

Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8-2177 Filed 2-5-08; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WC Docket No. 07-267; FCC 07-202]

Petition To Establish Procedural Requirements To Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission seeks comment regarding whether to adopt procedural rules to govern the Commission's consideration of petitions to forbear from enforcing rules that are alleged to be unnecessary or inconsistent with the public interest (forbearance petitions). The Commission is responding to arguments that current procedures governing consideration of forbearance petitions are unfair, and to several proposed new rules that would include, for example, requiring forbearance petitions to be complete-as-filed, and assigning the burden of proof on parties that file forbearance petitions. The Commission intends both to solicit comment on the proposals before it and to encourage suggestions of other rules that the Commission should consider that would govern the form and content of forbearance petitions.

DATES: Comments are due March 7, 2008 and Reply Comments are due March 24, 2008. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before April 7, 2008.

ADDRESSES: You may submit comments, identified by WC Docket No. 07-267, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site:* <http://www.fcc.gov/cgb/ecfs/>. Follow the instructions for submitting comments.

- *E-mail:* ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response. Include the docket number in the subject line of the message.

- *Mail:* Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov or phone: 202-418-0530 or TTY: 202-418-0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. In addition to filing comments with the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to the Federal Communications Commission via e-mail to PRA@fcc.gov and to Nicholas A. Fraser, Office of Management and Budget, via e-mail to Nicholas_A._Fraser@omb.eop.gov or via fax at 202-395-5167.

FOR FURTHER INFORMATION CONTACT: Jonathan Reel, Wireline Competition Bureau, (202) 418-1580. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Jerry R. Cowden at (202) 418-0447, or via the Internet at PRA@fcc.gov.

SUPPLEMENTARY INFORMATION: Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file Comments on or before March 7, 2008 and Reply Comments on or before March 24, 2008. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121, May 1, 1998.

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

- For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or

rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

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

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

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

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

Initial Paperwork Reduction Act of 1995 Analysis

This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

Synopsis of the Notice of Proposed Rulemaking

Petition To Establish Procedural Requirements To Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended

1. In this Notice of Proposed Rulemaking (*NPRM*), the Commission addresses the Petition filed on September 19, 2007 by Covad Communications Group, NuVox Communications, XO Communications, LLC, Cavalier Telephone Corp., and McLeod USA Telecommunications Services, Inc. (Petitioners or Covad, *et al.*) asking the Commission to consider the adoption of procedural rules to govern the Commission's consideration of petitions for forbearance pursuant to the Communications Act of 1934, as amended (Act).

2. Pursuant to section 10 of the Act, the Commission is required to forbear from any statutory provision or regulation if it determines that: (1) Enforcement of the regulation is not necessary to ensure that the telecommunications carrier's charges, practices, classifications, or regulations are just, reasonable, and not unjustly or

unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest. In determining whether forbearance is consistent with the public interest, the Commission also must consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions. In addition, section 332(c)(1)(A) of the Act authorizes the Commission to "forbear" from applying the provisions of Title II to commercial mobile radio service (CMRS) providers, except for sections 201, 202, and 208, if certain criteria are satisfied. In particular, the Commission may exercise its forbearance authority pursuant to section 332 if it determines that: (1) Enforcement of the requirement is unnecessary to ensure that rates are just, reasonable, and non-discriminatory; (2) the requirement is not needed to protect consumers; and (3) forbearance is consistent with the public interest. The Commission also must consider whether any proposed forbearance from the requirements of Title II will enhance competition among CMRS providers.

3. The Commission seeks comment in general on the need for procedural rules to govern the Commission's consideration of petitions for forbearance pursuant to section 10 and/or section 332 (collectively, forbearance petitions), and with respect to the issues raised and rules proposed by the Petitioners in particular. For example, the Petitioners cite the need to apply Administrative Procedure Act (APA) notice-and-comment rules to forbearance petitions. The Petitioners state that to date the Commission's practice has been to provide interested parties with the opportunity to comment on a forbearance petition. Petitioners argue, however, that the Commission should institutionalize this practice to ensure that potentially-affected parties have a well-defined right to have their views taken into account. The Commission seeks comment both on the Petitioners' specific proposal and, more generally, on how the Commission should provide notice and an opportunity to comment in forbearance proceedings.

