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DISPATCH

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

In the Matter of	)	
	)	
Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services	)	WT Docket No. 94-148
	)	
Amendment of Part 21 of the Commission's Rules for the Domestic Public Fixed Radio Services	)	CC Docket No. 93-2
	)	
McCaw Cellular Communications, Inc. Petition for Rule Making	)	RM-7861
	)	
Amendment of Part 101 of the Commission's Rules to Streamline Processing of Microwave Applications in the Wireless Telecommunications Services	)	WT Docket No. 00-19
	)	
Telecommunications Industry Association Petition for Rulemaking	)	RM-9418

MEMORANDUM OPINION AND ORDER
AND NOTICE OF PROPOSED RULE MAKING

Adopted: February 2, 2000 **Released: February 14, 2000**

Comment Date: [30 days after publication in the Federal Register]
Reply Comment Date: [45 days after publication in the Federal Register]
(Comments to be filed in WT Docket No. 00-19 and RM-9418 only.)

By the Commission:

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In the *Report and Order* in WT Docket No. 94-148 and CC Docket No. 93-2, the Commission consolidated the rules for the common carrier and private operational fixed (POFS) microwave services contained in Parts 21 and 94, respectively, of the Commission's Rules to create a new Part 101 (*Part 101 Order*).[1] The *Memorandum Opinion and Order* portion of this action addresses the pending petitions for reconsideration and clarification of the *Part 101 Order*. Because the majority of the petitioners' suggested clarifications contribute significantly to more readily understood rules, we have modified certain Part 101 provisions accordingly. In addition, we, on our own motion, adopt other changes that improve the clarity and completeness of our Part 101 rules. We decline, however, to adopt several of the substantive changes suggested, either because the suggested changes already were considered and rejected, or because they are more appropriately raised in the context of a separate proceeding. The significant decisions in this *Memorandum Opinion and Order* are as follows:

- Until a more sufficient record can be developed, we decline to change the rule prohibiting POFS licensees from using the 11 GHz band as the "final link" for the delivery of video programming to cable television (CATV) systems, multipoint distribution systems (MDS), and master antenna television (MATV) systems.

- We decline to reinstate the requirement that POFS applications be placed on public notice thirty days prior to the date the application is granted, but will continue to release an informal listing of such applications.

- Until a more sufficient record can be developed, we retain the rule prohibiting POFS licensees from handling common carrier traffic.

- We modify Parts 24, 25, 74, and 78 to substitute references to the new Part 101 and to remove references therein to former Parts 21 and 94.

- We clarify and incorporate necessary clerical changes to certain rules.

2. In the *Notice of Proposed Rule Making* portion of this document, we propose eliminating

[1]Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, *Report and Order*, WT Docket No. 94-148, 11 FCC Rcd 13449 (1996) (*Part 101 Order*).

regulations that are duplicative, outmoded, or otherwise unnecessary. We seek to further the work begun by the consolidation of Parts 21 and 94 into a single Part 101 in the *Part 101 Order* and in our implementation of a Universal Licensing System (ULS) for wireless applications. The new consolidated Part 101 reduces or eliminates the differences in processing applications between common carriers and private operational fixed microwave service licensees, and furthers regulatory parity between these microwave services.[2] Once fully deployed, the ULS will eliminate the need for wireless carriers to file duplicative applications, and will increase the accuracy and reliability of licensing information.[3] In addition, we note that SBC Communications has similarly proposed that the Commission consolidate and/or streamline rules concerning wireless radio services to remove duplication.[4] Applicants, licensees and related industries are invited to examine these rules and procedures and offer their view and explanations of ways to streamline them and to make sure that the regulations conform with the Communications Act of 1934, as amended (Act).[5]

3. Specifically, we seek comment on the following issues:

- grandfathering certain POFS licensees who formerly carried private traffic now classified as common carrier traffic, or eliminating the prohibition on POFS licensees offering common carrier services;

- revising Parts 74, 78, 90, and 101 for shared use of certain frequency bands;

- deleting several unnecessary or redundant sections of the rules concerning forms, notifications, and technical standards;

- clarifying conditional operations in the four low power frequency pairs in the 23 GHz band in Section 101.31(b)(vii);

- updating the transmitter frequency tolerance table in Section 101.107, and correcting and

[2]*Part 101 Order*, 11 FCC Rcd at 13452-53.

[3]Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, WT Docket No. 98-20, 13 FCC Rcd 21027, 21031, 63 Fed. Reg. 68904 (1998) (*ULS Proceeding*); *see also* Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Notice of Proposed Rulemaking*, WT Docket No. 98-20, 13 FCC Rcd 9672 (1998) (*ULS Notice*). Generally, issues relating to the consolidation of Part 101 procedural rules were handled in the *ULS Proceeding*, while this item deals with technical and regulatory issues that are unique to microwave services. The *ULS Proceeding* replaced FCC Form 415 with FCC Form 601, so substitute Form 601 wherever the *Part 101 Order* referred to FCC Form 415. *ULS Proceeding*, 13 FCC Rcd at 21037. *See also* Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order*, WT Docket No. 98-20, FCC 99-139, (rel. Jun. 28, 1999).

[4]*See* SBC Communications, Inc. Petition for Section 11 Biennial Review at vii, 35-36 (filed May 8, 1998) (SBC Petition).

[5]Communications Act of 1934, as amended, 47 U.S.C § 151, *et seq.*

clarifying other minor technical rules;

- allowing conditional operation in the 952.95-956.15 and 956.55-959.75 MHz bands.

4. We note that some of the proposed rule changes are procedural in nature, and thus are exempt from notice and comment requirements pursuant to Section 553(b)(3)(A) of the Administrative Procedure Act.[6] However, as a result of the consolidation of Parts 21 and 94, we realize that the combination of common carrier and private microwave rules and procedures requires a period of adjustment. We believe that this approach will afford the public an opportunity to provide feedback on how these adjustments are succeeding or failing.

5. We also address a Petition for Rulemaking filed by the Telecommunications Industry Association (TIA).[7] The *TIA Petition* focuses on permitting conditional authorization in the 23 GHz band, making the 23 GHz band more accessible to fixed service users, and modifying antenna standards for the 10 GHz and 23 GHz bands to allow for more hops and longer paths. TIA also proposes rule changes to Part 74, Television Broadcast Auxiliary Service, to permit transport of digital transmissions over point-to-point microwave frequencies in that service.[8] We seek comment on the following proposals regarding the 23 GHz band:

- permitting conditional licensing;
- rechannelizing the band into 50, 40, 30, 20, 10, 5, and 2.5 MHz channels;
- permitting common carrier and POFS users to share the entire band;
- changing the frequency tolerance to 0.001%;
- requiring spectrum efficiency of one bit-per-second per Hertz (1 bps/Hz);
- designating 200 MHz for low power, limited coverage systems;
- modifying the antenna standards.

