

incumbent operations.²⁹² Motorola, for example, believes the relocation choices offered to incumbents in many cases will not provide a legitimate option.²⁹³ Similarly, the Industry Coalition states that even if relocation were possible, the logistics would be staggering, causing devastating disruptions in service and severe levels of interference as a result of compressing tens of thousands of private wireless communications facilities within a limited amount of spectrum.²⁹⁴

107. In light of these concerns, we conclude that it is not advisable to revisit the licensing scheme for the 450-470 MHz band at this time. Moreover, we believe that not enough time has elapsed in order to reap the benefits of the licensing reforms that were adopted as part of the Refarming proceeding.²⁹⁵ We therefore deny AMTA's petition. This decision does not, however, preclude us from deciding in the future that some alternative approach is warranted.

4. Licensing of PLMR Channels in the 800 MHz Band for Use in Commercial SMR Systems

108. Background. In the *Notice*, we noted that some spectrum currently allocated for private internal use is also used to provide subscriber-based services, pursuant to intercategory sharing or rule waiver.²⁹⁶ We referred to a request by Nextel Communications, Inc. (Nextel) for waivers to permit it to acquire by assignment Part 90 PLMR services frequencies, and utilize those frequencies for CMRS operation in its 800 MHz SMR systems.²⁹⁷ Subsequently, the Wireless Telecommunications Bureau (Bureau) granted Nextel's request in part and denied in part.²⁹⁸ Specifically, the Bureau granted those waivers and assignments where Nextel would use the spectrum for relocation of incumbent licensees on the upper 200 channels of the 800 MHz band.²⁹⁹ The Bureau also permitted Nextel to use PLMR frequencies in its SMR network, but only on the condition that at least seventy-five percent of the channels involved in the waiver requests would be used to relocate upper 200 channel incumbents.³⁰⁰ The Bureau declined to address broader issues raised by Nextel's request to acquire channels without relocating an upper 200 incumbent, and determined that incorporation into the instant proceeding would

²⁹² See, e.g., SBT Comments (RM-9705) at 2; Motorola Opposition (RM-9705) at 4-5; Chadmoore Reply Comments (RM-9705) at 3 (forced migration of incumbents is unreasonable and would not serve the public interest); Mobex Opposition (RM-9705) at 6-7 (forced relocation would cause harmful and devastating disruptions in service as well as massive interference).

²⁹³ Motorola Opposition (RM-9705) at 4-5; Chadmoore Reply Comments (RM-9705) at 3.

²⁹⁴ Industry Coalition Joint Opposition (RM-9705) at 5.

²⁹⁵ See, e.g., Blooston Comments (RM-9705) at 7; ARINC Comments (RM-9705) at 2.

²⁹⁶ See *Notice*, 14 FCC Rcd at 5241 ¶ 69.

²⁹⁷ See *id.* at 5241 n.201.

²⁹⁸ See Applications of Nextel Communications, Inc. and Associated Waiver Request of 47 C.F.R. §§ 90.617(c) and 90.619(b), *Order*, 14 FCC Rcd 11678 (WTB 1999) (*Nextel Order*), *reconsideration pending* (filed Aug. 20, 1999).

²⁹⁹ See *id.* at 11689 ¶ 26.

³⁰⁰ See *id.* at 11691 ¶ 30.

be the more appropriate avenue to resolve such a proposal.³⁰¹ Consequently, the Bureau released a *Public Notice* incorporating the record of the Nextel matter into the instant proceeding and seeking comment on whether the Commission's licensing rules for PLMR channels in the 800 MHz band should be amended to allow their use in CMRS systems.³⁰²

109. Discussion. We first address whether our Rules should be amended to allow PLMR licensees to assign or transfer spectrum to CMRS licensees for use in CMRS operations. Commenters were split on this issue. Commenters supporting such a change argue that licensees should be permitted to enter into voluntary assignment agreements that alter the use of the spectrum³⁰³ because such voluntary transactions, wherein the licensee is willing to forego use of the spectrum for the consideration offered by the other party, result in the most economically efficient use of the spectrum.³⁰⁴ That is, they contend that if a PLMR licensee finds advantageous the terms of commercial service, including the assignment of its frequency(ies) to the CMRS operator, then we should allow such transactions because the CMRS operator values the frequency(ies) more highly than the PLMR licensee.³⁰⁵ We note that the 800 MHz band is particularly suited to such flexibility because 800 MHz PLMR and CMRS channels are interleaved, rather than grouped into separate subbands.³⁰⁶ In addition, a review of our licensing database indicates a greater presence in the 800 MHz Business and I/LT channels of licenses on which CMRS operations are permitted, through rule waivers or inter-category sharing, than in other PLMR bands. We therefore find that permitting such transactions would create additional flexibility for both PLMR licensees seeking to fill their communications needs and for CMRS licensees seeking additional spectrum.

110. Consequently, we will amend our Rules to allow 800 MHz Business and I/LT licensees to assign or transfer their spectrum to CMRS licensees for use in CMRS operations.³⁰⁷ Moreover, unlike

³⁰¹ See *id.* at 11691-92 ¶¶ 31-32.

³⁰² See Wireless Telecommunications Bureau Incorporates Nextel Communications, Inc. Waiver Record into WT Docket No. 99-87, *Public Notice*, 14 FCC Rcd 11795 (WTB 1999). In response to this public notice comments and reply comments were filed by the following: AAA, AMTA, API, APCO, Blooston I, Boeing, Chadmoore, ComEd, FM Communications, Inc. (FM) Ex Parte Letter, FIT, Joint Commenters, MRFAC, NAM/MRFAC, Nextel, NTCC, PCIA, Rocky Mountain, SBT, and Ameren.

³⁰³ AMTA Comments at 14; APCO Reply Comments at 7; Chadmoore Comments at 4-5; Chadmoore Reply Comments at 2-4; FM Ex Parte Letter; Nextel Comments at 14-15; Nextel Reply Comments at 22-23; NTCC Comments at 14-15; PCIA Comments at 21-23.

³⁰⁴ See, e.g., Nextel Comments at 15; Chadmoore Comments at 4.

³⁰⁵ See, e.g., AMTA Comments at 14; Chadmoore Reply Comments at 2; Nextel Comments at 15; PCIA Comments at 23.

³⁰⁶ See 47 C.F.R. § 90.617.

³⁰⁷ This decision resolves the related issue raised elsewhere by the Southern Company. See Letter from Christine M. Gill, McDermott, Will & Emery to David Furth, Senior Legal Advisor, Wireless Telecommunications Bureau (dated May 18, 2000). Southern seeks a determination that the Commission's Rules permit a CMRS licensee that obtained 800 MHz PLMR spectrum via intercategory sharing to transfer that spectrum to another CMRS licensee for use in its CMRS system. Pursuant to our decision above, we will permit CMRS use of assigned 800 MHz PLMR channels, whether the transferor/assignor is a PLMR or CMRS licensee. We emphasize that CMRS use will be limited to the 800 MHz PLMR channels because most of the other PLMR (continued....)

the Bureau's decision in the *Nextel Order*, we will not require that any portion of the channels transferred or assigned to CMRS licensees be used to relocate upper 200 channel incumbents. We are not persuaded that we should require the relocation of upper 200 channel incumbents as a condition of approving the transaction. That the spectrum at issue would be used predominantly for relocation purposes was important to the Bureau's public interest analysis of Nextel's waiver request.³⁰⁸ In this broader proceeding, however, we conclude that permitting such assignments and transfers will be beneficial for other reasons. We are convinced that alienability of PLMR licenses will enhance spectral use and efficiency. Limiting the flexibility of spectrum use to relocating upper 200 channel incumbents does not serve the public interest, and would merely erect another barrier to achieving maximum spectral efficiency.

111. Similarly, we also will permit these PLMR licensees to modify their PMRS licenses to allow CMRS use in their own systems. Just as with assignments and transfers, spectral efficiencies and technological developments will be aided by providing PLMR licensees with this same flexibility. Allowing PLMR licensees the flexibility to modify their licenses for CMRS use permits the PLMR licensee to assess marketplace needs and economic factors when determining the best and most efficient use of spectrum.³⁰⁹

112. We disagree with those commenters opposed to permitting the incorporation of PLMR spectrum into CMRS systems, who argue that it will reduce the available supply of PLMR spectrum.³¹⁰ They note that the Commission's purpose in eliminating intercategory sharing of non-SMR spectrum by SMR applicants³¹¹ was to stop encroachment on PLMR frequencies by commercial SMR licensees and

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spectrum is shared spectrum. In this context, freer channel transferability in this band is warranted. In addition, the *Refarming* proceeding significantly affected a substantial portion of the PLMR spectrum below 512 MHz. As a result, we are reluctant to introduce additional policy changes with respect to the PLMR spectrum until more time has passed and we have the opportunity to fully analyze the benefits of the licensing reforms that were adopted as part of the *Refarming* proceeding. Similarly, we are not applying the decision above to PLMR spectrum at 900 MHz, but we seek comment in the Further Notice of Proposed Rule Making on whether we should do so. The approach we adopt today is new, and we believe that we should examine its results with respect to the availability of spectrum for future PLMR needs before we consider extending this approach to other bands.

³⁰⁸ See *Nextel Order*, 14 FCC Rcd at 11691 ¶ 30.

³⁰⁹ See Chadmoore Reply Comments at 2-3; Nextel Comments at 7.

³¹⁰ See, e.g., AAA Comments at 12; API Comments at 20-22; API Reply Comments at 6; Blooston I Comments at 13-17; Boeing Comments at 11-12; Boeing Ex Parte Letter at 4-5; Boeing Reply Comments at 6; ComEd Comments at 21-22; FIT Comments at 9-10; ITA Comments at 23; Intek Comments at 6; MFRAC Comments at 9-10; NAM/MRFAC Reply Comments at 16; Rocky Mountain Comments at 9; SBT Reply Comments at 12-13.

³¹¹ See Amendment of Part 90 of the Communications Act Regulatory Treatment of Mobile Services, *First Report and Order*, *Eighth Report and Order* and *Second Further Notice of Proposed Rulemaking*, PR Docket 93-144, 11 FCC Rcd 1463, 1536-37 ¶¶ 138-142 (1995); 47 C.F.R. § 90.621(e) (1996). In 1997, the Commission affirmed its decision to eliminate intercategory sharing by SMR eligibles. Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 9972, 10,005-06 ¶ 106 (1997).

eligibles,³¹² and argue that allowing CMRS use of 800 MHz PLMR spectrum would further exacerbate the current shortage of private spectrum.³¹³ We do not find these concerns persuasive. These objections seem to envision a scenario in which current PLMR licensees voluntarily surrender their rights to frequencies they are not using or are using inefficiently and these frequencies are then returned to the PLMR pool so as to be available for licensing to other private users. It has been our experience, however, that licensees do not in any large measure turn back to the Commission PLMR frequencies they no longer need or are using inefficiently; rather, they continue to hold the spectrum. Consequently, we believe that allowing licensees to modify their licenses for CMRS use or assign or transfer these frequencies to CMRS entities will not materially affect the supply of available spectrum for licensing from the PLMR pool.

113. However, we deny Nextel's proposal to eliminate the distinction between CMRS spectrum and non-Public Safety PLMR spectrum with respect to initial licensing.³¹⁴ We believe that the existing PLMR pool of unassigned frequencies should remain available on an initial basis to PLMR eligibles only, to construct new systems or expand existing systems. Therefore, we maintain the eligibility criteria for all new applications.

114. While we will allow incumbent PLMR licensees to transfer or modify their licenses for CMRS use, we do not want to facilitate trafficking of PLMR spectrum (e.g., PLMR eligibles acquiring new licenses from the existing pool of unassigned frequencies for the purpose of selling them to CMRS providers).³¹⁵ Several methods are employed to avoid trafficking, including holding periods, random audits, moratoria on acquiring new frequencies and reporting requirements.³¹⁶ In that connection, PCIA,³¹⁷ supported by several other commenters,³¹⁸ suggests that we discourage trafficking by adopting a

³¹² See API Comments at 20; Boeing Letter at 4-5; FIT Comments at 9-10; ITA Comments at 23 and SBT Reply Comments at 12-13.

³¹³ See AAA Comments at 12-13; API Comments at 21-22; ITA Comments at 23; SBT Reply Comments at 12-13.

³¹⁴ See Nextel Comments at 14-15; Nextel Reply Comments at 2, 22-23.