4. The Petitioners also request the adoption of rules governing the format and content of forbearance petitions, including a complete-as-filed requirement. In particular, the Petitioners contend that a complete-as-filed rule would facilitate Commission review and would help ensure that all interested parties have a full and fair

opportunity to present their views to the Commission. The Petitioners note that the Commission has adopted similar requirements in other circumstances, such as section 271 proceedings and formal complaint proceedings subject to statutory deadlines. The Commission seeks comment on the Petitioners' specific proposal for complete-as-filed requirements, including whether the Commission should specify certain information necessary for a *prima facie* showing that forbearance is warranted as the Petitioners recommend. The Commission also seeks comment on the Petitioners' proposal for a rule specifying that the forbearance petitioner has the burden of proof. The Commission also seeks comment on whether there are other particular rules governing the form and content of forbearance petitions that the Commission should consider.

5. In addition, the Petitioners propose that the Commission require a forbearance petitioner to separately demonstrate how it has satisfied each component of the forbearance standard. They assert that such a requirement is consistent with the Commission's pleading requirements in other contexts. The Petitioners contend that, in past practice, petitioners have failed to address each element of the section 10 standard individually, instead generally asserting that the forbearance criteria are satisfied with respect to all of the regulations and statutory provisions from which they are seeking forbearance. The Commission seeks comment on the Petitioners' specific proposal, including its relationship to the section 10 or section 332 forbearance standard and the Commission's forbearance analysis set forth in prior orders.

6. The Commission also seeks comment on the Petitioners' request that the Commission adopt particular rules addressing the scope and interpretation of protective orders in forbearance proceedings. The Petitioners suggest rules governing the timing of adoption of protective orders and the terms of access to, and use of, documents and information submitted pursuant to those protective orders. For example, the Petitioners suggest that all interested parties should be permitted to obtain copies of confidential and highly confidential documents. In addition, the Petitioners recommend that parties be allowed to use information submitted pursuant to protective order in one forbearance proceeding in other Commission forbearance proceedings in which a petitioning party seeks relief from the same rules and/or statutory provisions and that states be permitted

to use documents designated as Confidential and Highly Confidential in related state proceedings. The Commission seeks comment on the Petitioners' specific proposals, as well as any other comments regarding the submission of, access to, and use of documents and information covered by protective orders in forbearance proceedings. The Commission also seeks comment specifically on the relationship between the rules proposed by Petitioners or other commenters and the Commission's rules and precedent regarding information withheld from public inspection.

7. The Petitioners further seek rules establishing a timetable for Commission proceedings addressing forbearance petitions, which, among other things, incorporates a limited period for a petitioning party to cure minor defects in its petition without having to re-start the statutory clock, provides a specific vehicle for state commission input in the forbearance process; addresses motions to dismiss, and establishes a standard comment cycle; as well as a time limit on substantive *ex parte* submissions and other requirements. The Commission seeks comment on each of the proposals suggested by the Petitioners, as well as their general recommendation for the adoption of specific timetables for the Commission's review of forbearance petitions. The Commission also seeks comment on other proposals for steps the Commission could take to facilitate the participation of state commissions, as well as other parties, in forbearance proceedings.

8. The Petitioners propose that the Commission adopt additional requirements for petitions seeking forbearance from sections 251 and/or 271 of the Act. For example, the Petitioners propose that petitioners seeking forbearance from sections 251 or 271 must provide supporting data at the wire center level. The Petitioners further propose that the Commission adopt a rule inviting states to report to the Commission on the potential effects of sections 251 and/or 271 forbearance in their states.

9. The Petitioners also suggest certain procedural requirements governing the resolution of forbearance petitions, including a proposal that the Commission adopt a rule requiring the issuance of a written order on all forbearance petitions, including those petitions that previously have been "deemed granted." The Commission seeks comment on that proposal.

10. To the extent that the Commission adopts procedural rules to govern forbearance petitions, the Petitioners

request that those rules apply both to forbearance petitions filed in the future, as well as forbearance petitions already pending before the Commission. The Commission seeks comment on the extent of the Commission's authority to adopt procedural rules governing both future forbearance petitions as well as those that already are pending before the Commission, particularly with respect to the procedural rules proposed by the Petitioners. The Commission also seeks comment on the propriety, as a policy matter, of extending particular procedural rules in such manner.