We also seek comment regarding modifying the antenna standards in the 10 GHz band.

6. In addition, we seek comment regarding whether, and how, our licensing approach in Part 101 should be modified to implement the Balanced Budget Act of 1997 (Balanced Budget Act).[9] We seek input on the best licensing structure to ensure that spectrum above the 2 GHz band is licensed efficiently and used in the public interest, including the following issues regarding whether we should substantially alter microwave licensing above 2 GHz in light of the Balanced Budget Act:

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[6]*See* 5 U.S.C. § 552(b)(3)(A).

[7]TIA Petition for Rulemaking (filed Mar. 5, 1998) (TIA Petition).

[8]This item will address this proposal only insofar as it overlaps with Part 101. The proposals for Part 74 are beyond the scope of this proceeding and will be handled in a separate proceeding.

[9]Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251.

- We present several options for reinventing the licensing process for Part 101 spectrum consistent with our auction procedures.

- We request comment on how to segregate exempted spectrum from the auctions process.

- We request comment on whether to require the licensees where we use geographic licensing to develop agreements between each other on how to utilize their spectrum, especially along the boundaries between areas and/or where there is line-of-sight into another area, to achieve the most efficient and effective use in each geographic area.

- We request comment about the possible technologies for terrestrial microwave users concerning a new proposal for frequency reuse in the 12.2.-12.7 GHz band.

- We request comment on whether it is appropriate to forbear from enforcing any provision of the Communications Act of 1934, as amended, or the Commission's rules with respect to Part 101 services.[10]

In addition, we issued a *Notice of Proposed Rule Making* seeking comment on how to implement the Balanced Budget Act generally, but we did not specifically address fixed microwave services in that proceeding.[11] We will consider the record in both proceedings in deciding whether or how Part 101 should be modified to conform to the Balanced Budget Act.

II. BACKGROUND

7. *Regulatory Framework.* Communications services that use the microwave spectrum[12] for fixed services include common carriers (formerly regulated by Part 21); common carrier Multiple Address Systems (MAS) (Part 22);[13] international point-to-point operators (Part 23); space station and satellite earth station operators such as Digital Audio Radio Service (DARS) (Part 25); AM, FM, and TV broadcasters for studio-to-transmitter links (STL) or inter-city relays (ICR) (Part 74); CATV operators (Part 78); MDS operators (Part 21); and POFS users (formerly Part 94).[14] Fixed microwave spectrum is primarily used to deliver video (such as Local Television Transmission Service (LTTS)), audio, data, and control functions for other specific communications services such as Local Multipoint Distribution

[10]*See* 47 U.S.C. § 160(a).

[11]*See* Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Notice of Proposed Rule Making*, WT Docket No. 99-87, 14 FCC Rcd 5206 (1999) (*BBA Notice*).

[12]Part 101 defines microwave frequencies as those of 890 MHz or above. *See* 47 C.F.R. § 101.3; *see also* Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, *Notice of Proposed Rulemaking*, WT Docket No. 94-148, 10 FCC Rcd 2508, 2509 n.2 (1994) (*Part 101 Notice*).

[13]Common carrier MAS are point-to-multipoint systems governed by Part 22 of the Rules. *See* 47 C.F.R. § 22.621; *see also* Amendment of the Commission's Rules Regarding Multiple Address Systems, *Further Notice of Proposed Rulemaking*, WT Docket No. 97-81, FCC 99-101, n.2 (rel. July 1, 1999) (*MAS Further Notice*); Amendment of the Commission's Rules Regarding Multiple Address Systems, *Notice of Proposed Rulemaking*, WT Docket No. 97-81, 12 FCC Rcd 7973, 7974 n.1 (1997) (*MAS Notice*).

[14]*Part 101 Order*, 11 FCC Rcd at 13451.

Service (LMDS) and Digital Electronic Message Service (DEMS) from one point and/or hub to other points and/or subscribers for distribution. A convergence of common carrier and POFS technical standards has occurred over the last decade as a result of several rule making proceedings.[15] In addition, the reallocation of five bands above 3 GHz, on a co-primary basis, to common carrier and POFS microwave licensees relocating from the 1850-1990, 2110-2150, and 2160-2200 MHz bands (2 GHz bands) has significantly impacted fixed microwave services.[16] As a result of the reallocation of spectrum for emerging technologies and the associated increase in frequency band-sharing, common carrier and private microwave industry members united to develop joint interference standards and coordination procedures. TIA's Fixed Point-to-Point Microwave Engineering Committee collaborated with the National Spectrum Managers Association, Inc. (NSMA), a group of frequency coordinators for microwave applicants, to determine interference criteria for microwave spectrum users, resulting in 1994 in a revised TIA Telecommunications Systems Bulletin TSB 10-F, "Interference Criteria for Microwave Systems." The industry's collaboration and coordination agreements greatly assisted the Commission in consolidating Parts 21 and 94 of the Rules, and signaled the industry's desire to have common carrier and POFS microwave services treated in the same fashion when appropriate.

8. On December 28, 1994, the Commission released a *Notice of Proposed Rule Making* in WT Docket No. 94-148 (*Part 101 Notice*).[17] The *Part 101 Notice* proposed simplifying the rules for the Part 21 common carrier and Part 94 POFS microwave services, and consolidating them into a new Part 101. In a separate *Notice of Proposed Rule Making* in CC Docket No. 93-2 (*Point-to-Point Notice*),[18] the Commission proposed revising Part 21 to eliminate certain reporting requirements and to allow common carrier microwave applicants to begin constructing facilities prior to the grant of authorizations.[19] The Commission consolidated the two proceedings, and, on February 8, 1996, adopted most of the proposals in the *Part 101 Order*.[20]

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[15]*See e.g.*, Amendment of Parts 1, 21, 22, 74 and 94 of the Commission's Rules to Establish Service and Technical Rules for Government and Non-government Fixed Service Usage of the Frequency Bands 932-935 MHz and 941-944 MHz, *First Report and Order*, Gen. Docket No. 82-243, 6 FCC Rcd 4320 (1991); Establishment of a Spectrum Utilization Policy for the Fixed and Mobile Services' Use of Certain Bands Between 947 MHz and 40 GHz, *Third Report and Order*, Gen. Docket No. 82-334, 2 FCC Rcd 1050 (1987); Authorizing Private Carrier Systems in the Private Operational-Fixed Microwave Radio Service, *First Report and Order*, PR Docket No. 83-426, 50 Fed. Reg. 13338 (1985); Use of Radio in Digital Termination Systems and in Point-to-Point Microwave Radio Systems for Provision of Digital Electronic Message and Other Specific Services, *Second Report and Order*, Gen. Docket No. 79-188, 48 Fed. Reg. 50322 (1983); Amendment of Part 94 of the Commission's Rules and Regulations to Facilitate Operation of Low Power, Limited Coverage Systems in the 22.0-23.6 GHz Band, *First Report and Order*, PR Docket No. 79-337, 81 FCC 2d 140 (1980).

