is inaccurate or that an insufficient reason is given for making a correction on a letter of assessment, we reserve the right to assess a carrier for the difference between what was paid and what should have been paid.

50. In its comments, Cingular also argues that the use of NRUF data for regulatory fee assessments would violate the Paperwork Reduction Act (PRA) because the Office of Management and Budget (OMB) never approved the use of NRUF for purposes other than number optimization.⁶¹ Cingular argues that the use of the NRUF information in the regulatory fee context “would have significant consequences for the accuracy of the data as a surrogate for any individual carrier’s current subscriber or telephone number count.”⁶²

51. We note that in *Tozzi*,⁶³ the U.S. District Court for the District of Columbia rejected essentially the same argument. There, plaintiffs argued that the EPA could not use data collected under an OMB-approved information collection for a new purpose “without first obtaining a separate OMB approval,”⁶⁴ and that using the data for a use different than that approved by OMB “constitutes a ‘substantive or material modification,’ which requires approval from OMB.”⁶⁵ The court rejected these arguments,⁶⁶ and found that the plaintiffs “failed to show that OMB must separately approve all new uses of data that agencies have previously collected.”⁶⁷ The court stated that that “this kind of Government

⁶⁰ Federal Communications Commission, Regulatory Fees Fact Sheet, “What You Owe - Commercial Wireless Services, July 2003, page 1.

⁶¹ Cingular Comments at 7-9, citing 44 U.S.C. § 3506(c)(1)(B)(iii) (each information collection must inform the public of “the reasons the information is being collected” and “the way such information is to be used”). The NRUF report is a Paperwork Reduction Act (PRA) information collection approved by OMB under OMB Control No. 3060-0895. See *Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission*, 69 FR 5545 (Feb. 5, 2004) (“The information will be used by the Commission, state regulatory commissions, and the NANP Administrator to monitor numbering resource utilization and to project the date of area code and NANP exhaust.”)

⁶² Cingular Comments at 8.

⁶³ *Tozzi v. U.S. Environmental Protection Agency*, No. Civ. 98-0169(TFH) (D.D.C. Apr. 21, 1998) (1998 WL 1661504)

⁶⁴ *Id.* at *2.

⁶⁵ *Id.* at *2-*3.

⁶⁶ *Id.* at *3 (observing that “the EPA has not made a substantive or material modification of the use of the data. . . . The information itself is not modified in any way. The way in which it is collected is not modified in any way.”).

⁶⁷ *Id.*

(continued....)

action [a new use for information collected] does not fall under the category of harms the PRA was enacted to address.”⁶⁸ We therefore reject Cingular’s argument.

5. Cable Subscriber-Billing

52. In our *FY2004 NPRM*, we proposed to modify our payment unit assessment methodology and our fee collection procedures for the cable industry by assessing regulatory fees for individual cable operators based on cable subscriber counts that the operators have reported in publicly available data sources. The primary data sources we proposed to reference were the *Broadcasting and Cable Yearbook 2003-2004* (“*Yearbook*”)⁶⁹ and industry statistics published by the National Cable and Telecommunications Association (“NCTA”).⁷⁰

53. We proposed that the 25 largest multiple-system operators (“MSOs”), as listed on NCTA’s web page, would base their fee obligations on their subscriber counts as reported by NCTA. Cable operators listed in the *Yearbook* would base their fee obligations upon their basic subscriber counts as reported in the *Yearbook*. Cable operators not in NCTA’s top 25 MSOs and not listed in the *Yearbook* would certify their aggregate basic subscriber counts as of December 31, 2003 on the Remittance Advice FCC Form 159 with the understanding that we would corroborate the certified counts with other publicly available data sources.⁷¹ NCTA and the American Cable Association (“ACA”) support our overall proposed assessment methodology, though both parties urge the Commission to provide an opportunity for cable operators listed in the data sources to rectify their subscriber numbers.⁷² Based on our original proposal and the comments received, we now provide the following guidance to cable operators.

a. Fee Assessment and Collection Procedures for NCTA’s 25 Largest MSOs and Cable Operators Reported in the 2003-2004 Edition of the *Yearbook*

54. NCTA’s 25 largest MSOs and cable operators reported in the 2003-2004 edition of the *Yearbook* will receive two rounds of fee assessment letters via surface mail—an initial assessment and a final assessment. The first assessment will be based on the number of basic cable subscribers reported by NCTA or in the *Yearbook*—the 25 largest MSOs shall refer to the subscriber counts reported by NCTA and all other operators shall refer to the subscriber counts reported in the *Yearbook*.