11. In recent years, the Commission has witnessed a significant increase in the number of petitions seeking forbearance submitted by telecommunications carriers that the Commission oversees. These petitions have had different results, such as petitions being approved, denied, withdrawn or deemed granted. In the course of Congressional oversight, some Members of Congress have raised concerns with how forbearance is used. Some companies have indicated serious concerns with the forbearance process, while others argue that it is an important tool for the Commission to eliminate rules, consistent with the public interest. The Commission therefore seeks comment on whether forbearance is an effective means for the Commission to make changes to its regulations. The Commission also seeks comment on whether forbearance is being utilized for the purposes intended by Congress. The Commission asks whether there are unintended consequences of forbearance, such as a focus on these petitions at the expense of other industry-wide proceedings, including burdens on stakeholders from forbearance proceedings, such as administrative and financial costs. The Commission asks whether there are additional burdens placed on stakeholders due to the fact that there is a statutory deadline on the completion of forbearance petitions. The Commission also seeks comment regarding the effects of having a company-specific petition drive agency decisions, rather than the Commission deciding to take industry-wide actions.

12. Finally, the Commission seeks comment on any other aspects of the Petition, as well as any other comments regarding the need for any other procedural rules to govern the Commission's consideration of forbearance petitions. The Commission also invites comment on the possible effect on small entities from adopting any of the Petitioners' proposed rules, or variations of those proposals set forth above. To the extent that the

Commission were to adopt any procedural rules governing forbearance petitions proposed by the Petitioners or otherwise justified in the record, the Commission asks what would be the appropriate remedy for a violation of those rules.

Ex Parte Presentations

13. The rulemaking this *NPRM* initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required. Other requirements pertaining to oral and written presentations are set forth in § 1.1206(b) of the Commission's rules.

Initial Regulatory Flexibility Analysis

14. As required by the Regulatory Flexibility Act of 1980, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth separately below. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA. Comments are due March 7, 2008 and Reply Comments are due March 24, 2008.

Paperwork Reduction Act

15. This document contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

Accessible Formats

16. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer &

Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov; phone: 202-418-0530 or TTY: 202-418-0432.

Initial Regulatory Flexibility Analysis

17. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities that might result from this *NPRM*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* provided above. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the *NPRM* and the IRFA (or summaries thereof) will be published in the **Federal Register**.

A. Need For, and Objectives Of, the Proposed Rules

18. In this *NPRM*, we seek comment on whether the Commission should adopt procedural rules governing its consideration of petitions for forbearance pursuant to section 10 or section 332 of the Act. In particular, we seek comment on the need to apply APA notice-and-comment rules to forbearance petitions. We also seek comment on the burdens of proof and production in forbearance proceedings. Additionally, we seek comment on whether to adopt rules governing the form and content of forbearance petitions, including possibly a "complete-as-filed" requirement and a requirement that the petitioner demonstrate that it has satisfied each element of the forbearance standard. Further, we solicit comment on the need for rules governing the scope and interpretation of protective orders in forbearance proceedings. In addition, we seek comment on the need for rules establishing timetables for Commission proceedings addressing forbearance petitions. In the *NPRM*, we also seek comment on whether additional rules are warranted for petitions seeking forbearance from section 251 or section 271 of the Act. We further seek comment on whether we should adopt procedural requirements governing the resolution of forbearance petitions. We also seek comment on the need for any other procedural rules governing

forbearance petitions, the scope of application of such rules, and the appropriate remedies for violation should the Commission adopt such rules. For each of these issues, we seek comment on the possible effects on small entities, associated with any rules the Commission might adopt.

B. Legal Basis

19. The legal basis for any action that may be taken pursuant to this *NPRM* is contained in sections 1, 4(i), 4(j), 10, 303, 332 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)-(j), 160, 303, 332, 403.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules May Apply

20. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

21. Small Businesses. Nationwide, there are a total of 22.4 million small businesses, according to SBA data.

22. Small Organizations. Nationwide, there are approximately 1.6 million small organizations.

23. Small Governmental Jurisdictions. The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States. We estimate that, of this total, 84,377 entities were "small governmental jurisdictions." Thus, we estimate that most governmental jurisdictions are small.

24. Incumbent Local Exchange Carriers (ILECs). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications

Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

25. Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers." Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 94 have more than 1,500 employees. In addition, 12 carriers have reported that they are "Shared-Tenant Service Providers," and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are "Other Local Service Providers." Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our proposed action.

26. Interexchange Carriers (IXCs). Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 316 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 292 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority

of IXC's are small entities that may be affected by our proposed action.

27. International Service Providers. There is no small business size standard developed specifically for providers of international service. The appropriate size standards under SBA rules are for the two broad census categories of "Satellite Telecommunications" and "Other Telecommunications." Under both categories, such a business is small if it has \$13.5 million or less in average annual receipts.