[16]*See* Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *Second Report and Order*, ET Docket No. 92-9, 8 FCC Rcd 6495 (1993) (*Emerging Technologies Second Report and Order*).

[17]*Part 101 Notice*, 10 FCC Rcd at 2508.

[18]Amendment of Part 21 of the Commission's Rules for the Domestic Public Fixed Radio Services, *Notice of Proposed Rule Making*, CC Docket No. 93-2, 8 FCC Rcd 1112 (1993) (*Point-to-Point Notice*).

[19]Herein we use "authorization" as a generic term which could refer to a license, special temporary authority, assignment of license, transfer of control, or any other order or instrument of authority that the Commission may grant.

[20]*Part 101 Order*, 11 FCC Rcd at 13449.

9. The *Part 101 Order* created one comprehensive rule part setting forth application processing rules, technical standards, and operational requirements for microwave spectrum, including DEMS (a two-way end-to-end fixed radio service utilizing digital termination systems for the exchange of digital information), the Private Operational Fixed Point-to-Point Microwave Service (a private radio service rendered on microwave frequencies on fixed and temporary fixed stations between points within the United States or between points in the United States and points in Canada or Mexico), the Common Carrier Fixed Point-to-Point Microwave Service (a common carrier public radio service rendered on microwave frequencies on fixed and temporary fixed stations between such points), and LTTS (a public radio communication service for the transmission of television material and related communications).[21] Soon thereafter, the Commission adopted rules for LMDS (a fixed one-way or two-way point-to-point or point-to-multipoint radio service that may be interconnected with the public switched telephone network), and added them to Part 101.[22] Each of these services shares at least some frequencies with at least one other Part 101 service, and some frequencies are shared with government users.[23] Most Part 101 application processing rules, technical standards, and operational requirements apply to all Part 101 services, but others apply only to specific services,[24] or to common carrier services but not private services (or *vice versa*).[25]

10. *Auctionability of Fixed Microwave Bands*. Section 309(j)(2) of the Communications Act formerly stated that mutually exclusive applications for initial licenses or construction permits were auctionable if the principal use of the spectrum was for subscriber-based services, and competitive bidding would promote the expressed objectives of the Act.[26] Based on this standard, the Commission found all Part 94 spectrum to be non-auctionable because the principal use of the POFS was not subscriber-based,[27] and found all Part 21 common carrier point-to-point microwave frequencies to be non-auctionable because using auctions to award licenses for intermediate links would not promote the

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[21] *Id.* at 13451, 13497-505; *see* 47 C.F.R. § 101.3. The Multipoint Distribution Service (MDS), included in Part 21 (Subpart K), was unaffected by this proceeding. Common carrier and non-common carrier MDS licensees and applicants continue to be subject to the current MDS rules and application filing procedures.

[22] Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, CC Docket No. 92-297, 12 FCC Rcd 12545, 12725-62 (1997) (*LMDS Second Report and Order*); Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *First Report and Order and Fourth Notice of Proposed Rulemaking*, CC Docket No. 92-297, 11 FCC Rcd 19005, 19064-70 (1996).

[23] *See* 47 C.F.R. § 101.147(a).

[24] *See, e.g.*, 47 C.F.R. §§ 101.21(e), 101.61(c).

[25] *See, e.g.*, 47 C.F.R. §§ 101.13, 101.15.

[26] *See* 47 U.S.C. § 309(j)(2) (1996).

[27] Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348, 2354 (1994).

Act's objectives.[28] LMDS, on the other hand, was determined to be an auctionable service.[29] In addition, the Commission tentatively concluded that two of the three frequency bands allocated to MAS also were auctionable under former Section 309(j)(2).[30]

11. In 1997, the Balanced Budget Act amended Section 309(j) to provide that all mutually exclusive applications for initial licenses or construction permits *shall* be auctioned, except licenses and construction permits for public safety radio services, digital television service for existing analog television licensees, and noncommercial educational radio and television stations.[31] Additionally, Section 309(j)(6)(E) of the Communications Act states that, in determining the auctionability of applications, the Commission has the "obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means to avoid mutual exclusivity in application and licensing proceedings."[32] We have issued a *Notice of Proposed Rule Making* seeking comment on how to implement the Balanced Budget Act.[33] We sought comment on, *inter alia*, how the Balanced Budget Act's revision of our statutory auction authority affects our determination of which wireless services are potentially auctionable and our determinations of the appropriate licensing schemes for new and existing services.[34] We also requested comment on the scope of the exemption from competitive bidding for public safety radio services, and on what regulatory provisions could be established to ensure that frequencies assigned without auctions meet the statutory requirements for exemption.[35] In the context of another proceeding, the Commission determined spectrum in the 38.6-40.0 GHz ("39 GHz") band, demand for which was increasing dramatically due to the projected need for point-to-point spectrum by Personal Communications Service (PCS) and cellular licensee and by providers requiring or furnishing other types of point-to-point services, to be auctionable under the

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[28] *Id.* at 2356.

[29] *LMDS Second Report and Order*, 12 FCC Rcd at 12673-74. The spectrum was divided into an 1,150 MHz block and a 150 MHz block, licensed based on 493 geographic areas known as Basic Trading Areas, *see Rand McNally Commercial Atlas and Marketing Guide* 38-39 (128th ed. 1997). Licensees are permitted to partition ("partitioning" is the assignment of geographic portions of a geographic service area along geopolitical or other boundaries) and disaggregate ("disaggregation" is the assignment of discrete portions of spectrum licensed to a geographic area licensee) their licenses.

[30] *MAS Notice*, 12 FCC Rcd at 7996-97. MAS was proposed to be licensed by forty-seven 12.5 kHz channel pairs based on 175 geographic areas known as Economic Areas, with partitioning and disaggregation permitted. *Id.* at 7982-83, 7987-88.

[31] 47 U.S.C. § 309(j) (as amended by Balanced Budget Act, § 3002). This *Notice of Proposed Rule Making* does not seek comment on the digital television exemption. To the extent the Commission determines that it is necessary to clarify the exemption for digital television or adopt implementing regulations for that exemption, we intend to do so in a proceeding specifically addressing broadcast services. *BBA Notice*, 14 FCC Rcd at n.104.

[32] 47 U.S.C. § 309(j)(6)(E).

[33] *See BBA Notice*, 14 FCC Rcd 5206.

[34] *Id.*, ¶ 1.

[35] *Id.*

Balanced Budget Act.[36] Under the new statutory standards for choosing among mutually exclusive applications, our previous reasons for not promulgating auction rules for other Part 101 spectrum now must be reconsidered.