55. We assume that the subscriber counts reported by NCTA and the *Yearbook* will coincide closely with the number of subscribers served by cable operators as of December 31, 2003. However, if the number of subscribers on the initial assessment differs from the number of subscribers served as of December 31, 2003, we ask that cable operators amend their assessment letters by correcting the number of basic subscribers served and mail the amended letter back to the Commission at 445 12th Street, S.W.,

(...continued from previous page)

⁶⁸ *Id.*

⁶⁹ *Broadcasting and Cable Yearbook 2003-2004*, by Reed Elsevier, Inc., Newton, MA, 2003. Subscriber counts reported in Section C, “Multiple System Operators, Independent Owners and Cable Systems,” page C-3.

⁷⁰ NCTA maintains an updated list of the 25 largest multiple-system operators at its web site located at <http://www.ncta.com>.

⁷¹ Sources consulted by the Commission may include but not be limited to *Cable TV Investor* by Kagan World Media and *Television and Cable Factbook* by Warren Communications.

⁷² NCTA Comments at 3, and ACA Comments at 1.

Room 1-C807, Washington, DC 20554. The amended assessment letter should indicate the specific reasons for the difference and indicate how and when the difference occurred (e.g. acquisition or sale of cable system, name of buying/selling entity, date of transaction, etc.). The amended letter should be mailed to the Commission address above by July 21, 2004. If cable operators do not contact us, we will assume the initial assessment is correct and we will expect the fee payment to be based on the number of subscribers on the initial assessment. As in previous years, operators will certify their subscriber counts in Block 30 of the FCC Form 159 Remittance Advice when making their regulatory fee payments.

56. We will review the amended assessment and will either accept the amendment, or contact the operator for more information. Upon establishing an agreed upon subscriber count, we will mail a final assessment letter that states the agreed upon subscriber count. If the cable operator and the Commission are unable to establish an agreed upon subscriber count by the due date of regulatory fees, the operator will be expected to submit payment for the number of subscribers on the initial assessment.

b. Fee Assessment and Collection Procedures for Cable Operators Not Listed in NCTA's 25 Largest MSOs and Not Reported in the 2003-2004 Edition of the *Yearbook*.

57. Cable operators not listed in NCTA's 25 Largest MSOs and not reported in the *Yearbook* will not receive assessment letters. If an operator's subscriber base is not reported by NCTA or in the *Yearbook*, it should simply provide its aggregate basic subscriber count as of December 31, 2003 and certify this subscriber count in Block 30 of the Form 159 Remittance Advice. It is not necessary to provide a listing of the Community Unit Identifier Numbers ("CUIDs"), nor a breakdown of individual subscriber counts for each CUID. A certified aggregate subscriber count for the operator's system(s) will suffice.

58. Cable operators who do not have access to the Internet to view the NCTA list or *Yearbook* may contact the FCC CORES Help Desk at (877) 480-3201, Option 4, to obtain their publicized subscriber count, if available, in either data source.

59. In our *FY2004 NPRM*, we proposed to institute a new de minimis fee exemption for cable operators serving 250 or fewer subscribers.⁷³ Upon further analysis of our proposal, we find that it is not feasible to implement. An exemption of this magnitude—and one tied to a payment unit amount rather than a dollar amount—is inconsistent with the Commission's general \$10 fee exemption that is in place for all regulatees. If we implemented a 250 subscriber de minimis exemption for cable subscribers, regulatees in other industries understandably would seek similar treatment. The task of managing similar yet different de minimis exemptions across multiple fee categories in different industries would prove to be too cumbersome for the Commission to perform when determining the fee sufficiency of various licensees. For these reasons, we decline to adopt our proposal for de minimis fee exemption relief designed exclusively for cable television system operators.

H. Future Streamlining of the Regulatory Fee Assessment and Collection Process

60. In our *FY2004 NPRM*, we welcomed comments on a broad range of options concerning our commitment to reviewing, streamlining and modernizing our statutorily required fee-assessment and collection procedures. Our areas of particular interest included: (1) the process for notifying licensees about changes in the annual regulatory fee schedule and how it can be improved; (2) the most effective

⁷³ ACA requested that the de minimum exemption be expanded to include cable operators serving less than 1,000 subscribers. See ACA comments, *passim*. In light of our decision that implementation of a de minimus exemption of any size is not feasible, ACA's argument is moot.

way to disseminate regulatory fee assessments and bills, i.e. through surface mail, email, or some other mechanism; (3) the fee payment process, including how the agency's electronic payment system can be improved and whether to make use of Fee Filer mandatory over a particular monetary level or for licensees holding a certain number of licenses; and (4) the timing of fee payments, including whether we should alter the existing fee payment "window" in any way.