28. The first category of Satellite Telecommunications "comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications." For this category, Census Bureau data for 2002 show that there were a total of 371 firms that operated for the entire year. Of this total, 307 firms had annual receipts of under \$10 million, and 26 firms had receipts of \$10 million to \$24,999,999. Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

29. The second category of Other Telecommunications "comprises establishments primarily engaged in (1) providing specialized telecommunications applications, such as satellite tracking, communications telemetry, and radar station operations; or (2) providing satellite terminal stations and associated facilities operationally connected with one or more terrestrial communications systems and capable of transmitting telecommunications to or receiving telecommunications from satellite systems." For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year. Of this total, 259 firms had annual receipts of under \$10 million and 15 firms had annual receipts of \$10 million to \$24,999,999. Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

30. Wireless Service Providers. The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging" and "Cellular and Other Wireless Telecommunications." Under both categories, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. For the

census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, under this second category and size standard, the majority of firms can, again, be considered small.

31. Cellular Licensees. The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging" and "Cellular and Other Wireless Telecommunications." Under both categories, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, under this second category and size standard, the majority of firms can, again, be considered small.

32. Common Carrier Paging. As noted, the SBA has developed a small business size standard for wireless firms within the broad economic census categories of "Cellular and Other Wireless Telecommunications." Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, U.S. Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year. Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more. Thus, under

this category and associated small business size standard, the great majority of firms can be considered small.

33. In addition, in the Paging Second Report and Order, the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. The SBA has approved this definition. An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold. One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses. Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent Trends in Telephone Service, 408 private and common carriers reported that they were engaged in the provision of either paging or "other mobile" services. Of these, we estimate that 589 are small, under the SBA-approved small business size standard. We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

34. Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these definitions. The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities,

and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670–1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

35. **Wireless Telephony.** Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The SBA has developed a small business size standard for “Cellular and Other Wireless Telecommunications” services. Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to Trends in Telephone Service data, 437 carriers reported that they were engaged in wireless telephony. We have estimated that 260 of these are small under the SBA small business size standard.

36. **Broadband Personal Communications Service.** The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years. For Block F, an additional small business size standard for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 “small” and “very small” business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.

38. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of

188 C Block licenses and 21 F Block licenses in Auction No. 58. There were 24 winning bidders for 217 licenses. Of the 24 winning bidders, 16 claimed small business status and won 156 licenses.

39. **Narrowband Personal Communications Services.** The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less. Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order. A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million. A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million. The SBA has approved these small business size standards. A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

40. **Lower 700 MHz Band Licenses.** We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. We have defined a “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years. A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years. Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is “entrepreneur,” which is defined as an entity that, together with its affiliates

and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. The SBA has approved these small size standards. An auction of 740 licenses (one license in each of the 734 MSAs/RSA and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses. Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses. On July 26, 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band (Auction No. 60). There were three winning bidders for five licenses. All three winning bidders claimed small business status.

41. **Upper 700 MHz Band Licenses.** In *Service Rules for the 746–764 and 776–794 MHz Bands*, 16 FCC Rcd 1239 (January 12, 2001), the Commission authorized service in the upper 700 MHz band. This auction, previously scheduled for January 13, 2003, has been postponed.

42. **700 MHz Guard Band Licenses.** In the 700 MHz Guard Band Order, we adopted size standards for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years. Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years. SBA approval of these definitions is not required. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were

sold to three bidders. One of these bidders was a small business that won a total of two licenses.

43. Fixed Microwave Services. Fixed microwave services include common carrier, private operational-fixed, and broadcast auxiliary radio services. At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees. The Commission does not have data specifying the number of these licensees that have no more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer common carrier fixed licensees and 61,670 or fewer private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies proposed herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

44. 39 GHz Service. The Commission created a special small business size standard for 39 GHz licenses—an entity that has average gross revenues of \$40 million or less in the three previous calendar years. An additional size standard for "very small business" is: An entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years. The SBA has approved these small business size standards.

The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000.

The 18 bidders who claimed small business status won 849 licenses.

45. Local Multipoint Distribution Service. Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS

licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years. An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years. The SBA has approved these small business size standards in the context of LMDS auctions. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses that won 119 licenses.

46. 218–219 MHz Service. The first auction of 218–219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs). Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years. In the 218–219 MHz Report and Order and Memorandum Opinion and Order, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding \$15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding \$3 million for the preceding three years. The SBA has approved of these definitions. A subsequent auction is not yet scheduled. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this analysis that in future auctions, many, and perhaps most, of the licenses may be awarded to small businesses.