III. MEMORANDUM OPINION AND ORDER

12. We have before us petitions for reconsideration and/or clarification of the *Part 101 Order* filed by the Association of American Railroads (AAR), CAI Wireless Systems, Inc. (CAI), Cox & Smith Inc. (C&S), Multipoint Networks (Multipoint), TIA's Network Equipment Division and NSMA (TIA/NSMA), and UTC, The Telecommunications Association (UTC). For the most part, the parties support the Commission's efforts to streamline, update, and simplify the rules for the common carrier and POFS services. Some petitioners take issue with the substantive context of certain Part 101 rules. Other petitioners have requested minor clarifications of certain rules or have indicated the need for correction of clerical errors. Below, we address the pending petitions, set forth our reasons for granting or denying particular requests, and make necessary modifications and additions to the Part 101 rules.

A. Expanded Use of 10.7 - 11.7 GHz Frequencies

13. Section 101.603(b)(3) of our Rules incorporates the prohibition, formerly found in Section 94.9(b)(3), against using POFS frequencies (except 6,425-6,525 MHz, 18,142-18,580 MHz, or above 21,200 MHz) for the final radio frequency link in the chain of transmission of program material to CATV, MDS, or MATV systems.[37] OpTel, Inc. seeks clarification concerning whether the Commission intended to retain the "final link" restriction when it established Section 101.603,[38] and CAI requests that the Commission either delete the restriction or add the 10.7-11.7 GHz band (11 GHz band) to the bands excepted from the restriction.[39] The *Part 101 Order*, *Part 101 Notice*, and *Point-to-Point Notice* do not address directly the final link restriction raised by OpTel and CAI. The *Part 101 Order* was primarily aimed at consolidating the Part 21 and 94 rules into a single Part 101. The "final link" restriction, however, was expressly included in the proposed and final language for Section 101.603(b)(3).[40] Because there has been no prior discussion of the idea, we conclude that it is important to develop a record on CAI's proposal. Thus, we plan to address the matter in the *Notice of Proposed Rule Making*.

B. Deletion of Thirty-Day Notice Period

14. After the comment period for the *Part 101 Notice* closed, Congress removed fixed point-to-

[36]Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rule Making*, ET Docket No. 95-183, 12 FCC Rcd 18600, 18645-47 (1997) (*39 GHz Report and Order*). The spectrum, which consists of fourteen pairs of 50 MHz blocks, will be licensed by geographic areas, and licensees will be permitted to partition and disaggregate. *Id.* at 18610-12, 18635. *See also* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, ET Docket No. 95-183, FCC 99-179, 64 FR 45891 (Aug. 23, 1999).

[37]*See* 47 C.F.R. §101.603(b)(3).

[38]*See* Letter from Henry Goldberg, counsel for OpTel, Inc. to Michele Farquhar, Chief, Wireless Telecommunications Bureau (March 29, 1996).

[39]CAI Petition for Partial Reconsideration at 2-4 (CAI Petition).

[40] 47 C.F.R. § 101.603(b)(3).

point microwave applications from the classes of applications that trigger a thirty-day public notice and comment period, during which interested parties could file petitions to deny.[41] Congress took this action to expedite licensing in the private fixed point-to-point microwave service by deleting the former subparagraph (A) that required public notice.[42] Accordingly, the *Part 101 Order* amended Section 1.962(a) of the Rules[43] to eliminate the public notice and comment requirement for such applications.[44]

15. TIA/NSMA claim that the Commission should have provided notice and the opportunity to comment before amending Section 1.962(a).[45] They argue that deleting the thirty-day public notice period effectively denies opposing parties the opportunity to file petitions to deny, which amounts to denial of a substantive right.[46] Thus, they contend, the rule change was beyond the scope of the exception to the notice and comment requirement for a "rule of agency organization, procedure or practice."[47] However, we find that our action reflected the self-execution of the will of Congress and was appropriate. We believe that eliminating the thirty-day public notice period for private fixed point-to-point microwave service applications changed neither the substantive standards under which we evaluate those applications nor removed the right to oppose those applications.[48] Entities will still have an opportunity to protest following the public notice announcing the Commission's action on the applications. Therefore, we believe that amendment of the rule to abolish the thirty-day public notice period falls comfortably within the exception for procedural rules.[49] Accordingly, we reject

[41]*See* Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56, 131 (amending 47 U.S.C. § 309(b)).

[42]*See* S. Conf. Rep. No. 230, 104th Cong. 2nd. Sess. 418 (1996); *see also Part 101 Order,* 11 FCC Rcd at 13478.

[43]47 C.F.R. § 1.962(a).

[44]*See Part 101 Order*, 11 FCC Rcd at 13478.

[45]TIA/NSMA Petition for Reconsideration at 10-12 (TIA/NSMA Petition).

[46]*See* 47 C.F.R. § 1.962(g) (petition to deny must be filed no later than 30 days following public notice of the acceptance for filing of an application or substantial amendment thereto).

[47]5 U.S.C. § 553(a)(A). TIA/NSMA rely on *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980). In *Batterton*, the Department of Labor modified the guidelines under which states could receive funding for an employment program, which reduced Maryland's share of funds. Maryland argued that the modification affected a substantive right – entitlement to the funds – and the Court of Appeals agreed, stating that the modification was "a conclusive agency action, governing the rights and interests of the parties," and therefore was not a rule of agency practice or procedure. *Id.* at 710. The court said, regarding the exception to notice and comment for procedural rules, "[A]n articulation of the exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *Id.* at 707 (citing *Pincus vs. U.S. Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974)).

[48]*See, e.g., Jem Broadcasting Co., Inc. v. FCC*, 22 F.3d 320, 322, 326 (D.C. Cir. 1994) (the Commission, without notice and comment, adopted "hard look" rules which eliminated the ability of FM broadcast applicants to amend their applications to correct mistakes therein, and the Court of Appeals, citing *Batterton*, held that the rules were procedural in nature because they did not change the substantive standards by which the Commission evaluated license applications).

[49]*See id.* at 326 (citing *Neighborhood TV v. FCC,* 742 F.2d 629, 637 (D.C. Cir. 1984); *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 328 (D.C. Cir. 1983)) (not every interest "qualifies" for notice and comment).

TIA/NSMA's argument that removal of private fixed point-to-point microwave service from Section 1.962 of our Rules required notice and comment.

16. Although we reject TIA/NSMA's legal argument, we agree that data related to POFS applications may be useful for interested parties to ensure that proper frequency coordination has been conducted.[50] In that connection, we note that our Office of Media Relations regularly issues informal public notices prepared by the Wireless Telecommunications Bureau, Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch that contain information on POFS applications. Though the informal public notices are informational only and do not confer the right to file petitions to deny, Alcatel and UTC acknowledge that these periodic notices will suffice to furnish the information previously contained in the formal public notices.[51] The Commission will continue to issue the informal notices as resources permit; however, we see no need for a rule mandating the release of such public notices as TIA/NSMA request.[52] We also note that the period covered by informal public notice of the filing of applications will necessarily decrease with implementation of the ULS.[53] With electronic filing and processing of applications via ULS, the time required to grant a properly prepared and filed application may be reduced to hours, not days. In that instance, awaiting public notice before grant would undercut the Commission's objective of establishing an efficient and rapid electronic licensing system.