³¹⁵ The Commission has defined as trafficking as "speculation, barter or trade in licenses." See KaStar 73 Acquisition, LLC and KaStar 109.2 Acquisition, LLC, Applications for Consent to Transfer Control, *Memorandum Opinion and Order*, 15 FCC Rcd 1615, 1619-20 ¶ 12 (1999).

³¹⁶ See *id.* (explaining that the Commission's anti-trafficking rule was designed to discourage speculators and prevent the unjust enrichment of those who do not implement their proposed systems); see also Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5583-84 ¶ 117 (1994) ("*Competitive Bidding Fifth Report and Order*") (explaining that a holding period would be imposed to avoid sham arrangements with broadband PCS licenses); Reexamination of the Comparative Standards for Non-Commercial Educational Applicants, MM Docket No. 95-31, *Report and Order*, 15 FCC Rcd 7386, 7424-25 ¶¶ 93, 94 (1999) (explaining that holding periods, random audits and certifications are used to ensure that the selection process is not undermined by the rapid re-assignment or transfer of broadcast stations); Amendment of Part 90, Subparts M and S, of the Commission's Rules, PR Docket No. 86-404, *Report and Order*, 3 FCC Rcd 1838, 1847 ¶79 (1988) (prohibiting application for new channels for one year to stem circumvention of channel recovery rules).

³¹⁷ See PCIA Comments at 20-23.

rule providing that a licensee that transfers or assigns 800 MHz PLMR spectrum to a CMRS licensee may not apply for new spectrum for six months after the Commission consents to the transfer or assignment. We do not believe that this proposal is sufficient to reduce potential trafficking of PLMR services licenses. Instead, we will preclude a licensee that modifies its license or transfers or assigns its license to a CMRS operator, or an affiliate of the modifying or assigning licensee, from applying for 800 MHz PLMR spectrum in the same area³¹⁹ for one year.³²⁰

115. In addition, we will allow modification to CMRS use or assignment to a CMRS operator only in the case of PLMR licenses that were initially granted at least five years prior to the modification, transfer, or assignment.³²¹ We believe a five-year holding period is appropriate because such a requirement has been applied to other situations where speculation and trafficking were concerns. For example, our rules provide that licensees are subject to unjust enrichment payments for any license transfer that occurs within five years of the license grant.³²² In this regard, we also note that 800 MHz PLMR licensees can receive an extended implementation period for of up to five years, if they demonstrate that such a period is required to construct the proposed wide-area system.³²³ One of our goals in requiring a holding period is to ensure that these channels will continue to be initially licensed only to entities that will use them for PLMR communications. A holding period of less than five years could undermine this goal by allowing many wide-area licensees to modify or transfer their licenses for CMRS use before they finish construction.

116. We will not apply this five year holding period to licenses already granted, or for which the application already was filed, as of the adoption date of this Report and Order. It is our belief that no purpose would be served by applying the holding period to licenses obtained or requested before we amended our rules to permit assignment and/or transfer of 800 MHz Business and I/LT channels for CMRS use, because prior to adoption of this Report and Order, no speculative incentive to acquire Business and I/LT frequencies can be inferred.

117. We are confident that the rules adopted herein, coupled with existing requirements in our rules,³²⁴ provide the necessary safeguards against trafficking in PLMR licenses for the purpose of

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³¹⁸ See AMTA Comments at 14; APCO Reply Comments at 7; Chadmoore Comments at 4; Chadmoore Reply Comments at 3; NTCC Comments at 15.

³¹⁹ We will define the area as 70 miles from the subject station. See 47 C.F.R. § 90.621(b).

³²⁰ We note that a one-year moratorium has been imposed upon General Category licensees that make partial assignment of a station's frequencies to stem trafficking in licenses. See 47 C.F.R. § 90.609(c); see also Amendment of Part 90, Subparts M and S, of the Commission's Rules, PR Docket No. 86-404, 3 FCC Rcd 1838, 1847 ¶ 79 (1988)

³²¹ See *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5583-84 ¶ 117 (explaining that a holding period would be imposed to avoid sham arrangements with broadband PCS licenses).

³²² See 47 C.F.R. § 1.2111(b)(1).

³²³ See 47 C.F.R. § 90.629.

³²⁴ Section 90.155 requires the licensee to have its station placed in operation within twelve months from the date of grant to avoid automatic cancellation. 47 C.F.R. § 90.155. Moreover, Section 90.609 requires complete construction of the radio facility prior to any transfer or assignment. 47 C.F.R. § 90.609. Additionally, (continued....)

assigning the license to a CMRS operator or using the spectrum to provide a CMRS service. We note that neither the one-year moratorium nor the five-year holding requirement is applicable to PLMR-to-PLMR assignments and/or transfers.

118. In addition, we note that there have been incidents of interference to public safety licensees in this band even though CMRS providers operate within their licensed parameters. To address this issue, an FCC/public safety/industry task force is investigating solutions for preventing and fixing interference to 800 MHz public safety operations. We seek to avoid the potential for future incidents of such interference that could result from the modification of PLMR facilities to CMRS. Consequently, we will require 800 MHz licensees seeking to use spectrum for CMRS, upon submitting a modification application, to: (a) certify that the co- or adjacent channel 800 MHz public safety licensees in the same geographic area have been notified of the application; and (b) commit that they will take affirmative steps to avoid harmful interference³²⁵ to such public safety licensees.³²⁶ We believe that these actions together will reduce the risk of increased interference in this band.

119. All 800 MHz PLMR licenses, including those granted before the rule change, may be assigned, transferred or modified in accordance with the new rules set forth herein. In addition, all new and pending applications for assignment, transfer, or modification will be subject to these new rules. However, other transactions were approved under previous and arguably more flexible terms and conditions. In this connection, we note that an application for review is pending with respect to the prior Nextel applications and associated waiver requests.³²⁷ Thus, in that regard, we believe that we should defer any decision affecting the transactions associated with the Nextel waivers to the disposition of the application for review. We believe that this approach will provide us with flexibility with respect to our treatment of the issues raised in the application for review

5. Revision of Part 90 Multiple Licensing Rules

120. Background. In the *Notice*, we sought comment on whether eliminating or modifying the multiple licensing rules would be appropriate in light of the potential expansion of our auction authority to include private radio services.³²⁸ The multiple licensing rules provide that two or more entities may be licensed for the same land station, provided that each licensee complies with the Commission's Rules regarding permissible communications and each licensee is eligible for the frequency(ies) on which the land station operates.³²⁹

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Section 90.157 provides that a license will cancel automatically if there is discontinuance of station operation for twelve months or more. 47 C.F.R. § 90.157.

³²⁵ See also 47 C.F.R. §§ 90.173(b), 90.403(e) (requiring licensees to undertake precautions to avoid harmful interference).

³²⁶ See Letter from Robert M. Gurs, counsel for APCO, to Magalie Roman Salas, Secretary, FCC (dated Nov. 6, 2000).

³²⁷ See *Nextel Order*, 14 FCC Rcd 11678.

³²⁸ *Notice*, 14 FCC Rcd at 5232 ¶ 50.

³²⁹ See 47 C.F.R. § 90.185.

121. A “multiple-licensed” system, also known as a “community repeater,” is a base station in the Part 90 private land mobile radio services which functions as a mobile relay, enabling low power mobile units to communicate with one another over a wide area by picking up a signal from one unit and repeating it to another.³³⁰ Generally, the licensees who share a multiple-licensed facility have been brought together by a third party, often the manufacturer of the land mobile equipment or a retailer, who operates the station on a profit-making basis.³³¹ The Commission does not usually regulate this third party’s activity and the third party is not licensed by the Commission.³³² Multiple licensing has been a widespread practice in the land mobile services since the 1960s.³³³

122. In 1982, the Commission re-examined the multiple licensing of facilities in the private land mobile radio services and found such practices to be permissible as a matter of law and desirable as a matter of public policy.³³⁴ The Commission noted that SMRs provide a possible substitute for multiple licensing, but concluded that the record did not support commenters’ claims that third-party managers were competing unfairly with radio common carriers.³³⁵

123. In 1992, in connection with the Refarming proceeding, the Commission proposed eliminating multiple licensing because (1) from a user’s standpoint, such facilities were indistinguishable from SMR facilities; and (2) the users’ needs could adequately be met by SMR and private carrier licensees, which were more widely available than they were ten years earlier.³³⁶ When the Commission implemented the 1993 Budget Act, however, it concluded that Congress recognized the benefits of allowing private radio users to enter into legitimate cost-sharing arrangements, and did not intend such arrangements to be classified as for-profit CMRS.³³⁷ This conclusion was based upon the definition of “mobile service” adopted in the 1993 Budget Act.³³⁸ The Commission determined that the legislative intent was to provide for shared use³³⁹ and multiple licensed “private” communications systems exempt

³³⁰ In the Matter of an Inquiry Concerning the Multiple Licensing of Land Mobile Radio Systems (‘Community Repeaters’) in the Bands 806-812 and 851-866 MHz, PR Docket No. 79-107, *Notice of Inquiry*, 71 FCC 2d 1391, 1392 ¶ 4 (1979).

³³¹ *Id.* at 1392 ¶ 5.

³³² *Id.* The third-party equipment provider is also sometimes one of the multiple licensees in order to serve its own internal communications need, but this is an infrequent scenario.

³³³ *Id.* at 1392 ¶ 6.

³³⁴ Amendment of Parts 89, 91, 93 and 95 of the Commission’s Rules and Regulations to Adopt New Practices and Procedures for Cooperative Use and Multiple Licensing of Stations in the Private Land Mobile Radio Services, Docket No. 18921, *Report and Order*, 89 FCC 2d 766, 771 ¶ 7 (1982).

³³⁵ *Id.*

³³⁶ Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Rules Governing Them, PR Docket No. 92-235, *Notice of Proposed Rule Making*, 7 FCC Rcd 8105, 8131 (1992).

³³⁷ *CMRS Second Report and Order*, 9 FCC Rcd at 1430 ¶ 47.

³³⁸ *See id.* at 1430 n.75. The definition of “mobile service” in 47 U.S.C. § 153(27) refers to communications that may be licensed on an “individual, cooperative, or multiple basis.”

³³⁹ *See* 47 C.F.R. § 90.185. Multiple licensing (licensed under code FB4) must be distinguished from shared use. Section 90.179 of the Commission’s Rules discusses shared use of radio stations. Shared use of (continued....)

from the competitive bidding process.³⁴⁰ Despite concern that these systems are often indistinguishable from commercial systems, the Commission deemed it appropriate at that time to retain multiple licensing as a non-auction, private radio licensing alternative.³⁴¹ The Commission stated, however, that it would closely monitor the use of multiple licensing in order to ensure that unlicensed station managers did not attempt to provide for-profit service in competition with CMRS licensees.³⁴²

124. Discussion. We agree with the American Mobile Telecommunication Association, Inc. ("AMTA") that multiple licensing is still permissible as a matter of law and desirable as a matter of public policy because the "practical realities" which led to the development of community repeaters continue to prevail.³⁴³ AMTA states that most Part 90 licensees cannot independently afford the monthly site rent for a tower or rooftop which could provide the necessary coverage, and that if each entity had to construct a separate system, it would be difficult to coordinate.³⁴⁴

125. MRFAC, on the other hand, states that the relevant rules for multiple licensing are widely ignored, little enforced, and an invitation to abuse.³⁴⁵ Some recent decisions support the view that not every multiple licensing application represents a legitimate private radio cost-sharing proposal. For example, in *East River Electric Power Cooperative*,³⁴⁶ East River, which previously had applied unsuccessfully for SMR frequencies, sought a waiver of the multiple licensing rules to permit use of its excess capacity by entities not otherwise eligible to use those frequencies.³⁴⁷ Opponents of the proposal argued that East River simply intended to provide a for-profit commercial communications service to other parties.³⁴⁸ The Wireless Telecommunications Bureau (Bureau) agreed, and found that East River's proposal was not a legitimate multiple licensing arrangement under Section 90.185 of the Commission's Rules.³⁴⁹ While East River's use of its system for internal communications remained PMRS, the proposed sale of excess capacity to third parties did not. More recently, in *Viking Dispatch Services*,

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facilities, licensed under code FB7, occurs when persons not licensed for the station control the station for their own use pursuant to the licensee's authorization. Shared use may be either on a non-profit, cost-shared basis or on a for-profit private carrier basis depending on the spectrum being used. Thus, shared use involves one licensee who shares its systems with other non-licensees who could get their own license but choose not to.