61. Kenneth J. Brown filed comments on this issue. Mr. Brown argues that we should include an FCC telephone number on the assessment postcards that will be mailed to media services entities to assist small businesses with no connection to the Internet.⁷⁴ Last year's assessment postcards only included a Commission-authorized web address entities could access to make various updates or corrections to the information on file for their facility ID. In addition to the web address, we will include the FCC CORES Help Desk telephone number on this year's fee assessment postcards.

62. Mr. Brown also notes that the assessment postcards state that the fee cited is the base fee only for the facility ID in question, and does not include any fee(s) for supplemental services such as broadcast auxiliary service.⁷⁵ Last year, we mailed postcards for all primary media services and all supplemental media services with the exception of the broadcast auxiliary service. We will repeat this exercise this year. The postcards will again be mailed out on a facility ID basis. We find that it is clear to the recipient of the postcard that the cited fee is only for the facility ID in question. As a point of clarification, the text of this year's postcards will make it apparent to recipients that the cited fee is only for the facility ID in question and does not include the recipient's fee obligation(s) for any supplemental services.

63. Finally, Mr. Brown responded to our solicitation for comments on migrating licensees to Fee Filer—our electronic payment software application available on the Commission's web site. Mr. Brown opposed any such mandatory migration to Fee Filer. He noted that last year the mandatory Internet browser to access all of the features of the Universal Licensing System (the FCC's licensing database for wireless services) and the mandatory Internet browser to access Fee Filer were not the same edition of browsers.⁷⁶

64. We will not at this time establish any thresholds (monetary amount of fee obligation, number of licenses held, etc.) for making use of Fee Filer mandatory. However, we strongly encourage regulatees to make their fee payments via Fee Filer regardless of the amount of fee obligation or number of licenses held. Through its evolution, Fee Filer has become an easy and convenient way to make fee payments on a timely basis. Regulatees who use Fee Filer do not expose themselves to the risk of unexpected slow mail delivery that could cause fee payments to be filed late and hence be subject to a 25% late payment penalty.

65. Regarding Mr. Brown's statement about mandatory browser requirements, while interface problems may prevent the Commission's Universal Licensing System (ULS) and Fee Filer Systems from being accessible via all models and editions of browsers, that does not mean that the Commission imposes browser requirements to access these automated systems. The ULS and Fee Filer systems were developed in different Commission offices, for different purposes, and are maintained by different technical support staff.

⁷⁴ Mr. Kenneth J. Brown Comments at 1.

⁷⁵ Mr. Kenneth J. Brown Comments at 1.

⁷⁶ Mr. Kenneth J. Brown Comments at 2.

66. The specific issue identified by Mr. Brown is that editions of Netscape's browsers in the 4.X series do not interface well with Fee Filer. Netscape first made its 4.X browsers available to the public in 2001 and these versions of Netscape's browsers are now rarely in use.⁷⁷ The Commission has been aware of the interface problem and attempted without success to resolve it. When customers access the Fee Filer system via a Netscape browser in the 4.X series, we prompt them with an automated message that they may experience interface problems and recommend that they upgrade their browser to a newer edition. Considering that 4.X is three years old, and that the life expectancy of a browser edition is considerably less than three years, the Commission believes that it is a wiser use of its resources to alert customers to the interface issue and encourage browser upgrades rather than spend further resources to resolve an interface problem with a legacy browser edition.

I. Procedures for Payment of Regulatory Fees

1. De minimis Fee Payment Liability

67. Regulatees whose total regulatory fee liability, including all categories of fees for which payment is due by an entity, amounts to less than \$10 are exempt from payment of regulatory fees in FY2004.

2. Standard Fee Calculations and Payment Dates

68. As in prior years, the responsibility for payment of fees by service category is as follows:

- a) **Media services:** The responsibility for the payment of regulatory fees rests with the holder of the permit or license as of October 1, 2003. However, in instances where a license or permit is transferred or assigned after October 1, 2003, responsibility for payment rests with the holder of the license or permit at the time payment is due.
- b) **Wireline (Common Carrier) Services:** Fees must be paid for any authorization issued on or before October 1, 2003. However, where a license or permit is transferred or assigned after October 1, 2003, responsibility for payment rests with the holder of the license or permit at the time payment is due.
- c) **Wireless Services: Commercial Mobile Radio Service (CMRS) cellular, mobile, and messaging services (fees based upon a subscriber, unit or circuit count):** The number of subscribers, units or circuits on December 31, 2003 will be used as the basis from which to calculate the fee payment. For small multi-year wireless services, the regulatory fee will be due at the time of authorization or renewal of the license, which is generally for a period of five or ten-years and paid throughout the year.
- d) **Cable Services (fees based upon a subscriber count):** The number of subscribers, units or circuits on December 31, 2003 will be used as the basis from which to