C. Common Carrier Traffic Requirements

17. Based on comments responding to the *Part 101 Notice*, the Commission revised former Section 21.119 (now Section 101.133) of the Rules, removing the restriction that prohibited the use of common carrier transmitters to carry non-common carrier communications, except in the MDS.[54] The Commission removed the restriction to promote economic efficiencies by obviating the need for a common carrier wishing to provide non-common carrier service to construct separate facilities.[55] On the other hand, the Commission carried over, unchanged, former Section 21.705 (now Section 101.703[56]), which provides that a common carrier may render any kind of communication service provided for in its tariffs so long as the kinds of communications carried do not violate the terms of the licensee's authorization or Sections 101.111 (emission limitations), 101.113 (transmitter power limitations), or 101.147 (frequency assignments) of the Rules.[57] The *Part 101 Order* also replicated, without change or

[50]TIA/NSMA Petition at 9.

[51]Alcatel Comments on Petition for Reconsideration at 3-4 (Alcatel Comments); UTC Consolidated Comments on Petitions for Reconsideration at 3 (UTC Comments).

[52]TIA/NSMA Petition at 12. TIA/NSMA observe that several Part 101 rules contain references to the 30-day public notice period and that such references are inappropriate given the elimination of the 30-day public notice period. Appropriate revisions to the rules are contained in Appendix B.

[53]*See ULS Proceeding*, 13 FCC Rcd at 21031; *see also* 47 C.F.R. § 1.933.

[54]47 C.F.R. § 101.133.

[55]*See Part 101 Order*, 11 FCC Rcd at 13465-66.

[56]47 C.F.R. § 101.703.

[57]47 C.F.R. §§ 101.111, 101.113, 101.147.

discussion, subsection (c) of former Section 21.700 (now Section 101.701), which provides that common carrier applicants for facilities that will be used primarily to relay television broadcast signals must demonstrate (1) that at least fifty percent of the customers using the microwave facility will not be affiliated in any way with the applicant; and (2) that at least fifty percent of the usage hours of the microwave facility will be dedicated to service for unaffiliated customers.[58]

18. UTC asserts that it is not clear whether common carriers must use at least fifty percent of their available capacity for common carrier traffic.[59] Although UTC was not specific as to which rule it was referring, we believe the intended reference was to Section 101.701(c). We note that the rule applies only to "stations or frequencies that will be used primarily to relay broadcast television signals," and requires that at least fifty percent of the capacity of such stations or frequencies be devoted to the carriage of traffic of customers who are not related to the licensee in any way. Accordingly, in response to UTC's request, we clarify that common carriers may carry any traffic described in Section 101.703 of our Rules, and that the fifty percent limitation in Section 101.701 applies only to common carrier microwave stations that are used "primarily to relay broadcast television signals."

D. POFS Licensees' Carriage of Common Carrier Traffic

19. In the *Part 101 Order,* the Commission declined to implement the suggestion of some commenters to delete proposed Section 101.603(b)(1) of the Rules,[60] which would allow POFS licensees to employ their excess capacity to carry common carrier traffic.[61] The Commission concluded that it lacked a sufficient record to justify deleting the proposed rule, the substance of which was carried forward from certain Part 94 provisions, but it stated that it would be receptive to a request to amend the Rules to permit POFS carriage of common carrier traffic if any party wished to pursue it, although further inquiry would be required.[62] UTC again urges us to eliminate Section 101.603(b)(1), and we again decline to do so. We do not believe that the Commission intended for the necessary inquiry to be conducted in the context of a petition for reconsideration, particularly given that such a petition usually does not stimulate – and has not here stimulated – the responsive comments necessary to create a record sufficient to justify deleting the provision. Instead, we seek comment on the issue in the *Notice of Proposed Rule Making* portion of this document.

E. Continuity of Licensing for Displaced 2 GHz Microwave Licensees

20. Our Rules provide that a Part 101 license will be forfeited automatically upon the voluntary removal or alteration of station facilities that renders the station non-operational for thirty days or longer.[63] In addition, a station that is inoperative for one year will be deemed to have permanently

[58] 47 C.F.R. § 101.701(c).

[59] UTC Petition for Reconsideration/Clarification at 5 (UTC Petition).

[60] 47 C.F.R. § 101.603(b)(1).

[61] *Part 101 Order*, 11 FCC Rcd at 13467.

[62] *Id.* at 13467-68.

[63] 47 C.F.R. § 101.65(a).

discontinued service, and the license must be surrendered.[64] C&S filed a Petition for Clarification and/or Reconsideration in which it proposed changes to these rules to exempt displaced 2 GHz incumbent licensees who relocate to another frequency band, find that frequency band unsuitable, and then wish to reactivate their original 2 GHz facilities.[65] The *C&S Petition* was endorsed by UTC.[66]

21. We wish to alleviate any concern on the part of incumbent 2 GHz microwave licensees that relocation of their facilities could result in premature license termination, but we do not believe that the suggested amendments are necessary. In the normal course, an incumbent 2 GHz licensee will file an application for modification of its license to specify a different frequency band. Thereafter, the new facilities will be constructed and tested while the licensee maintains its operations in the 2 GHz band. When the new facilities are placed in operation and the 2 GHz facility is discontinued, the licensee will be operating pursuant to its modified license. Under normal circumstances, at no time during the described period will the licensee be deemed to have forfeited its license, because there will have been no discontinuation of operations that would trigger invocation of the referenced rule sections. However, C&S suggests that there may be instances in which a period of time elapses between discontinuance of 2 GHz operations and inauguration of operations in a new frequency band.[67] We believe that such instances will be rare; however, should they arise, we will look favorably upon requests for rule waivers in order to accommodate affected licensees. In sum, it is not our intent to invoke the automatic forfeiture provisions in a manner which would hamper an incumbent licensee's legitimate efforts to relocate its 2 GHz facilities.

F. Finder's Preference

22. Notwithstanding the fact that the matter was not raised in the *Part 101 Notice* or the *Part 101 Order*, Multipoint requests[68] that we establish a finder's preference program for MAS frequencies licensed under Part 101 of our Rules similar to the program formerly established under Part 90 of the Rules.[69] Multipoint argues that a finder's preference program – under which an applicant receives a preference when applying for a frequency if the applicant demonstrates that the frequency is not being used by its current licensee – would supplement the Part 101 automatic forfeiture provisions, thereby reducing "spectrum warehousing."[70] UTC agrees, but submits that this is not the proper forum for this proposal.[71] We agree with UTC that Multipoint has raised a rule making proposal in the context of a petition for reconsideration which is procedurally improper because interested parties have not been

[64] 47 C.F.R. §§ 101.65(d), 101.305(d).