³⁴⁰ *CMRS Second R & O*, 9 FCC Rcd at 1430 ¶ 47.

³⁴¹ *Id.*

³⁴² *Id.* at 1430-31 ¶ 49.

³⁴³ See AMTA Comments at 7.

³⁴⁴ *Id.*

³⁴⁵ MRFAC Comments at 8 n.2.

³⁴⁶ *East River Electric Power Cooperative, Order*, 13 FCC Rcd 5871 (WTB 1997).

³⁴⁷ *Id.* at 5873-74 ¶¶ 5-6.

³⁴⁸ *Id.* at 5876 ¶ 9.

³⁴⁹ *Id.* at 5876-78 ¶¶ 10-11

Inc., we rejected a purported sharing proposal on the grounds that it really was a for-profit CMRS.³⁵⁰ Viking proposed to operate forty-two sites for PMRS two-way mobile dispatch systems as a third-party provider on a not-for-profit, cost-shared basis.³⁵¹ We concluded that Viking's proposal was not PMRS because it intended only to provide service to others.³⁵² We also concluded that it was not a true not-for-profit arrangement, because the system manager and equipment vendor was an affiliate of Viking.³⁵³ Therefore, Viking's request was denied.

126. Given the light response to our request for comment on whether to modify the multiple licensing rules, however, we conclude that cases such as these are exceptional, and do not warrant eliminating multiple licensing. Furthermore, eliminating multiple licensing would be contrary to our current efforts to introduce more, not less, flexibility in how licensees use their spectrum.³⁵⁴ Thus, as in *Viking* and *East River*, we will continue to closely monitor multiple-licensed systems and judge their validity on a case-by-case basis.

E. Section 337 Licensing for Public Safety Services

127. *Background.* The Balanced Budget Act added a new Section 337 to the Communications Act. Section 337 of the Communications Act, *inter alia*, provides certain public safety entities the opportunity to apply for unused spectrum not otherwise allocated for public safety use. For purposes of applying Section 337 and determining who may invoke its provisions, subsection 337(f) defines the term "public safety services" as "services –

- (A) the sole or principal purpose of which is to protect the safety of life, health or property;
- (B) that are provided--
 - (i) by State or local government entities; or
 - (ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and
- (C) that are not made commercially available to the public by the provider."³⁵⁵

128. The terms and conditions under which an eligible entity may apply to the Commission for spectrum under Section 337 are provided at subsection (c)(1) of Section 337 as follows:

(c) Licensing of Unused Frequencies for Public Safety Services.--

(1) Use of unused channels for public safety services.--Upon application by an entity seeking to provide public safety services, the Commission shall waive any requirement of this Act or its regulations implementing this Act (other than its regulations regarding harmful interference) to the extent necessary to permit the use of unassigned frequencies for the provision of public safety services by such entity. An application shall be granted under this subsection if the

³⁵⁰ Viking Dispatch Services, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 18814 (1999).

³⁵¹ *Id.* at 18815 ¶ 2.

³⁵² *Id.* at 18817-18 ¶ 7.

³⁵³ *Id.* at 18818-19 ¶ 8.

³⁵⁴ See *Spectrum Policy Statement*, 14 FCC Rcd 19868 (1999).

³⁵⁵ 47 U.S.C. § 337(f).

Commission finds that--

- (A) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use;
- (B) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission's regulations;
- (C) the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made;
- (D) the unassigned frequency was allocated for its present use not less than 2 years prior to the date on which the application is granted; and
- (E) granting such application is consistent with the public interest.³⁵⁶

129. If the Commission finds that the applicant satisfies the statutory criteria, the authorization pursuant to Section 337 is granted.³⁵⁷ Providers of public safety services may obtain spectrum via Section 337(c) without engaging in competitive bidding.³⁵⁸

130. In the *Notice*, we sought comment on how to apply the statutory criteria. We specifically requested commenters to address the statutory requirement that the frequency applied for be "unassigned" and that the showing necessary to demonstrate that granting the application would be in the public interest, with particular attention to the question of whether it would be in the public interest for applicants seeking to provide public safety services to apply for frequencies that, while not yet licensed to another entity, already have been identified and designated by the Commission as frequencies to be licensed by auction.³⁵⁹ Since enactment of the statute, we have issued several decisions on Section 337 applications.³⁶⁰

131. *Discussion.* Some commenters suggest that an applicant need not satisfy all five statutory criteria to satisfy the requirements of Section 337(c), if it makes a particularly strong showing for the factors it does meet.³⁶¹ We disagree. We do not find any statutory basis or legislative history supporting such a conclusion. Indeed, the legislative history clearly states, "Before granting applications under this subsection, the Commission must make five specific findings."³⁶² All five statutory criteria

³⁵⁶ 47 U.S.C. § 337(c)(1).

³⁵⁷ *Notice*, 14 FCC Rcd at 5234 ¶ 56.

³⁵⁸ *Id.* at 5233 ¶ 54.

³⁵⁹ *Notice*, 14 FCC Rcd at 5234 ¶ 57.

³⁶⁰ See e.g., South Bay Regional Public Communications Authority, *Memorandum Opinion and Order*, 13 FCC Rcd 23,781 (1998) (*South Bay*) (granting Section 337 application); see also, e.g., New Hampshire Department of Transportation, *Memorandum Opinion and Order*, 14 FCC Rcd 19,438 (WTB 1999) (*New Hampshire*) (denying Section 337 application); see also Hennepin County, *Order*, 14 FCC Rcd 19,418 (WTB 1999); County of Sacramento, California, *Order on Reconsideration*, 15 FCC Rcd 12,600 (WTB 2000) ("*Sacramento*") (granting Section 337 application).

³⁶¹ APCO Comments at 13-14; IAFC/IMSA Comments at 6-7.

³⁶² Conference Report at 579.

must be satisfied to receive authorization based on a Section 337 request.³⁶³

132. In addition, we believe that further exposition regarding two of the criteria is warranted. With regard to the statutory requirement that “no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use,”³⁶⁴ several Section 337 applicants apparently have interpreted this provision as only requiring a showing that no public safety frequencies are currently available in the same band as the frequencies being requested.³⁶⁵ We disagree with this interpretation. We believe that the statutory language is clear in that it expressly requires that no other spectrum allocated to public safety services be available without any qualification. Thus, we believe that the statute requires that there be no unassigned public safety spectrum, or not enough for the proposed public safety use, in any band in the geographic area in which the Section 337 applicant seeks to provide public safety services.³⁶⁶

133. With regard to the statutory requirement that “granting such application is consistent with the public interest,”³⁶⁷ we believe that our analysis under this criterion generally will entail a balancing of various public interest factors. For instance, some commenters assert that unlicensed spectrum should be available to entities seeking to provide public safety services, even if the spectrum is in the process of being auctioned.³⁶⁸ We agree that spectrum does not *per se* become unavailable to Section 337 applicants once we have initiated the competitive bidding process. Competing spectrum management goals may be implicated by Section 337 requests, depending upon when such requests are filed during the competitive bidding process. On the one hand, we do not believe that Congress intended for Section 337 applications to compromise or frustrate the competitive bidding process generally. On the other hand, there may be circumstances in which the public interest would warrant grant of a Section 337 request on spectrum that is subject to competitive bidding. Thus, we conclude that the state of the competitive bidding process when the Section 337 application is received is relevant to our determination of whether grant of the waiver request and the associated application(s) is in the public interest, as required by subsection (c)(1)(E).

134. As a result, we will balance such determinations on a case-by-case basis. In a number of cases to date we have granted Section 337 requests utilizing the five criteria for spectrum that was

³⁶³ See, e.g., *South Bay*, 13 FCC Rcd at 23796 ¶ 33 (applicant demonstrated all 5 criteria); County of San Mateo, California, *Memorandum Opinion and Order*, 14 FCC Rcd 19002, ¶ 10 (WTB 1999) (applicant demonstrated all 5 criteria); City of Pomona, California, *Order*, 15 FCC Rcd 15,597 ¶ 7 (WTB 2000) (applicant demonstrated all 5 criteria).

³⁶⁴ 47 U.S.C. § 337(c)(1)(A).

³⁶⁵ See, e.g., *New Hampshire*, 14 FCC Rcd at 19,439 ¶ 4, 19,442 ¶ 8; County of Burlington, New Jersey, *Order on Reconsideration*, 15 FCC Rcd 16,569 ¶ 7 (WTB 2000).

³⁶⁶ See 47 U.S.C. §§ 337(c)(1)(A); see also Conference Report at 579-80 (“spectrum must not be immediately available on a frequency already allocated to public safety services.”). We note that an applicant that could not obtain relief pursuant to Section 337 because public safety spectrum was available in other bands could nonetheless seek a rule waiver pursuant to Section 1.925 of the Commission’s Rules, 47 C.F.R. § 1.925.

³⁶⁷ 47 U.S.C. § 337(c)(1)(E).

³⁶⁸ See, e.g., APCO Comments at 12-13; APCO Reply Comments at 7-8; IAFC/IMSA Comments at 5-8; NYSTEC Comments at 12-13.

potentially subject to auction. For example, we granted such a request by South Bay Regional Communications Authority for channels in the 470-512 MHz band.³⁶⁹ As part of that grant we assigned auctionable narrowband PCS channels to a third party that applied for the same channels South Bay requested. This resolution enabled South Bay to gain access to spectrum it needed for important public safety needs. In another instance, the Wireless Telecommunications Bureau granted a Section 337 request for channels that had been designated for auction in the 900 MHz band.³⁷⁰ The Bureau weighed the five factors in the statute, and determined that a grant was warranted, despite the fact the spectrum was subject to an application freeze and a paging auction. Significantly, at the time the Section 337 request was filed in this case, the auction date had not yet been established for the frequencies at issue.

135. Therefore, in reviewing Section 337 waiver requests, we will balance a variety of public interest factors such as the likelihood that the spectrum will be auctioned, the likely timetable for such an auction, and the effect that grant of the request may have on such a future auction *against* the stated needs of the applicant and our obligation to promote public safety.³⁷¹ Section 337 requests received early in the competitive bidding process, before an auction is announced, will likely weigh more in favor of a grant than requests received on the eve of an auction. For example, at the rulemaking stage, when we are soliciting comments on whether to auction a particular spectrum band, we may give more weight to the public interest considerations of the public safety applicant than to our concerns about the impact on the auction process. However, once the mechanisms for a particular spectrum auction are in place, beginning with the issuance of a public notice announcing the date of the auction (typically four to six months before the auction), the competitive bidding process is substantially underway. At this juncture, we believe that accepting Section 337 applications would substantially impair our ability to conduct an orderly auction, on which prospective bidders depend in planning their auction strategies. Consequently, such requests will be subject to stricter review than those received earlier, and we anticipate that only in highly extraordinary circumstances will they be found to satisfy the requirements of Section 337(c)(1)(E).³⁷² In these situations, Section 337 applicants will be expected to provide a showing that grant of their requests would result in significant public interest benefits that outweigh the uncertainty and disruption to the auction process that would be associated with a grant of their requested waiver.

136. Finally, we take this opportunity streamline our processing of Section 337 requests by amending our rules to require that Section 337 requests be filed in the same manner and on the same form(s) as ordinary applications requesting the subject spectrum. Specifically, Section 337 waiver requests and applications for commercial spectrum must be filed through the Universal Licensing System using Form 601 Main Form and Schedules B and J.³⁷³ and applicants will need to register their Taxpayer

³⁶⁹ See *South Bay*, 13 FCC Rcd at 23796 ¶ 33.

³⁷⁰ See *Sacramento*, 15 FCC Rcd 12600, 12607 ¶ 19.

³⁷¹ See 47 U.S.C. § 151.

³⁷² We also note that the legislative history of Section 337 indicates that its intent was to ensure that "public safety agencies . . . are not denied use of unassigned frequencies that have lain fallow for an extended period of time." Conference Report at 579-580. We question whether spectrum in the process of being auctioned can fairly be said to be lying fallow, and thus still within the scope of Section 337 requests contemplated by Congress.

³⁷³ See Amendment of Parts 0, 1, 13, 22, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, WT Docket No. 98-20, *Report and Order*, 13 FCC Rcd 21027, Appendix C (1998).