47. Rural Radiotelephone Service. The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service. A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS). In the present context, we will

use the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," i.e., an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

48. Incumbent 24 GHz Licensees. This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of "Cellular and Other Wireless Telecommunications" companies. This category provides that such a company is small if it employs no more than 1,500 persons. For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, under this second category and size standard, the majority of firms can, again, be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent and TRW, Inc. It is our understanding that Teligent and its related companies have fewer than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

49. Future 24 GHz Licensees. With respect to new applicants in the 24 GHz band, we have defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding \$15 million. "Very small business" in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding

three years. The SBA has approved these definitions. The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

50. Should the Commission decide to adopt any procedural rules governing petitions for forbearance, the associated rules potentially could modify or impose new reporting or recordkeeping requirements. For example, we seek comment on the possible need for rules governing the form and content of forbearance petitions, such as “complete-as-filed” requirements and obligations for forbearance petitioners to demonstrate that they have satisfied each element of the forbearance standard. The Commission also seeks comment on the possible need or rules governing the scope and interpretation of protective orders in forbearance proceedings, including rules governing the submission of, access to, and use of information submitted pursuant to protective orders in forbearance proceedings. In addition, we seek comment on the need for rules establishing timetables for Commission proceedings addressing forbearance petitions, including requirements governing modification of forbearance petitions and processes for ex parte filings. We further seek comment on whether we should adopt procedural requirements governing petitions for reconsideration of forbearance decisions. The Commission also seeks comment on the need for any other procedural rules governing forbearance petitions, the scope of application of such rules, and the appropriate remedies for violation should the Commission adopt such rules. These proposals may impose additional reporting and recordkeeping requirements on entities. Also, we seek comment on the effects of any of these proposals on small entities. Entities, especially small businesses, are encouraged to quantify the costs and benefits or any reporting requirement that may be established in this proceeding.

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

51. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) The establishment of differing compliance or reporting

requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

52. The Commission’s primary objective is to implement the “pro-competitive, deregulatory” framework established in sections 10 and 332 of the Act. We seek comment on the burdens, including those placed on small carriers, associated with related Commission rules and whether the Commission should adopt different requirements for small businesses.

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

53. None.

Ordering Clauses

54. Accordingly, *it is ordered* that pursuant to sections 1, 4(i), 4(j), 10, 303, 332 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–(j), 160, 303, 332, 403, this Notice of Proposed Rulemaking in WC Docket No. 07–267 *is adopted*.

55. *It is further ordered* that the Covad, et al. Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended, WC Docket No. 07–267 (filed Sept. 19, 2007), *is granted* to the extent indicated herein and otherwise *is denied*.

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

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–2180 Filed 2–5–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 226

[Docket No. 070801431–7787–01]

RIN 0648–AV35

Endangered and Threatened Species; Critical Habitat for Threatened Elkhorn and Staghorn Corals

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

ACTION: Proposed rule; request for comments.

SUMMARY: We, the National Marine Fisheries Service (NMFS), propose to designate critical habitat for elkhorn (*Acropora palmata*) and staghorn (*A. cervicornis*) corals, which we listed as threatened under the Endangered Species Act of 1973, as amended (ESA), on May 9, 2006. Four specific areas are proposed for designation: the Florida unit, which comprises approximately 3,301 square miles (8,671 sq km) of marine habitat; the Puerto Rico unit, which comprises approximately 1,383 square miles (3,582 sq km) of marine habitat; the St. John/St. Thomas unit, which comprises approximately 121 square miles (313 sq km) of marine habitat; and the St. Croix unit, which comprises approximately 126 square miles (326 sq km) of marine habitat. We propose to exclude one military site, comprising approximately 47 square miles (123 sq km), because of national security impacts.

We are soliciting comments from the public on all aspects of the proposal, including our identification and consideration of the positive and negative economic, national security, and other relevant impacts of the proposed designation, and the areas we propose to exclude from the designation. A draft impacts report prepared pursuant to section 4(b)(2) of the ESA in support of this proposal is also available for public review and comment.

DATES: Comments on this proposal must be received by May 6, 2008. Public hearings will be held; see **SUPPLEMENTARY INFORMATION** for dates and locations.

ADDRESSES: You may submit comments, identified by the Regulation Identifier Number (RIN) 0648–AV35, by any of the following methods:

Electronic Submissions: Submit all electronic public comments via the