[65] Cox & Smith, Inc. Petition for Clarification and/or Reconsideration at 1 (C&S Petition).

[66] *See* UTC Petition at 9-10.

[67] C&S Petition at 1-3.

[68] Multipoint Petition for Reconsideration of Part 101 of the Commission's Rules at 3 (Multipoint Petition).

[69] *See* 47 C.F.R. § 90.173(k) (1997).

[70] Multipoint Petition at 3.

[71] UTC Comments at 5.

given sufficient notice to comment on the issue.[72] We are aware of the current scarcity of available MAS channels in many areas, and we recognize the importance of ensuring that frequencies are licensed to parties with an actual and immediate requirement for them. However, Multipoint's proposal exceeds scope of this *Memorandum Opinion and Order*,[73] so we dismiss the petition.[74]

G. Electronic Filing

23. The *Part 101 Order* noted that the proposal in the *Part 101 Notice* to allow electronic filing for all fixed microwave services authorized under Part 101[75] had been rendered moot by rule changes in another proceeding implementing the proposal, and stated that procedures for electronic filing in the Part 101 services would be implemented by Public Notice.[76] Also, the Wireless Telecommunications Bureau began use of ULS for licensing activity for microwave services on August 30, 1999.[77] Although TIA/NSMA and Alcatel endorse our commitment to electronic filing, they urge us to go further by establishing specific timetable benchmarks for implementation of electronic filing, and convening an Industry Advisory Committee to advise the Commission on the electronic filing process.[78] We deem such action to be unnecessary at this time given the actions we have taken in the context of the ULS proceeding. Electronic filing and online access are integral components of the ULS, and we recently adopted rule changes involving all aspects of the ULS filing and licensing process.[79] We will continue to keep the industry informed of significant developments in the ULS by issuing periodic Public Notices, and will be attentive to any informal comments or other communications furnished in response thereto.

H. Conditional Licensing

24. Based on comments responding to the *Part 101 Notice*, the Commission amended the Rules to permit operation prior to final license grant, subject to certain conditions, on the 4, 6, 10, 11, 18, and 23 GHz bands, except for the 10.6-10.68 GHz band; the 17.8-19.7 GHz band in Colorado, Maryland, Virginia, and the District of Columbia; and the 21.2-23.6 GHz band for operations with an effective radiated power greater than 55 dBm.[80] The Commission excluded those bands from conditional licensing

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[72] *Id.*

[73] *See* 47 C.F.R. § 1.429; *see also* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, *Memorandum Opinion and Order*, MM Docket No. 86-289, 4 FCC Rcd 7887 (1989).

[74] The Commission eliminated the Part 90 finder's preference program. *See* Amendment of Part 90 Concerning the Commission's Finder's Preference Rules, *Report and Order*, WT Docket No. 96-199, 13 FCC Rcd 23816 (1998).

[75] *Part 101 Notice*, 10 FCC Rcd at 2512.

[76] *Part 101 Order*, 11 FCC Rcd at 13460.

[77] *See* WTB to Begin Use of Universal Licensing System (ULS) for Microwave Services on August 30, 1999, DA 99-1543, *Public Notice* (rel. Aug. 6, 1999).

[78] *See* TIA/NSMA Petition at 7; Alcatel Comments at 4.

[79] *See ULS Proceeding*, 13 FCC Rcd at 21033-35.

[80] *Part 101 Order*, 11 FCC Rcd at 13462-63.

because they are allocated to both government and non-government users. Thus, licensing on these frequencies must be coordinated by the Commission with the National Telecommunications and Information Administration (NTIA), and the two agencies did not have an agreement concerning conditional licensing on those frequencies.[81] After such an agreement was reached regarding the 10.6-10.68 GHz band, the Wireless Telecommunications Bureau and the Office of Engineering and Technology, pursuant to delegated authority,[82] amended Section 101.31(e) of the Commission's Rules[83] to provide for conditional licensing in that band except in certain areas of the country where NTIA requested continued pre-operation coordination.[84] This action has mooted TIA/NSMA's request that we allow conditional licensing in that band except for specified areas of the country where government radio astronomy services are operated.[85]

25. TIA/NSMA also request that conditional licensing be authorized in the 932-941, 952-960, and 2110-2200 MHz frequency bands, but did not discuss the merits of expanding conditional licensing to those bands.[86] Because we have no record concerning the potential effect of conditional licensing in the lower microwave bands, we decline the request at this time.[87]

I. Correct Definition of Operational Fixed Point-to-Point Microwave Service

26. The *Part 101 Notice* proposed only minor editorial changes in the definitions to be provided in the Part 101 rules.[88] Former Section 94.3 of the Commission's Rules defined "Operational-fixed Station" as "[a] fixed station not open to public correspondence, operated by and for the sole use of those persons or agencies operating their own radio communication facilities. This term includes all stations licensed to the fixed service under this part."[89] The underlined material *supra* sets out an important and

[81] *Id.*

[82] *See id.* at 13463.

[83] 47 C.F.R. § 101.31(e).

[84] Reorganization and Revision of Parts 1, 2, 21 and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, *Order*, WT Docket No. 94-148, 13 FCC Rcd 4394 (WTB/OET 1998). We also note that subsequent to the *Part 101 Order* the Commission permitted conditional licensing in the 18 GHz band outside certain prohibited zones. Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service, *Order*, ET Docket No. 97-99, 13 FCC Rcd 3581 (1997); *see* 47 C.F.R. § 101.31(b)(1)(v), (vi).

[85] *See* TIA/NSMA Petition at 18.

[86] *See id.* at 18 n.1.

[87] We also note that not all of these frequencies are available for point-to-point or point-to-multipoint operations. The Commission suspended acceptance of applications for the 932/941 MHz and 928/959 MHz MAS in 1997. *MAS Notice*, 12 FCC Rcd at 8006-07. Also, frequencies in the 2100-2150 MHz and 2160-2200 MHz bands have been reallocated for emerging technology mobile services. *See Emerging Technologies Second Report and Order*, 8 FCC Rcd at 6496.

[88] *See Part 101 Notice*, 10 FCC Rcd at 2511.

[89] 47 C.F.R. § 94.3 (1995) (emphasis supplied).

distinguishing characteristic of the POFS which the Commission inadvertently omitted when it created the new Section 101.3. In addition, this section defined "Private line service" as "[a] service whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time."[90]

27. We agree with AAR and Alcatel that the definitions of "Private operational fixed point-to-point microwave service" and "Private line service" in the new Section 101.3 lack the concept of "self-service" – a licensee's use of the POFS facility for its own internal communications – which was contained in the prior definition of "Operational-fixed Station" in former Section 94.3.[91] We likewise agree with UTC's recommendation that the definition of "Private operational fixed point-to-point microwave service" (a) incorporate the concept of "self-service," and (b) should not refer to private line service, which UTC contends is essentially a common carrier construct with little application to private operational fixed services.[92] Therefore, we delete the term "Private line service," and adopt UTC's suggested change to the definition of "Private operational fixed point-to-point microwave service," with minor revisions, as follows:

> *Private operational fixed point-to-point microwave service.* A private radio service rendered by fixed and temporary fixed stations on microwave frequencies for the exclusive use or availability for use of the licensee or other eligible entities[93] for communication between two or more designated points. Service may be provided between points within the United States, points within United States' possessions, or between the United States and points in Canada or Mexico.