Identification Number or Employer Identification Number.³⁷⁴ Additionally, antennas that require registration must be registered prior to filing the request.³⁷⁵

IV. FURTHER NOTICE OF PROPOSED RULE MAKING

A. AMTA Proposal to Require New Spectrum Efficient Technologies

137. *Background.* On June 19, 1998, AMTA filed a petition for rule making proposing that certain Part 90 licensees be required to employ new spectrum-efficient technologies.³⁷⁶ Specifically, AMTA urges that non-Public Safety licensees in the bands between 222 MHz and 896 MHz be required to deploy technology that achieves the equivalent of two times the capacity of most current operations.³⁷⁷ The gain in efficiency would result in one voice path per 12.5 kilohertz of spectrum, using a 25 kilohertz frequency.³⁷⁸ AMTA proposes that the requirement be phased in from 2003 to 2020, beginning with the most congested areas.³⁷⁹ Licensees not deploying this new equipment would be required to accept secondary status.³⁸⁰

138. AMTA contends that such requirements are needed because, under the current rules, it is financially imprudent for a licensee to invest in new, more efficient technology, since doing so results in additional costs without additional benefits.³⁸¹ The current rules, which were adopted in the Refarming proceeding, provide that, in order to effect a transition to a narrowband channel plan, we will type certify only increasingly efficient equipment.³⁸² Specifically, since February 14, 1997, we have certified equipment for 25 kilohertz channels only if it is also capable of operating on 12.5 kilohertz and/or

³⁷⁴ *Id.* at 21087-91 ¶¶ 132-142.

³⁷⁵ Streamlining the Commission's Antenna Structure Clearance Procedure, *Report and Order*, WT Docket No. 95-5, 11 FCC Rcd 4272 (1995); *see also* Streamlining the Commission's Antenna Structure Clearance Procedure, WT Docket No. 95-5, *Memorandum Opinion and Order on Reconsideration*, 15 FCC Rcd 8676 (2000).

³⁷⁶ AMTA Petition for Rulemaking (RM-9332) at 3 (filed June 19, 1998) (AMTA Petition I).

³⁷⁷ *Id.* at 6. AMTA would exclude from this proposal all channel blocks awarded by competitive bidding, as well as Part 90 spectrum at 220 and 900 MHz, because bandwidth requirements are already strict in those bands. *Id.*

³⁷⁸ AMTA Petition I at 6.

³⁷⁹ *Id.* The timetable for compliance with this proposal, which is based on urban area rankings under Part 90 of the Commission's Rules, is December 31, 2003 for markets 1-50; December 31, 2008 for markets 51-100; and December 31, 2020 for all other markets. *See* 47 C.F.R. § 90.741.

³⁸⁰ AMTA Petition I at 7. Secondary operations may not cause interference to operations authorized on a primary basis and are not protected from interference from those primary operations. 47 C.F.R. § 90.7.

³⁸¹ AMTA Petition I at 3. AMTA argues that when commercial licensees operate on shared spectrum, any increased capacity would merely become available to co-channel licensees who have not made a comparable investment. *Id.*

³⁸² *Refarming Report and Order and Further Notice*, 10 FCC Rcd at 10081 ¶ 7.

narrower channels.³⁸³ After January 1, 2005, only new equipment that operates on 6.25 kilohertz channel bandwidths will be certified.³⁸⁴ New equipment that operates on 25 and/or 12.5 kilohertz channels will be certified only if it is also capable of operating on 6.25 kilohertz or narrower channels.³⁸⁵ The rules do not require users to replace existing systems.³⁸⁶

139. AMTA's petition was placed on public notice on July 31, 1998.³⁸⁷ Because the issues raised in that petition are relevant to the instant proceeding, the petition was included in the *Notice*.³⁸⁸

140. *Discussion.* When the Commission adopted the current rules in 1995, it specifically declined to implement a comprehensive set of dates mandating strict manufacturing and licensing requirements.³⁸⁹ The Commission concluded that the type certification process itself could provide the catalyst for transition from one technology to another by promoting a natural migration to new technologies.³⁹⁰ The Commission concluded that this approach was preferable to requiring manufacturing or licensing of narrowband equipment by certain dates, because it would provide users immediate flexibility in equipment decisions, provide a period for the development of new technologies, and avoid creating an unreasonable burden for licensees.³⁹¹

141. AMTA and other commenters argue that a new approach is needed, because the migration to narrowband technology is not occurring as rapidly as the Commission intended.³⁹² Other commenters believe that the Refarming rules should be retained at least for the time being, because not enough time has elapsed in order to reap the benefits of the well-considered compromises the Commission adopted in that proceeding.³⁹³ After considering the record and comments in this

³⁸³ *Id.*; 47 C.F.R. § 90.203(j)(2) We also certify new equipment with a maximum bandwidth of 25 kHz if it meets the efficiency standards set forth in 47 C.F.R. § 90.203(j)(3).

³⁸⁴ 47 C.F.R. § 90.203(j)(4).

³⁸⁵ *Id.*

³⁸⁶ *Refarming Report and Order and Further Notice*, 10 FCC Rcd at 10081 ¶ 7.

³⁸⁷ Public Notice, Report No. 2288 (rel. July 31, 1998).

³⁸⁸ *See Notice*, 14 FCC Rcd at 5242 ¶ 71.

³⁸⁹ *Refarming Report and Order and Further Notice*, 10 FCC Rcd at 10099 ¶ 37.

³⁹⁰ *Id.* at 10097-98 ¶¶ 34-36.

³⁹¹ *Id.* at 10099 ¶ 37.

³⁹² *See* AMTA Petition I at 5; PCIA Comments (RM-9332) at 2-3 (conversion to more efficient technologies proceeding slowly); UTC Comments (RM-9332) at 12 (refarming process has caused significant delays due to regulatory uncertainty); MFRAC Comments (RM-9332) at 3-4 (supporting mandatory conversion to narrowband technology for the "top-20" markets.); ComSpace Reply Comments (RM-9332) at 4 (current regulatory scheme has resulted in unbalanced uncertainty, a delayed transition, and ever increasing congestion).

³⁹³ *See* Chadmoore Reply Comments (RM-9332) at 3; CICS Comments (RM-9332) at 2; SCANA Opposition (RM-9332) at 5; USMSS Comments (RM-9332) at 2; *see also, e.g.*, MRFAC Partial Opposition at 5 (the unresolved Refarming issues should be resolved before any new rules are adopted); PCIA Comments at 5-6 (continued....)

proceeding, we are inclined to agree with AMTA that the current pace of migration to more spectrally efficient technology is not rapid enough. We seek comment on this tentative conclusion, as well as whether enough time has elapsed to allow us to evaluate the effectiveness of our current rules.

142. Commenters believing that the rules need to be revised should also discuss what action the Commission should take. We tentatively conclude that that we should encourage the migration to narrowband technology by prohibiting the manufacture or importation of equipment that does not meet certain efficiency standards by certain dates.³⁹⁴ We continue to be concerned that requiring the employment of new spectrum-efficient technologies by certain dates, as proposed by AMTA, would impose unreasonable burdens on licensees, and we acknowledge the concerns raised by opponents of AMTA's proposal that it would be unfair to require users to replace systems in which they have recently invested substantial amounts.³⁹⁵ On the other hand, a user that continues to employ spectrally inefficient equipment, when more efficient alternatives are available, is harming other users with whom it is sharing the frequencies in these bands. Therefore, we are also concerned with a system that permits users to remain on spectrally inefficient systems indefinitely. We request comment on these issues and on the comparative merits of alternative approaches to addressing these concerns. We also request comment on what timetable would be appropriate for implementing any new requirement. One alternative would be to prohibit the manufacture or importation of equipment that does not meet certain efficiency standards by January 1, 2005, which, as noted above, is the date after which, under our current rules, only new equipment that operates on 6.25 kilohertz channel bandwidths will be certified. We seek comment on this proposal and alternative dates for this proposal to become effective. Commenters are encouraged to suggest specific dates and specific efficiency requirements, and to explain their recommendations.

B. Licensing of PLMR Channels in the 900 MHz Band for Use in Commercial SMR Systems

143. In the Report and Order portion of this item, we amended our rules to allow 800 MHz BI/LT licensees to assign or transfer their spectrum to CMRS licensees for use in CMRS operations, or to modify the licenses to CMRS use in their own systems.³⁹⁶ We also adopted rules to safeguard against trafficking in 800 MHz BI/LT licenses, and notification procedures to avoid interference to 800 MHz public safety operations. We did not ask commenters to address whether we should also extend this flexibility to any other frequency bands, and therefore did not consider any such rule amendments.

(Continued from previous page) _____

(Commission should wait to impose any type of mandatory conversion until the Refarming rules are in place and have had time to take effect).

³⁹⁴ We note that the Commission took such an approach with respect to fixed microwave equipment. 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, 6514 ¶ 53 (1993). The deadline would not apply to equipment manufactured for export. See *id.* at 6514 n.26. See also *Amendment of Part 90 of the Commission's Rules to Restrict the Use of Radio Transmitters with External Frequency Controls*, PR Docket No. 86-37, 2 FCC Rcd 7221 (1987). See generally 47 C.F.R. § 302(b) ("No person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.").

³⁹⁵ See AEP Comments (RM-9332) at 4; APSC Comments (RM-9332) at 5; BGE Comments (RM-9332) at 3; CSW Comments (RM-9332) at 2.

³⁹⁶ See *supra* at ¶¶ 110, 111.

144. We now seek comment on whether this flexibility in use of PLMR channels should be extended to the 900 MHz band. We believe that such an action would promote the statutory objective of regulatory symmetry among CMRS providers.³⁹⁷ We intend, if we introduce such flexibility for licensees in the 900 MHz band, to impose an appropriate holding period requirement on all licenses the application for which is filed on or after the date we adopt this item. We would take such an action in order to ensure that our request for comment on this issue does not motivate prospective licensees to apply for vacant PLMR spectrum with the sole intent of using it for CMRS operations. Given the unique characteristics of the 800 MHz PLMR bands, however,³⁹⁸ we also seek comment as to whether there are any reasons we should continue to treat the 800 MHz and 900 MHz bands differently.

V. PROCEDURAL MATTERS

A. Ex Parte Presentations

145. This is a permit-but-disclose notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.³⁹⁹

B. Regulatory Flexibility Act Analyses

146. A Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act ("RFA"),⁴⁰⁰ is contained in Appendix C. An Initial Regulatory Flexibility Analysis, pursuant to the RFA, is contained in Appendix D.⁴⁰¹

C. Final Paperwork Reduction Act of 1995 Analysis

147. This Report and Order contains a new information collection, and the Further Notice of Proposed Rule Making contains a proposed information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget ("OMB") to take this opportunity to comment on the information collections contained in this Report and Order and Further Notice of Proposed Rule Making as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days after publication of the Report and Order and Further Notice of Proposed Rule Making in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information

³⁹⁷ 47 U.S.C. § 332; *see, e.g.*, Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems. *Second Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-18, 12 FCC Rcd 2732, 2737 (1997).

³⁹⁸ *See supra* at ¶ 109.

³⁹⁹ *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

⁴⁰⁰ *See* 5 U.S.C. § 604.

⁴⁰¹ *See* 5 U.S.C. § 603.

technology.

148. In addition to filing comments on the information collections contained in this Report and Order and Further Notice of Proposed Rule Making with the Secretary, a copy of any comments on the information collections should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street S.W., Washington, DC 20554, or via the Internet to jbolev@fcc.gov and to Edward Springer, OMB Desk Officer, 10236 NEOB, 725 – 17th Street, N.W., Washington, DC 20503 or via the Internet to edward.springer@omb.eop.gov.”

D. Filing Procedures

149. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before 60 days after publication in the Federal Register, and reply comments on or before 90 days after publication in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System (“ECFS”) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 13 FCC Rcd 11322, 11326 (1998).

150. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov and should include the following words in the body of the message, “get form <your e-mail address>.” A sample form and directions will be sent in reply.

151. Parties choosing to file by paper must file an original and four copies of each filing. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, The Portals, 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554. In addition, courtesy copies should be delivered to Leora Hochstein, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room #4-A633, Washington, D.C. 20554 and Scot Stone, Public Safety and Private Wireless Division, Federal Communications Commission, 445 12th Street, S.W., Room #4-B408, Washington, D.C. 20554.

152. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. Comments and reply comments will be available for public inspection and duplication during regular business hours in the FCC Reference Information Center, Room CY-A257, 445 12th Street, S.W., Washington, DC 20554. Copies also may be obtained from International Transcription Services, Inc., 445 12th Street, S.W., Room CY-B400, Washington, DC 20554, (202) 314-3070.

E. Further Information

153. For further information concerning this Report and Order and Further Notice of Proposed Rule Making, contact Gary D. Michaels or Leora Hochstein of the Auctions and Industry Analysis Division at (202) 418-0660 (voice), (202) 418-7233 (TTY), or Shellie Blakeney of the Public Safety and Private Wireless Division at (202) 418-0680 (voice), (202) 418-7233 (TTY), Wireless

Telecommunications Bureau, Washington, DC 20554.

VI. ORDERING CLAUSES

154. Accordingly, pursuant to Sections 1, 2, 4(i), 5(c), 7(a), 11(b), 301, 302, 303, 307, 308, 309(j), 310, 312a, 316, 319, 323, 324, 332, 333, 336, 337, and 351 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 155(c), 157(a), 161(b), 301, 302, 303, 307, 308, 309(j), 310, 312a, 316, 319, 323, 324, 332, 333, 336, 337, and 351, the Balanced Budget Act of 1997, Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997), and Sections 1.421 and 1.425 of the Commission's Rules, 47 C.F.R. §§ 1.421 and 1.425, IT IS ORDERED that the REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULE MAKING is hereby adopted.

155. IT IS FURTHER ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes contained in the Further Notice of Proposed Rule Making, and that comment is sought on these proposals.

156. IT IS FURTHER ORDERED that Parts 1 and 90 of the Commission's Rules ARE AMENDED as set forth in Appendix B, and that these Rules shall be effective [60 days after publication in the Federal Register], except that the information collection contained in these rules become effective 70 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

157. IT IS FURTHER ORDERED that, pursuant to sections 1, 2, 4(i), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i) and 303, and Section 1.425 of the Commission's Rules, 47 C.F.R. § 1.425, the Petition for Rulemaking filed by the American Mobile Telecommunications Association, Inc. on July 30, 1999 (RM-9705) IS DENIED.

158. IT IS FURTHER ORDERED that, pursuant to sections 1, 2, 4(i), 303, and 337 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 303, and 337, the Petition for Rulemaking filed by UTC, The Telecommunications Association, the American Petroleum Institute, and the Association of American Railroads on August 14, 1998 (RM-9405) IS DENIED.

159. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order and Further Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis and Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the U.S. Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

APPENDIX A: COMMENTS AND REPLY COMMENTS FILED IN WT DOCKET 99-87**Comments¹**

1. Aeronautical Radio, Inc. (ARINC)
2. Alliant Energy (Parent to : Wisconsin Power and Light, Interstate Power Company & IES Utilities, Inc.)
3. American Automobile Association (AAA)
4. American Electric Power Service Corporation (AEP)
5. The American Mobile Telecommunications Association (AMTA)
6. The American Petroleum Institute (API)
7. American Water Works Association (AWWA)
8. American Water Works Association Government Affairs
9. Amtech Systems Division of Intermec Technologies Corporation (Amtech)
10. Anchorage Water & Wastewater Utility (AWWU)
11. APW Electronics, Inc.
12. Arizona Public Service Company
13. Association of American Railroads (AAR)
14. Association of Public-Safety Communications Officials-International, Inc. (APCO)
15. Baltimore Gas and Electric Company (BGE)
16. Basin Electric Power Cooperative
17. Benton County Public Utility District
18. The Boeing Company (Boeing)
19. Blooston, Mordkofsky, Jackson & Dickens (Blooston I)
Representing:
Automobile Club of Southern California
Betterroads Asphalt Corporation
Clarkson Construction Company, Inc.
Cross Timbers Oil Company
Flash Cab Company
Foster Engineering Company
Hill County Electric Cooperative, Inc.
Hutchinson Telephone Company, Inc.
Lubbock Radio Paging Service, Inc.
Mankato Citizens Telephone Company
Midwest Mobile Radio Service
Minnesota Mining and Manufacturing Co.
Mobilephone of Humboldt, Inc.
Mobile Phone of Texas, Inc.
Nemont Telephone Cooperative
North Pittsburgh Telephone Company
Pond Branch Telephone Company
Supreme Security Systems
TXU Communications Telephone Company
Webster Calhoun Cooperative Telephone Association
The Wilkinsburg-Penn Joint Water Authority

¹ This list includes comments and reply comments submitted in response to RM-9405.

- XIT Rural Telephone Cooperative, Inc.
Zirkelbach Refrigeration, Inc.
20. Blooston, Mordkofsky, Jackson & Dickens (Blooston II)
Representing:
Betteroads Asphalt Corporation
Clarkson Construction Company, Inc.
Cross Timbers Oil Company
Flash Cab Company
Foster Engineering Company
Hill County Electric Cooperative, Inc.
Hutchinson Telephone Company, Inc.
Lubbock Radio Paging Service, Inc.
Mankato Citizens Telephone Company
Midwest Mobile Radio Service
Mobilephone of Humboldt, Inc.
Mobile Phone of Texas, Inc.
Nemont Telephone Cooperative
North Pittsburgh Telephone Company
Pond Branch Telephone Company
Supreme Security Systems
TXU Communications Telephone Company
Webster Calhoun Cooperative Telephone Association
The Wilkinsburg-Penn Joint Water Authority
XIT Rural Telephone Cooperative, Inc.
Zirkelbach Refrigeration, Inc.
21. Dixie Ten Broeck
22. Jack Campitelli
23. CellNet Data Systems, Inc. (CellNet)
24. Central and South West Corporation (CSW)
25. Central Nebraska Public Power and Irrigation (Central)
26. Central Station Alarm Association (CSAA)
27. Chadmoore Wireless Group, Inc. (Chadmoore)
28. Cinergy Corporation (Cinergy)
29. Citizens Water Resources (Citizens Water)
30. City of Calhoun, Georgia Water System (City Administrator)
31. City of Calhoun, Georgia Water System (Director of Public Works)
32. City of Calhoun, Georgia Water System (Mayor)
33. Clay Electric Co-Op
34. Columbus (Georgia) Water Works
35. Commonwealth Edison Company (ComEd)
36. ComSpace Corporation (Comspace)
37. Consumer's Energy
38. Council Of Independent Communications Suppliers (CICS)
39. Allen Crawford
40. The Critical Infrastructure Industries (CII). Representing: United Telecom Council, American Petroleum Institute (API) and Association of American Railroads (AAR)
41. DeKalb County, Georgia Water and Sewer Division
42. Allan Dersham
43. East Bay Municipal Utility District (EBMUD)

44. Entergy Services, Inc. (Entergy)
45. Ford Communications, Inc. (Ford)
46. Forest Industries Telecommunications (FIT)
47. Ronald K. Greenhalgh
48. Henry Radio, Inc.
49. Hewlett-Packard Company (HP)
50. Houston Lighting & Power Company (HL&P)
51. Industrial Telecommunications Association, Inc.(ITA), the Council of Independent Communications Suppliers (CICA), and The Taxicab & Livery Communications Council (TLCC)
52. International Association of Fire Chiefs, Inc (IAFC)
International Municipal Signal Association (IMSA)
53. International Bridge, Tunnel and Turnpike Association
54. International Communications Association (ICA)
55. Intek Global Corp. (Intek)
56. Kansas City, Missouri Water Services Department
57. Kay Communications, Inc.
58. Kenwood Communications Corporation (Kenwood)
59. Land Mobile Communications Council (LMCC)
60. Lincoln Water System (LWS)
61. Lubrizol Corporation
62. Mark IV Industries Ltd. (Mark IV)
63. David B. Marricle
64. Maryland Transportation Authority (MDTA)
65. McCook Public Power District
66. Midwest Energy, Inc.(Midwest)
67. Minnesota Power, Inc.
68. Motorola
69. MRFAC, Inc. (MRFAC)
70. MTA Bridges & Tunnels (MTA)
71. National Association of Water Companies (NAWC)
72. National Fuel Gas Company
73. National Rural Electric Cooperative Association (NRECA)
74. New England Power Service Company
75. New Jersey Highway Authority (NJHA)
76. New Jersey Turnpike Authority (NJTA)
77. New York State Electric & Gas Corporation (NYSEG)
78. New York State Technology Enterprise Corporation (NYSTEC)
79. New York State Thruway Authority (NYSTA)
80. Nextel Communications, Inc. (Nextel)
81. Niagara Mohawk Power Corporation
82. Northeast Missouri Electric Power Cooperative
83. Northeast Utilities Service Company (NU)
84. North Marine Water District (NMWD)
85. The North Texas Communications Council (NTCC)
86. On Site Communications (OSC)
87. Pacific Gas and Electric (PG&E)
88. PacifiCorp
89. The Peace Bridge Authority
90. The Personal Communications Industry Association, Inc. (PCIA)

91. The Private Internal Radio Service Coalition (PIRSC)
92. Ponca City Refinery
93. Public Service Electric and Gas Company (PSE&G)
94. Radscan, Inc.
95. Rappahannock Electric Cooperative (REC)
96. Ray's Radio Shop, Inc. (RRS)
97. Rees Communications
98. City of Sacramento, Department of Utilities
99. San Francisco Public Utilities Commission
100. San Francisco Public Utilities Commission, Water Quality Bureau
101. San Juan Water District
102. SCANA Corporation (SCANA)
103. Mr. Merrill T. See (Mr. See)
104. Small Business In Telecommunications (SBT)
105. Thomas C. Smith
106. South Jersey Transportation Authority (SJTA)
107. The Texas Section of the American Water Works Association
108. Transportation Operations Coordinating Committee (Transcom)
109. Trimble Navigation Limited (Trimble)
110. Turlock Irrigation District (TID)
111. Union Electric Company d/b/a Ameren UE and Central Illinois Public Service Company
d/b/a Ameren Cips (Ameren)
112. U.S. Department of Transportation (DOT)
113. United States Small Business Administration, Office of Advocacy (Advocacy)
114. The United Telecom Council (UTC)
115. United Water Idaho
116. United Water New York (UWNY)
117. United Water New Jersey (UWNJ)
118. United Water Resources
119. USMSS, Inc. (USMSS)
120. Virginia Electronic and Power Company (Virginia Power)
121. Washington Gas Light Company (Washington Gas)
122. Joseph T. Wehrkamp
123. Western Communications (WC)
124. Western Resources (WR)
125. West Virginia Parkways Economic Development and Tourism Authority(WVPA)
126. WinStar Communications, Inc. (WinStar)
127. Wisconsin Department of Transportation, Division of State Patrol
128. Wisconsin Public Service Corporation (WPSC)

Reply Comments

1. American Automobile Association (AAA)
2. The American Mobile Telecommunications Association (AMTA)
3. The American Petroleum Institute (API)
4. Association of American Railroads (AAR)
5. Association of Public-Safety Communications Officials-International, Inc. (APCO)

6. Atlantic City Electric Company(Atlantic), Cinergy Corp.(Cinergy), Delmarva Power & Light Company (Delmarva), Entergy Services, Inc.(Entergy), and Indianapolis Power & Light Company (IPL) (collectively "the Utilities")
7. Automobile Club of Southern California (ACSC)
8. The Boeing Company (Boeing)
9. Blooston, Mordkofsky, Jackson & Dickens (Blooston II- Reply)
Representing:
Betteroads Asphalt Corporation
Bobier Electronics
Caprock Communications
Citizens Telephone Company
Clarkson Construction Co./Total Risk Mgt.
Cross Timbers Oil Company
Electronic Specialties
First Communications Co.
Flash Cab Company
Foster Engineering Company
Hill County Electric Cooperative, Inc.
Hutchinson Telephone Company, Inc.
IMC Agrico Co.
Instant Signal & Alarm Co., Inc.
Lubbock Radio Paging Service, Inc.
Mankato Citizens Telephone Company
Midwest Mobile Radio Service
Minnesota Mining and Manufacturing Co.
Mobilcom
Mobilephone of Humboldt, Inc.
Mobile Communications Service of Miami
Mobile Phone of Texas, Inc.
Nemont Telephone Cooperative
North Pittsburgh Telephone Company
Penasco Valley Telephone
Platte Valley Communications of Kearney, Inc.
Pond Branch Telephone Company
Sanborn Telephone Company
Supreme Security Systems
Teletouch Communications, Inc.
TXU Communications Telephone Company
UBTA Communications
Webster Calhoun Cooperative Telephone Association
Western Atlas International, Inc.
The Wilkinsburg-Penn Joint Water Authority
W.T. Services, Inc.
XIT Rural Telephone Cooperative, Inc.
Zirkelbach Refrigeration, Inc.
10. California State Automobile Association (Cal State)
11. Central Station Alarm Association (CSAA)
12. CellNet Data Systems, Inc. (CellNet)
13. Chadmoore Wireless Group, Inc. (Chadmoore)