⁷⁷ Netscape currently offers the 6.X and 7.X editions of its browsers. Currently, fewer than 1% of customer visits to Fee Filer are done so via Netscape browsers in the 4.X series, and as newer editions of browsers are made available, fewer users will hold onto the 4.X series.

calculate the fee payment.⁷⁸ CARS licensees: Fees must be paid for any authorization issued on or before October 1, 2003.

- e) International Services: Earth stations, geostationary orbit space stations, international public fixed radio services and international broadcast stations: Payment is calculated per operational station. Non-geostationary orbit satellite systems: Payment is calculated per operational system. The responsibility for the payment of regulatory fees rests with the holder of the permit or license on October 1, 2003. However, in instances where a license or permit is transferred or assigned after October 1, 2003, responsibility for payment rests with the holder of the license or permit at the time payment is due. International bearer circuits: Payment is calculated per active circuit as of December 31, 2003.

69. The Commission strongly recommends that entities submitting more than twenty-five (25) Form 159-C's use the electronic Fee Filer program when sending in their regulatory fee payment. The Commission will, for the convenience of payers, accept fee payments made in advance of the normal formal window for the payment of regulatory fees.

J. Enforcement

70. Finally, as a reminder to all licensees, section 159(c) of the Communications Act requires us to impose an additional charge as a penalty for late payment of any regulatory fee. As in years past, A LATE PAYMENT PENALTY OF 25 PERCENT OF THE AMOUNT OF THE REQUIRED REGULATORY FEE WILL BE ASSESSED ON THE FIRST DAY FOLLOWING THE DEADLINE DATE FOR FILING OF THESE FEES. Failure to pay regulatory fees and/or any late penalty will subject regulatees to sanctions, including the provisions set forth in the Debt Collection Improvement Act of 1996 ("DCIA"). We also assess administrative processing charges on delinquent debts to recover additional costs incurred in processing and handling the related debt pursuant to the DCIA and §1.1940(d) of the Commission's Rules. These administrative processing charges will be assessed on any delinquent regulatory fee, in addition to the 25 percent late charge penalty. Partial underpayments of regulatory fees are treated in the following manner. The licensee will be given credit for the amount paid, but if it is later determined that the fee paid is incorrect or was submitted after the deadline date, the 25 percent late charge penalty will be assessed on the portion that is submitted after the filing window.

71. Furthermore, we recently amended our regulatory fee rules effective October 1, 2004, to provide that we will withhold action on any applications or other requests for benefits filed by anyone who is delinquent in any non-tax debts owed to the Commission (including regulatory fees) and will ultimately dismiss those applications or other requests if payment of the delinquent debt or other satisfactory arrangement for payment is not made. See 47 C.F.R. §§ 1.1161(c), 1.1164(f)(5), and 1.1910. Failure to pay regulatory fees can also result in the initiation of a proceeding to revoke any and all authorizations held by the delinquent payer.

⁷⁸ Cable system operators and MSOs that are not listed in any of the data sources indicated in this item are to compute their subscribers as follows: Number of single family dwellings + number of individual households in multiple dwelling unit (apartments, condominiums, mobile home parks, etc.) paying at the basic subscriber rate + bulk rate customers + courtesy and free service. Note: Bulk-Rate Customers = Total annual bulk-rate charge divided by basic annual subscription rate for individual households. Operators may base their count on "a typical day in the last full week" of December 2003, rather than on a count as of December 31, 2003.

III. PROCEDURAL MATTERS

72. Authority for this proceeding is contained in sections 4(i) and (j), 8, 9, and 303(r) of the Communications Act of 1934, as amended.⁷⁹ It is ordered that the rule changes specified herein be adopted. It is further ordered that the rule changes made herein will become effective 30 days after publication in the *Federal Register*. A Final Regulatory Flexibility Analysis (FRFA) has been performed and is found in Attachment A, and it is ordered that the Commission's Consumer And Governmental Affairs Bureau, Reference Information Center, send this to the Chief Counsel for Advocacy of the Small Business Administration (SBA). Finally, it is ordered that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

⁷⁹ See 47 U.S.C. §§ 154(i)-(j), 159, and 303(r).