J. Reduction of the Number of Remotes Required in a Multiple Address System

28. In the *Part 101 Order*, the Commission carried over the Part 94 definition of MAS into Part 101, despite some commenters' request that the requirement that MAS facilities serve at least four remotes be replaced with a provision that would require MAS systems to serve "multiple" remotes.[94] That proposal was deemed inconsistent with the Commission's determination in a prior proceeding[95] that MAS is to be used to satisfy point-to-multipoint needs, not for communication requirements that can be met using frequencies allocated for point-to-point use.[96] AAR seeks reconsideration of our decision, but presents no new data or arguments in support of its position.[97] Further, we note that we considered the substance of AAR's request in another rulemaking proceeding examining our MAS licensing approach.[98] For these reasons, we deny AAR's petition for reconsideration.

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[90] *Id.*

[91] AAR Opposition to Petition for Partial Reconsideration at 5-6 (AAR Opposition); Alcatel Comments at 7.

[92] UTC Comments at 7.

[93] *See* 47 C.F.R. § 101.61 for further explanation of eligible entities.

[94] *Part 101 Order*, 11 FCC Rcd at 13468-69.

[95] Amendment of §§ 22.501(g)(2) and 94.65(a)(1) of the Rules and Regulations to Re-Channel the 900 MHz Multiple Address Frequencies, *Report and Order*, PR Docket No. 87-5, 3 FCC Rcd 1564 (1988).

[96] *Part 101 Order*, 11 FCC Rcd at 13469.

[97] *See* WWIZ, Inc., 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F 2d 824 (D.C. Cir.

K. Loading Requirements

29. The *Part 101 Order* retained the existing transmitter capacity and loading requirements for point-to-point microwave radio systems operating in 3,700-4,200 MHz, 5,925-6,425 MHz, 6,525-6,875 MHz, 10,550-10,680 MHz, and 10,700-11,700 MHz bands.[99] The Commission declined requests to lower the standards, because weakening loading requirements likely would lead to a significant amount of licensed, but unused, spectrum, which, in turn, would reduce the availability of spectrum for displaced 2 GHz licensees.[100] However, the Commission stated that it would give liberal consideration to requests for waiver of the loading requirements filed by displaced 2 GHz licensees seeking to relocate in the bands above 3 GHz.[101]

30. We deny the requests of AAR, TIA/NSMA, or UTC to reconsider the loading requirements.[102] These parties have failed to provide any additional justifications for their requested relief other than those rejected in the *Part 101 Order*.[103] Similarly, we reject UTC's request that we "liberally waive loading requirements" for all POFS systems.[104] UTC has failed to provide sufficient justification that would warrant our affording the same treatment to all POFS users as we are affording to displaced 2 GHz licensees.

1965), *cert. denied*, 383 U.S. 967 (1966).

[98]*See MAS Notice*, 12 FCC Rcd at 7993; *see also MAS Further Notice*, FCC 99-101, ¶21; *see also* Amendment of the Commission's Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Report and Order (MAS Report and Order)*, FCC No. 99-415 (rel. Jan. 19, 2000).

[99]*Part 101 Order*, 11 FCC Rcd at 13476.

[100]*Id.*

[101]*Id.* (quoting *Emerging Technologies Second Report and Order*, 8 FCC Rcd at 6514).

[102]AAR Petition for Partial Clarification and Reconsideration at 9-10 (AAR Petition); TIA/NSMA Petition at 21; UTC Comments at 2-3.

[103]*See* WWIZ, Inc., 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F 2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

[104]UTC Comments at 2-3.

L. Prior Coordination Notices with Use of ATPC

31. In the *Part 101 Order*, the Commission authorized Automatic Transmitter Power Control (ATPC)[105] for common carrier and POFS licensees.[106] However, in response to concerns expressed by some commenting parties, the Commission required applicants to notify potentially affected licensees that ATPC transmitters will be used, and to include a value for each of the following parameters on the coordination notice: (1) maximum transmit power, (2) coordinated transmit power, and (3) nominal transmit power.[107] TIA/NSMA and Alcatel note, however, that this requirement was not carried forward into the final rules.[108] We hereby remedy that inadvertent oversight by amending Section 101.103(d) in the manner suggested by TIA/NSMA.[109]

M. Clarification of Grandfathering Provisions

32. In the *Part 101 Order*, the Commission stated that systems authorized and applications filed prior to the effective date of the *Part 101 Order* would be afforded co-primary status relative to all systems authorized subsequently pursuant to the provisions of the new Part 101, and that these previously authorized stations and pending applications would be "grandfathered" in that status indefinitely.[110] The implementing rule provides, "All systems subject to Parts 21 and 94 of the Rules, which are licensed or which are proposed in an application on file, as of the effective date of this part, are subject to the requirements under Part 21 or Part 94, as applicable."[111] We agree with TIA/NSMA that adding the word "indefinitely" to the end of the sentence will more clearly convey that the "grandfathering" afforded to the subject systems will continue indefinitely, so we amend the rule accordingly.[112]

N. Minor Clerical Errors and Editorial Changes in the Rules

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[105]ATPC is a feature of radio transmitters which will automatically adjust the output power to keep the receive signal at a uniform level even though the path attenuation may change due to rain or atmospheric anomaly. *Part 101 Order*, 11 FCC Rcd at 13469.

[106]*Id.* at 13470; *see* 47 C.F.R. § 101.113(b).

[107]*Part 101 Order*, 11 FCC Rcd at 13471. These terms are defined in TIA Telecommunications Systems Bulletin TSB 10-F, "Interference Criteria for Microwave Systems," at Section 4.3.

[108]TIA/NSMA Petition at 20; Alcatel Comments at 6.

[109]47 C.F.R. § 101.103(d). We also clarify the terms in the formula in Section 101.143(b) for calculating maximum permissible EIRP for shorter path lengths and amend the note to read as follows: "For transmitters using Automatic Transmitter Power Control, EIRP corresponds to the maximum transmitter power available, not the coordinated transmit power or the nominal transmit power."

[110]*Part 101 Order*, 11 FCC Rcd at 13477-78.

[111]47 C.F.R. § 101.4(a).

[112]TIA/NSMA Petition at 20.