14. Cinergy Corporation (Cinergy)
15. Columbia Energy Group (Columbia)
16. Commonwealth Edison Company (ComEd)
17. ComSpace Corporation (ComSpace)
18. Consolidated Edison Company of New York, Inc.(ConEdison)
19. Entergy Services, Inc. (Entergy)
20. Ford Communications, Inc.
21. Forest Industries Telecommunications (FIT)
22. Florida Fruit & Vegetable Association (FFVA)
23. Joint Comments of the Industrial Telecommunications Association, Inc., the Council of Independent Communications Suppliers, The Taxicab 7 Livery Communications Council, and the Telephone Maintenance Frequency Advisory Committee (Joint Commenters)
24. Mark IV Industries, Limited. I.V.H.S. Division (Mark IV)
25. Minnesota Power
26. Motorola
27. MRFAC, Inc.(MRFAC)
28. The National Association of Manufacturers and MRFAC, Inc. (NAM/MRFAC)
29. National Propane Gas Association (NPGA)
30. National Ready Mixed Concrete Association (NRMCA)
31. National Utility Contractors Association (NUCA)
32. Nextel Communications, Inc. (Nextel)
33. Nextel/ Attachment: Comments by Dr. Rosston
34. Otter Tail Power Company
35. Personal Communications Industry Association, Inc. (PCIA)
36. Radscan, Inc. (Radscan)
37. Rocky Mountain Motorists (Rocky Mountain)
38. SCANA Corporation (SCANA)
39. Small Business In Telecommunications (SBT)
40. Southern Company
41. Trimble Navigation Limited (Trimble)
42. Union Electric Company d/b/a Ameren UE and Central Illinois Public Service Company d/b/a Ameren Cips (Ameren)
43. United Telecom Council (UTC)
44. UTC, The Telecommunications Association

Ex Parte Submissions

1. AEP Communications, LLC
2. Ameren, Cinergy Corporation, Commwealth Edison, Entergy Services, and Cinergy
3. American Mobile Telecommunications Association (AMTA)
4. American Petroleum Institute (API)
5. Association of Public-Safety Communications Officials-International, Inc. (APCO)
6. The Boeing Company (Boeing)
7. Cellnet Data Systems, Inc.
8. Central Station Alarm Association
9. CoServ Security, LLC
10. FM Communications, Inc. (FM)
11. Forest Industries Telecommunications (FIT)
12. Global Frontiers, Inc. (Global)

13. Keller and Heckman on behalf of Colorado Interstate Gas Company, American Petroleum Institute (API), Shell Oil Company
14. Thomas R. Koeing d/b/a Interphone Co. (Interphone)
15. Mark IV Industries Ltd. (Mark IV)
16. Merchants Alarm Systems
17. Mobex Communications, Inc. (Mobex)
18. Motorola, Inc. (Motorola)
19. MRFAC, Inc. (MRFAC)
20. Nextel Communications, Inc. (Nextel)
21. Pacific Wireless Technologies, Inc.
22. Personal Communications Industry Association (PCIA)
23. Representative Steven R. Rothman
24. Representative Cliff Stearns
25. Representative Edolphus Towns
26. Senator Tom Daschle
27. Senator Peter G. Fitzgerald
28. Senator Frank R. Lautenberg
29. Sentry Watch, Inc.
30. Southern Communications Services, Inc. (Southern)
31. Staley Communications, Inc.
32. U.S.A Central Station Alarm Corp.
33. U.S. Environmental Protection Agency (EPA)
34. United Telecom Council (UTC)
35. UTC, The Telecommunications Association
36. Wiley, Rein & Fielding
Representing:
Industrial Telecommunications Associations, Inc. (ITA)
Motorola, Inc. (Motorola)

Extension of Time to File Reply Comments Submissions

1. Land Mobile Communications Council (LMCC)
2. William R. Miller dba Russ Miller Rental

Petition for Rulemaking RM-9332

1. American Mobile Telecommunications Association, Inc.(AMTA)
2. UTC, The Telecommunications Association (UTC), Association of American Railroads(AAR), and the American Petroleum Institute (API)

Support to Petition for Rulemaking RM-9332

1. American Petroleum Institute (API)

Opposition to Petition for Rulemaking RM-9332

1. Atlantic City Electric Company(Atlantic), Cinergy Corp.(Cinergy), Delmarva Power & Light Company (Delmarva), Entergy Services, Inc.(Entergy), and Indianapolis Power & Light Company (IPL) (collectively "the Utilities")

2. Industrial Telecommunications Association, Inc.(ITA), the Council of Independent Communications Suppliers (CICs), The Taxicab & Livery Communications Council (TLCC), and the Telephone Maintenance Frequency Advisory Committee (TELFAC) and USMSS, Inc. (collectively, "Joint Commenters")
3. MRFAC, Inc.(MRFAC)
4. Petroleum Communications, Inc.
5. SCANA Communications, Inc. (SCANA)

Comments Filed in Response to RM-9705

1. Aeronautical Radio, Inc. (ARINC)
2. American Hospital Association (AHA)
3. American Mobile Telecommunications Association, Inc. (AMTA)
4. Association of American Railroads (AAR)
5. Association of Public-Safety Communications Officials-International. Inc. (APCO)
6. Blooston, Mordkofsky, Jackson & Dickens (Blooston)

Representing:

Automobile Club of Southern California
AAA Colorado
Betterroads Asphalt Corporation
Bobier Electronics
Caprock Communications
Citizens Telephone Company
Clarkson Construction Co./Total Risk Mgt.
Cross Timbers Oil Company
Electronic Specialties
First Communications
Flash Cab Company
Foster Engineering Company
Hill County Electric Cooperative, Inc.
Hutchinson Telephone Company, Inc.
IMC Agrico Co.
Instant Signal & Alarm Co., Inc.
Lubbock Radio Paging Service, Inc.
Mankato Citizens Telephone Company
Midwest Mobile Radio Service
Minnesota Mining and Manufacturing Co.
Mobilcom
Mobilephone of Humboldt, Inc.
Mobile Communicaitons Service of Miami
Mobile Phone of Texas, Inc.
Nemont Telephone Cooperative
North Pittsburgh Telephone Company
Penasco Valley Telephone
Platte Valley Communications of Kearney, Inc.
Pond Branch Telephone Company, Inc.
Sanborn Telephone Company
Supreme Security Systems, Inc.
Teletouch Communications, Inc.
TXU Communications Telephone Company

- UBTA Communications
Webster-Calhoun Cooperative Telephone Association
Western Atlas International, Inc.
Wilkinsburg-Penn Joint Water Authority
W.T. Services, Inc.
XIT Rural Telephone
Zirkelbach Refrigeration, Inc.
7. ComSpace Corporation (ComSpace)
 8. Fisher Wireless Services, Inc.
 9. Industry Coalition
Comprised of:
Aeronautical Radio, Inc.
Alliance of Motion Picture and Television Producers
American Automobile Association (AAA)
American Petroleum Institute (API)
American Trucking Associations
Associated Builders & Contractors, Inc.
Association of American Railroads
Council of Independent Communications Suppliers (CICA)
Forest Industries Telecommunications (FIT)
Industrial Telecommunications Association, Inc. (ITA)
International Taxicab and Livery Association
MRFAC, Inc. (MRFAC)
National Food Processors Association
National Mining Association
National Propane Gas Association
National Ready Mixed Concrete Association
National Utility Contractors Association
New England Fuel Institute
Newspaper Association of America
Personal Communications Industry Association (PCIA)
Telephone Maintenance Frequency Advisory Committee (TELEFAC)
United Telecom Council (UTC)
USMSS, Inc. (USMSS)
 10. Mobex Communications, Inc. (Mobex)
 11. Motorola, Inc. (Motorola)
 12. Qualicom, Inc. (Qualicom)
 13. Small Business in Telecommunications (SBT)
 14. The Boeing Company (Boeing)

Reply Comments Filed in Response to RM-9705

1. American Mobile Telecommunications Association, Inc. (AMTA)
2. Chadmoore Wireless Group, Inc. (Chadmoore)
3. Industrial Telecommunications Association, Inc. (ITA)

APPENDIX B: FINAL RULES

Section 1.913 is amended by adding a new paragraph (g) to read as follows:

§1.913 Application forms; electronic filing and manual filing

(g) *Section 337 Requests.* Applications to provide public safety services submitted pursuant to 47 U.S.C. 337 must be filed on the same form and in the same manner as other applications for the requested frequency(ies).

Section 90.179 is amended by revising paragraph (g) to read as follows:

§ 90.179 Shared use of stations.

* * * * *

(g) The provisions of this section do not apply to licensees authorized to provide commercial mobile radio service under this part, including licensees authorized to use channels transferred or assigned pursuant to § 90.621(e)(2) of this part.

Section 90.621 is amended by revising paragraph (e)(2) to read as follows:

§ 90.621 Selection and assignment of frequencies.

* * * * *

(e) * * *

(2) Notwithstanding paragraph (e)(5) of this section, licensees of channels in the Industrial/Land Transportation and Business categories may request a modification of the license, *see* § 1.947 of this part, to authorize use of the channels for commercial operation. The licensee may also, at the same time or thereafter, seek authorization to transfer or assign the license, *see* § 1.948 of this part, to any person eligible for licensing in the General or SMR categories. Applications submitted pursuant to this paragraph must be filed in accordance with the rules governing other applications for Industrial/Land Transportation and Business channels, and will be processed in accordance with those rules, except that the modification application and the assignment application will be placed on public notice in accordance with § 1.933 of this chapter. Grant of requests submitted pursuant to this paragraph is subject to the following conditions:

(i) A licensee that modifies its license to authorize commercial operations will not be authorized to obtain additional 800 MHz Business or Industrial/Land Transportation category channels for sites located within 113 km (70 mi.) of the station for which the license was modified, for a period of one year from the date the license is modified. This provision applies to the licensee, its controlling interests and their affiliates, as defined in § 1.2110 of this part.

(ii) With respect to licenses the initial application for which was filed on or after November 9, 2000, requests submitted pursuant to paragraph (e)(2) of this section may not be filed until five years after the date of the initial license grant. In the case of a license that is modified on or after November 9, 2000 to add 800 MHz Industrial/Land Transportation or Business frequencies or to add or relocate base stations that expand the licensee's the interference contour, requests submitted pursuant to paragraph (e)(2) of this section for these frequencies or base stations may not be filed until five years after such

modification.

(iii) Requests submitted pursuant to paragraph (e)(2) of this section must include a certification that written notice of the modification application has been provided to all Public Safety licensees. *see* § 90.20(a) of this part, with base stations within 113 km (70 mi.) of the site of the channel(s) for which authorization for commercial use is sought that operate within 25 kHz of the center of those channel(s). If, pursuant to paragraph (e)(2), modification and assignment or transfer applications are filed at different times, the written notice required by this paragraph must be provided each time.

(iv) The applicant must certify that it will take reasonable precautions to avoid causing harmful interference to Public Safety licensees, *see* § 90.20(a) of this part, and to take such action as may be necessary to eliminate interference to such licensees caused by its operations. (When an assignment or transfer application is filed pursuant to paragraph (e)(2) of this paragraph, this representation is required only of the assignee or transferee.) Licensees of stations suffering or causing harmful interference are expected to cooperate and resolve this problem by mutually satisfactory arrangements. If the licensees are unable to do so, the Commission may impose restrictions including specifying the transmitter power, antenna height, or area or hours of operation.

* * * * *

APPENDIX C: FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act ("RFA"),¹ an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rule Making* in WT Docket 99-87.² The Commission sought written public comment on the issues and proposals in the *Notice*, including comment on the IRFA. The comments received are discussed below. This Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.³

A. Need for, and Objectives of, the Report and Order

2. This Report and Order was initiated to evaluate the Commission's auction authority for wireless telecommunications services following the enactment of the Balanced Budget Act of 1997. The Balanced Budget Act revised the original spectrum auction standard that had been established under the Omnibus Budget Reconciliation Act of 1993. In this Report and Order, we develop a framework for making certain determinations for future licensing of the private wireless services and the scope of the Balanced Budget Act's exemption from competitive bidding for licenses and permits issued for public safety radio services. In attempting to maximize the use of private radio spectrum, we continue our efforts to improve the efficiency of spectrum use, maintain public safety services, reduce the regulatory burden on spectrum users, facilitate technological innovation, and provide opportunities for development of competitive new service offerings. The policies adopted in this Report and Order are also designed to implement Congress' goal of giving small businesses the opportunity to participate in the provision of spectrum-based services in accordance with Section 309(j) of the Communications Act of 1934, as amended.⁴

3. The Report and Order also amends certain Part 1 and 90 rules to conform the application and licensing procedures in the private radio services with the new policies described in the Report and Order. In particular, these amendments adopt filing procedures for license applications submitted pursuant to Section 337 of the Communications Act, describe procedures by which mutually exclusive applications for licenses in the public safety radio services will be resolved, and revise certain Part 90 regulations applicable to the Private Land Mobile Radio ("PLMR") services.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

4. There were two timely filed comments in response to the IRFA.⁵ The Office of Advocacy of

¹See 5 U.S.C. § 601 *et seq.* The RFA has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

²See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz, WT Docket No. 99-87, RM-9332, RM-9405, *Notice of Proposed Rule Making*, FCC 99-52, 14 FCC Rcd 5206 (1999) ("*Notice*").

³See 5 U.S.C. § 604.

⁴ 47 U.S.C. § 309(j)(3)(B); *see also* 47 U.S.C. § 257.

⁵ See Comment of the Office of Advocacy, U.S. Small Business Administration on the Notice of Proposed Rulemaking and the Initial Regulatory Flexibility Analysis of the Notice of Proposed Rulemaking, CC (continued....)

the U.S. Small Business Administration (“SBA”) claims that the *Notice* offers no rationale for changing licensing procedures for PLMR services, and did not consider the impact of the proposed rules on small businesses.⁶ SBA also argues that the *Notice* and the IRFA do not describe the impact of the rules on small businesses and does not provide significant alternatives designed to minimize this impact.⁷ The law firm of Blooston, Mordkofsky, Jackson & Dickens contends that the adoption of geographic licensing and competitive bidding will adversely impact small businesses, particularly those in rural areas.⁸

5. We believe that the *Notice* provided ample justification for changes in our traditional approaches to licensing the private radio services. The *Notice* observed that significant efficiency gains might be expected from a move to new license assignment mechanisms. In particular, the Commission noted:

We have previously observed that the use of competitive bidding to assign geographic overlay licenses in private radio services would promote spectrum efficiency. This approach would promote competition among licensees, which, in turn, would provide market-based incentives for efficient spectrum use. In particular, incumbents would be able to continue existing operations without harmful interference, and overlay licensees would be able to negotiate voluntary mergers, buyouts, frequency swaps, or similar arrangements with incumbents. Thus, the overlay licensee would incur an opportunity cost if spectrum is not used as efficiently as possible and would have incentives to promote spectrum efficiency.⁹

Implicit in this discussion is an understanding (shared by many commenters) that private radio spectrum is scarce and is in great demand.¹⁰ In addition, the IRFA described how the notice sought comment on how the Balanced Budget Act’s amendments to Section 309(j) affect the Commission’s determinations of what services are auctionable. The IRFA also pointed out that the *Notice* was requesting comment on whether the Balanced Budget Act’s amendments to Section 309(j) require the Commission to revise its licensing schemes and license assignment methods to provide for competitive bidding in services that it previously determined were not auctionable, and on how such schemes for new services might be established. Further, the IRFA stated that the *Notice* was considering issues relating to a petition for rulemaking arising from the statutory exemption from competitive bidding for public safety radio services. In short, the IRFA and the *Notice* described the reasons beyond the statutory mandates that provided the basis for the Commission’s consideration of such licensing mechanisms, and gave

(Continued from previous page) _____

Docket 99-87 (sic) (filed Aug. 2, 1999) (“SBA Comments”); Initial Regulatory Flexibility Analysis Comments of Blooston, Mordkofsky, Jackson & Dickens, WT Docket 99-87, RM-9332 (filed Aug. 2, 1999) (“Blooston IRFA Comments”).

⁶ See SBA comments at 1, 2-3.

⁷ See *id.* at 1, 4-6.

⁸ See Blooston IRFA Comments at 1.

⁹ *Notice* at ¶ 76.

¹⁰ See, e.g., Cinery Comments at ii; API Comments at 22; PCIA Comments at 21-22; Motorola Comments at 9.

commenters adequate opportunity to address the issues affecting small businesses and others.

6. As can be seen throughout the *Notice*, the Commission has thoroughly considered the impact on small businesses of the Balanced Budget Act's amendments to the Commission's auction authority under Section 309(j) of the Communications Act.¹¹ For example, the *Notice* sought comment on whether it would be appropriate to limit auction eligibility to certain classes of small business entities.¹² Specifically, the *Notice* inquired as to possible standards to be considered in establishing eligibility, and asked whether it would be appropriate to adopt the SBA's size standards under the Standard Industrial Classifications ("SIC"), or service-specific size standards, taking into account the characteristics and capital requirements of particular private services.¹³ The Commission also observed that 96 percent of the governmental entities in the U.S. qualify as small businesses under SBA definitions.¹⁴ Governmental entities are primary users of spectrum for public safety radio services. Thus, in devoting considerable attention in the *Notice* to the exemption from the Commission's auction authority for public safety radio services and its impact on public safety users, the Commission was simultaneously considering impacts on small businesses.¹⁵

7. Likewise, the Commission considered significant alternatives designed to minimize impacts on small business users of private radio spectrum. The RFA requires the Commission to provide an analysis that discusses significant alternatives, including, among others, "an exemption from coverage of the rule, or any part thereof, for such small entities."¹⁶ As is discussed above, a significant portion of the *Notice* was devoted to our consideration of exemptions from the statute's auction mandate.¹⁷ Thus, we adequately considered the effect on small business from the outset and ultimately developed policies which apply equally to all parties.

8. SBA and Blooston also suggest that auctions are inherently unfair to small businesses. In drawing that conclusion, SBA fails to mention that the Commission, in consultation with SBA, has developed designated entity preferences, such as bidding credits, to facilitate participation by small businesses in spectrum auctions,¹⁸ and routinely makes bidding credits available to encourage the award

¹¹ See, e.g., *Notice*, 14 FCC Rcd. at 5242, 5244, 5246 ¶ 72, 77, 83-84.

¹² See *id.*, 14 FCC Rcd. at 5246 ¶ 83-84.

¹³ See *id.*

¹⁴ See *id.*, 14 FCC Rcd. at 5261 ¶ 23 (IRFA).

¹⁵ See *id.*, 14 FCC Rcd. at 5222-34 ¶ 26-57.

¹⁶ See 5 U.S.C. § 603(c).

¹⁷ See *id.*, 14 FCC Rcd. at 5222-34 ¶ 26-57.

¹⁸ See, e.g., Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) (modified by *Erratum*, DA 98-419 (rel. Mar. 2, 1998)) (adopting small business bidding credits). See also 47 C.F.R. § 1.2110 (definition of small business designated entities for purposes of FCC's competitive bidding processes).

of licenses to small businesses.¹⁹ Contrary to SBA's assertions,²⁰ we believe that band manager licensing is an approach that may benefit small businesses by making more efficient use of the private radio spectrum. We expect that band manager licensing will allow small business users to obtain access to spectrum in amounts that are tailored to meet their particularized needs or to outsource their communications requirements to a third party who may be able to provide service at lower cost. Blooston argues that auctions are burdensome to small businesses because they may require small entities to hire personnel to manage day-to-day business affairs while the small business' managers are participating in the auction.²¹ However, we believe that band manager licensing may alleviate this problem by alleviating the need for small businesses to participate in the auction and instead allow all types of users to more readily secure access to spectrum in post-auction markets.

9. We find little merit in Blooston's criticism that small entities may be required to submit detailed financial showings, which might then be available to competitors.²² As Blooston acknowledges, such showings are required only where a small business claims eligibility for a designated entity benefit, such as a bidding credit.²³ If a small business applicant does not wish to risk disclosing such information to obtain a bidding discount, it may simply elect not to seek such benefits.²⁴ Further, the Commission's designated entity rules call for the submission of financial data that has presumably already been tabulated for reasons not related to Commission regulations, thus reducing burdens on small business applicants which seek to claim these benefits.²⁵ Finally, of course, financial showings are necessary to ensure that only qualified entities receive this particular form of government assistance.

10. We disagree with the premise of Blooston's argument that auctions will lead to a concentration of licenses in the hands of a few licensees.²⁶ Rather, where licensees are afforded the flexibility to maximize use of the spectrum during their license tenure, as under a band manager licensing scheme, those licensees will have an economic incentive not to discriminate or warehouse, and

¹⁹ See, e.g., Amendment of 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 the Local Multipoint Distribution Service and for Fixed Satellite Services; Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Service Rules; Suite 12 Group Petition for Pioneer Preference, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545, 12,686-96 ¶¶ 340-63 (1997)(adopting small business credits for LMDS auction).

²⁰ See SBA Comments at 4.

²¹ See Blooston IRFA Comments at 4.

²² See *id.*

²³ See *id.*

²⁴ We note that applicants may request that trade secrets and privileged information be withheld from public inspection. See 47 C.F.R. § 0.459. However, we generally do not grant routinely such requests with regard to financial information that is necessary to establish eligibility for designated entity benefits.

²⁵ See, e.g., 47 C.F.R. § 1.2110(m) (generally requiring submission of audited financial statement to prove small business status).

²⁶ See Blooston IRFA Comments at 5.

will instead maximize use of the spectrum. The Report and Order observes that the Commission will consider whether it is appropriate for band managers in other bands to be subject to the same types of rules as 700 MHz Guard Band Managers regarding fair and nondiscriminatory access to the band manager's spectrum, and limits on the type of restrictions that band managers may impose on their customers' use of the spectrum.²⁷ If circumstances warrant, moreover, the Commission might consider imposing reasonable access standards or other requirements to forestall anticompetitive behavior.²⁸

11. We have also stated that it may be necessary to consider the licensing of more than one licensee in a given geographic area to promote competition, or the imposition of reasonable access standards or other such requirements. Our experiences in promoting competition in other wireless services leads us to believe that competition among band managers would serve to regulate price, quality, and availability of spectrum.²⁹

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

12. 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, if adopted.³⁰ Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions.³¹ The RFA generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act.³² 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.³³ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."³⁴ Nationwide, as of 1992, there were approximately 275,801 small organizations.³⁵

13. The rule changes effectuated by this Report and Order apply to users of public safety radio services, and private radio licensees that are regulated under Part 90 of the Commission's rules, and may also affect manufacturers of radio equipment. An analysis of the number of small entities affected

²⁷ See *supra* ¶ 47.

²⁸ See *id.*

²⁹ See Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *First Report*, 10 FCC Rcd 8844, 8846, 8872 ¶¶ 7, 83 (1995).

³⁰ See 5 U.S.C. § 603(b)(3).

³¹ See 5 U.S.C. § 601(6).

³² Compare 5 U.S.C. § 601(3) (RFA) with 15 U.S.C. § 632 (SBA).

³³ Small Business Act, 5 U.S.C. § 632 (1996).

³⁴ 5 U.S.C. § 601(4).

³⁵ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to the Office of Advocacy of the Small Business Administration).

follows.

14. *Public Safety radio services and Governmental entities.* Public Safety radio services include police, fire, local governments, forestry conservation, highway maintenance, and emergency medical services.³⁶ The SBA rules contain a definition for small radiotelephone (wireless) companies, which encompasses business entities engaged in radiotelephone communications employing no more than 1,500 persons.³⁷ There are a total of approximately 127,540 licensees within these services. Governmental entities as well as private businesses comprise the licensees for these services. The RFA also includes small governmental entities as a part of the regulatory flexibility analysis.³⁸ "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."³⁹ As of 1992, there were approximately 85,006 such jurisdictions in the United States.⁴⁰ This number includes 38,978 counties, cities and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.⁴¹ The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, the Commission estimates that 81,600 (91 percent) are small entities.