33. Below, we treat various requests by TIA/NSMA for correction or clarification.[113] Where the reason for a rule change is self-evident and clerical in nature, an appropriate revision to the rule has been incorporated into Appendix A hereto and is not treated in the body of this *Memorandum Opinion & Order*. In addition, on our own motion, we have made certain minor and non-substantive editorial changes to the rules, which we likewise believe do not require explanation. Those requested changes that merit comment are set forth *infra*.

1. Requested Changes Adopted

Section 101.31(a) – We change the title of this subsection from "Temporary authorizations" to "Operation at temporary locations," to more accurately describe its content. However, we deny TIA/NSMA's request to reduce the time in which to file an application to convert a temporary authorization into a permanent authorization from ninety days before the temporary authorization expires to sixty days, for the record does not support their assertion that ninety days is too long.

Section 101.101 – We correct various errors in the chart listing frequency bands and the services permitted on each.

Section 101.105(c)(3) – We correct the reference to the frequencies for which MAS applicants must make an interference showing to include those in Section 101.147(b)(2)-(4) of the Rules.

Section 101.113(a) – We move footnote 5 of the table listing maximum Equivalent Isotropically Radiated Power (EIRP) by frequency band from the 21,200-23,600 MHz band to the 18,800-19,700 MHz band, we change the reference in footnote 10 from Section 101.147(t) of the Rules to Section 101.147(s), and correct the maximum power listing for the bands between 31,000 MHz and 31,300 MHz.

Section 101.115(c) – We change the reference in footnote 11 of the table for Antenna Standards from Section 101.147(t) of the Rules to Section 101.147(s).

Section 101.145(a) – The references to subsections (a) and (b) of this rule are corrected to reference subsections (b) and (c).

Section 101.147(a) – We revise the table of frequency assignments in this rule to more accurately reflect the services using particular frequency bands. Other corrections to the rule already were made in another proceeding.[114]

Section 101.147(j) – We delete the obsolete reference to Part 21.

Section 101.803(a) – Most of footnote 5 applies to frequencies in the 21-23.6 GHz band, but the last sentence applies to the 14.2-14.4 GHz band. To improve clarity, we make the last sentence a separate footnote.

[113] *See id.* at 22-23.

[114] *See* Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 95-157, 11 FCC Rcd 8825, 8917 (1996).

Section 101.803(d) – We add an entry for 11.7-12.2 GHz to ensure that the appropriate requirements apply to that band.

Section 101.815(a)(5) – We change the reference to the requirement for applications from Section 101.713 to Section 101.21(f).

2. Requested Changes Rendered Moot

Former Section 101.31(a) – TIA/NSMA's proposals regarding requests for Special Temporary Authorization (STA) have been superseded by the *ULS Proceeding*'s changes to the STA rules.[115]

Section 101.31(a)(3)(vii) – The *ULS Proceeding* corrected the reference for operations to be conducted within the coordination distance contours of a fixed earth station from Section 101.21(e) to Section 101.21(f).[116]

Section 101.63(b) – The Commission stated in the *Part 101 Order* that a station would be regarded as being "'in operation' when construction is completed and the station is capable of providing service," but the rule set forth a stricter standard.[117] We recognized the discrepancy, and deleted the inconsistent language before the rule went into effect.

IV. NOTICE OF PROPOSED RULEMAKING

A. Streamlining Part 101

34. We have reviewed the rules and application procedures for all microwave radio services licensed by the Wireless Telecommunications Bureau. We propose eliminating regulations that are duplicative, outmoded, or otherwise unnecessary. This will further the work begun by the consolidation of Parts 21 and 94 into a single Part 101 and the implementation of the ULS.

1. POFS licensees' carriage of common carrier traffic

35. The *Part 101 Order* eliminated the restriction on the use of common carrier transmitters for non-common carrier purposes.[118] Licensees operating common carrier stations now may provide private services at the same location without having to construct duplicative facilities.[119] However, the Commission declined to eliminate the rule prohibiting stations licensed as private systems from offering common carrier communications services or leasing reserve capacity to common carriers for their common carrier traffic.[120] The Commission pointed to the increased flexibility that it had given common

[115] 47 C.F.R. § 1.931; *see ULS Proceeding,* 13 FCC Rcd at 21052-53.

[116] *ULS Proceeding,* 63 Fed. Reg. at 63982.

[117] *Part 101 Order*, 11 FCC Rcd at 13465.

[118] *Id.* at 13466.

[119] *Id.*

[120] *Id.* at 13467; *see* 47 C.F.R. § 101.603(b)(1).

carriers, and suggested that private licensees desiring to carry common carrier traffic as well as internal communications become common carrier licensees.[121]

36. We also declined to eliminate this restriction in the *Memorandum Opinion and Order* portion of this document, on the grounds that we lacked a sufficient record.[122] UTC argues that requiring POFS licensees to become common carriers in order to carry common carrier traffic unnecessarily subjects them to onerous common carrier obligations, and that the Act, which states that "[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services,"[123] dictates that POFS licensees be permitted to carry common carrier traffic without becoming common carriers.[124] We seek comment on whether we should eliminate the rule prohibiting stations licensed as private systems from offering common carrier communications services. Among the issues that commenters should address are the extent to which improved transmission techniques and increased transmission rates have created excess capacity in private systems; and whether POFS carriage of common carrier traffic should be permitted only on a secondary basis, or whether limitations should be placed on what types of common carrier traffic (*e.g.*, voice and data, but not video) could be carried on POFS systems.

37. Alternatively, we note that many land mobile radio licensees with wide area communication systems use operational fixed microwave systems to transmit communications between base stations in their systems. In some cases, the land mobile radio licensee is also the licensee of the microwave facilities. In other cases, land mobile radio licensees lease excess capacity from existing microwave systems. If, however, the communications (including any land mobile communications) being carried on the microwave system is common carrier traffic, our Rules require that the microwave system be licensed as a common carrier.[125] When the Commission reclassified many land mobile radio licensees as Commercial Mobile Radio Services (CMRS), *i.e.*, common carriers, there was an unanticipated effect on some private microwave licensees.[126] For example, the reclassification of some Specialized Mobile Radio (SMR) licensees made them no longer eligible to use a POFS facility under the plain language of our Rules. Many of these private microwave systems supporting SMR and other private operations are owned by petroleum companies, utility companies, or government entities that do not want to become, or, in some cases, may be prohibited by law from becoming, common carriers.

38. It is unreasonable, unduly burdensome, and unnecessary to require SMRs and other former private operators to either duplicate their supporting facilities or seek service from a possibly unavailable common carrier. Consequently, in the event we retain the general prohibition against POFS carriage of

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[121] *Part 101 Order*, 11 FCC Rcd at 13468.

[122] *See supra*, ¶ 19.

[123] *See* 47 U.S.C. § 153(49).

[124] UTC Petition at 5-8.

[125] *See* 47 C.F.R. § 101.603(b)(1).

[126] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Second Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 1411 (1994).