15. *Specialized Mobile Radio ("SMR").* The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to two tiers of firms: (1) "small entities," those with revenues of no more than \$15 million in each of the three previous calendar years; and (2) "very small entities," those with revenues of no more than \$3 million in each of the three previous calendar years. The regulations defining "small entity" and "very small entity" in the context of 800 MHz SMR

³⁶ With the exception of the special emergency service, these services are governed by Subpart B of Part 90 of the Commission's rules. 47 C.F.R. §§ 90.15 through 90.27. The police service includes 26,608 licensees that serve state, county and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes 22,677 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service that is presently comprised of 40,512 licensees that are state, county or municipal entities that use the radio for official purposes not covered by other public safety services. There are 7,325 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The 9,480 state and local governments are licensed to highway maintenance service provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The 1,460 licensees in the Emergency Medical Radio Service (EMRS) use the 39 channels allocated to this service for emergency medical service communications related to the actual delivery of emergency medical treatment. 47 C.F.R. §§ 90.15 through 90.27. The 19,478 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities and emergency repair of public communication facilities. 47 C.F.R. §§ 90.33 through 90.55.

³⁷ See 13 C.F.R. § 121.201 (SIC Code 4812).

³⁸ See 5 U.S.C. § 601(5) (including cities, counties, towns, townships, villages, school districts, or special districts).

³⁹ 5 U.S.C. § 601(5).

⁴⁰ U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

⁴¹ *Id.*

(upper 10 MHz and lower 230 channels) and 900 MHz SMR have been approved by the SBA. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. We assume, for our purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz (upper 10 MHz) and 900 MHz SMR bands. There were 60 winning bidders that qualified as small and very small entities in the 900 MHz auction. Of the 1,020 licenses won in the 900 MHz auction, 263 licenses were won by bidders qualifying as small and very small entities. In the 800 MHz SMR auction, 38 of the 524 licenses awarded were won by small and very small entities.

16. *Estimates for PLMR Licensees.* Private land mobile radio systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the Commission has not developed a definition of small entities specifically applicable to PLMR users, nor has the SBA developed any such definition. The SBA rules do, however, contain a definition for small radiotelephone (wireless) companies.⁴² Included in this definition are business entities engaged in radiotelephone communications employing no more than 1,500 persons.⁴³ According to the Bureau of the Census, only twelve radiotelephone firms of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. For the purpose of determining whether a licensee is a small business as defined by the SBA, each licensee would need to be evaluated within its own business area. The Commission's fiscal year 1994 annual report indicates that, at the end of fiscal year 1994, there were 1,101,711 licensees operating 12,882,623 transmitters in the PLMR bands below 512 MHz.⁴⁴

17. *Equipment Manufacturers.* We anticipate that at least six radio equipment manufacturers will be affected by our decisions in this proceeding. According to the SBA's regulations, a radio and television broadcasting and communications equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern.⁴⁵ Census Bureau data indicate that there are 858 U.S. firms that manufacture radio and television broadcasting and communications equipment, and that 778 of these firms have fewer than 750 employees and would therefore be classified as small entities.⁴⁶

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

18. This Report and Order establishes a framework for making certain determinations for future licensing of the private wireless services and the scope of the Balanced Budget Act's exemption from competitive bidding for licenses and permits issued for public safety radio services. This Report and

⁴² See 13 C.F.R. § 121.201 (SIC Code 4812).

⁴³ *Id.*

⁴⁴ See Federal Communications Commission, 60th Annual Report, Fiscal Year 1994 at 120-121.

⁴⁵ 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 3663.

⁴⁶ U.S. Dept. of Commerce, *1992 Census of Transportation, Communications and Utilities* (issued May 1995), SIC 3663.

Order also imposes new compliance requirements for Part 90 PLMR licensees seeking to modify their licenses to for use in CMRS systems.

19. We make minor revisions to the compliance requirements in Parts 1 and 90 of the Commission's Rules to conform the application and licensing procedures in the private and public safety radio services with the policies described in the Report and Order. These amendments require public safety applicants seeking licenses Section 337 of the Communications Act to file using the Commission's Web-based Universal Licensing System, and require PLMR licensees seeking to modify 800 MHz non-Public Safety PLMR licenses for use in CMRS systems to demonstrate that they meet the requirements to be eligible for such modifications.

20. Also, in response to incidents of interference to public safety licensees, a joint task force composed of members of the public safety community, Commission licensees, and Commission representatives is investigating solutions for preventing and fixing interference to 800 MHz public safety operations. We seek to avoid the potential for further incidents of such interference that could result from the conversion to CMRS. Consequently, we will require licensees seeking to convert to CMRS, upon submitting a modification application, to: (a) certify that the co- or adjacent-channel 800 MHz public safety licensees in the same geographic area have been notified of the application; and (b) commit that they will take affirmative steps to avoid harmful interference to such public safety licensees. We believe that these actions together will reduce the risk of increased interference in this band.

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

21. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (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.⁴⁷

22. The Part 1 rule adopted in this Report and Order clarifies our policies with regard to the processing of applications for licenses in the public safety radio services under Section 337 of the Communications Act. While we considered the alternative of accepting Section 337 requests on an *ad hoc* basis, such an approach would not eliminate the procedural uncertainties faced by public safety entities seeking spectrum. Further, clarification of the process and use of the electronic ULS will greatly reduce the cost of preparing wireless applications and pleadings, while increasing the speed of the licensing process. We expect that these changes will benefit all public safety entities, including those 96% of governmental entities considered to be small entities. Further, use of the ULS will present tremendous advantages for small businesses because it permits access to licensing information at tremendously reduced costs. Finally, we observe that we continue to review the burdens imposed by these and other regulations in our biennial review processes in an effort to minimize regulatory impacts.

23. The Part 90 regulations amended by this Report and Order permit the conversion of 800 MHz non-Public Safety PLMRS licensees be permitted to convert their spectrum to CMRS use under certain circumstances, and clarify that spectrum in the 800 MHz non-Public Safety PLMRS may not be

⁴⁷ See 5 U.S.C. § 603(c).

shared under our Part 90 multiple licensing rule. We denied a proposal to eliminate the distinction between CMRS spectrum and non-Public Safety PLMR spectrum with respect to initial licensing. We believe that the existing PLMR pool of unassigned frequencies should remain available on an initial basis to PLMR eligibles only, to construct new systems or expand existing systems. Therefore, we maintain the eligibility criteria for all new applications. Similarly, we considered an alternative of permitting PLMR licensees to convert their spectrum without restriction, but rejected that idea because it would undercut important public interest objectives. The Report and Order imposes a holding period to prevent trafficking of PLMR spectrum (e.g., PLMR eligible acquiring new PLMR licenses from existing pool of unassigned frequencies for the purpose of selling them to CMRS providers). Rather than negatively impact small businesses, we believe that this rule change is likely to benefit small business PLMR licensees by giving them greater ability to assess marketplace needs and economic factors when determining the best and most efficient use of spectrum. We believe that the benefits of this rule change outweigh the costs that may be associated with providing the required notice to potentially affected public safety licensees. Further, the Report and Order finds that allowing licensees to convert their frequencies to CMRS use or assign or transfer these frequencies to CMRS entities will not affect the supply of available PLMR spectrum for licensing from the PLMR pool, and thus should not further exacerbate the current shortage of private spectrum available to small business entities and other PLMR eligibles.

24. *Report to Congress:* The Commission will send a copy of this Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.⁴⁸ In addition, the Commission will send a copy of this Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of this Report and Order and FRFA (or summaries thereof) will also be published in the *Federal Register*.⁴⁹

⁴⁸ See 5 U.S.C. § 801(a)(1)(A).

⁴⁹ See 5 U.S.C. § 604(b).

APPENDIX D: INITIAL REGULATORY FLEXIBILITY ANALYSIS FOR FURTHER NOTICE OF PROPOSED RULE MAKING

1. As required by the Regulatory Flexibility Act ("RFA"),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities by the policies and rules proposed in this Further Notice of Proposed Rule Making ("Further Notice"). 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 this Further Notice provided above in paras. 149-152, *supra*. The Commission will send a copy of the Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").² In addition, the Further Notice and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules:

2. The purpose of this Further Notice is to determine whether it would be in the public interest, convenience, and necessity to amend our rules governing non-public safety private land mobile radio ("PLMR") licensees in the bands between 222 MHz and 896 MHz in order to expedite the transition to narrowband technology. As is described in the Further Notice, AMTA urges that non-Public Safety licensees in the bands between 222 MHz and 896 MHz be required to deploy technology that achieves the equivalent of two times the capacity of most current operations. AMTA asserts that the gain in efficiency would result in one voice path per 12.5 kilohertz of spectrum, using a 25 kilohertz frequency. AMTA proposes that the requirement be phased in from 2003 to 2020, beginning with the most congested areas. Other commenters believe that the Refarming rules should be retained at least for the time being, because not enough time has elapsed in order to reap the benefits of the well-considered compromises the Commission adopted in that proceeding. The Report and Order tentatively concludes that we should encourage the migration to narrowband technology by prohibiting the manufacture or importation of equipment that does not meet certain efficiency standards by certain dates and requests comment on these issues and the comparative merits of alternative approaches to addressing the concerns that have been raised, including what timetable would be appropriate for implementing any new requirement.

3. The Further Notice also seeks comment on whether to permit 900 MHz Business and Industrial/Land Transportation ("BI/LT") licensees to modify their licenses to permit CMRS use. The Commission believes that extending this flexibility to 900 MHz BI/LT licensees would promote the statutory objective of regulatory symmetry among CMRS providers.

B. Legal Basis:

4. Authority for issuance of this Further Notice is contained in Sections 4(i), 303(r), and

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² See 5 U.S.C. § 603(a).

³ See *id.*

332(a)(2) of the Communications Act of 1934, as amended.⁴

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply:

5. 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, if adopted.⁵ Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions.⁶ The RFA generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act.⁷ 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.⁸ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."⁹ Nationwide, as of 1992, there were approximately 275,801 small organizations.¹⁰

6. The proposed rule amendments may affect users of public safety radio services and private radio licensees that are regulated under Part 90 of the Commission's rules, and may also affect manufacturers of radio equipment. An analysis of the number of small entities affected follows.

7. *Public Safety radio services and Governmental entities.* Public Safety radio services include police, fire, local governments, forestry conservation, highway maintenance, and emergency medical services.¹¹ The SBA rules contain a definition for small radiotelephone (wireless) companies, which

⁴ 47 U.S.C. §§ 154(i), 303(r), 332(a)(2).

⁵ See 5 U.S.C. § 603(b)(3).

⁶ See 5 U.S.C. § 601(6).

⁷ Compare 5 U.S.C. § 601(3) (RFA) with 15 U.S.C. § 632 (SBA).

⁸ Small Business Act, 5 U.S.C. § 632 (1996).

⁹ 5 U.S.C. § 601(4).

¹⁰ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to the Office of Advocacy of the Small Business Administration).

¹¹ With the exception of the special emergency service, these services are governed by Subpart B of Part 90 of the Commission's rules. 47 C.F.R. §§ 90.15 through 90.27. The police service includes 26,608 licensees that serve state, county and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes 22,677 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service that is presently comprised of 40,512 licensees that are state, county or municipal entities that use the radio for official purposes not covered by other public safety services. There are 7,325 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The 9,480 state and local governments are licensed to highway maintenance service provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The 1,460 licensees in the Emergency Medical Radio Service (EMRS) use the 39 channels allocated to this service for emergency medical service communications related to the actual delivery of emergency medical treatment. 47 C.F.R. §§ 90.15 through 90.27. The 19,478 (continued....)

encompasses business entities engaged in radiotelephone communications employing no more than 1,500 persons.¹² There are a total of approximately 127,540 licensees within these services. Governmental entities as well as private businesses comprise the licensees for these services. The RFA also includes small governmental entities as a part of the regulatory flexibility analysis.¹³ "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."¹⁴ As of 1992, there were approximately 85,006 such jurisdictions in the United States.¹⁵ This number includes 38,978 counties, cities and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.¹⁶ The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, the Commission estimates that 81,600 (91 percent) are small entities.

8. *Specialized Mobile Radio ("SMR")*. The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to two tiers of firms: (1) "small entities," those with revenues of no more than \$15 million in each of the three previous calendar years; and (2) "very small entities," those with revenues of no more than \$3 million in each of the three previous calendar years. The regulations defining "small entity" and "very small entity" in the context of 800 MHz SMR (upper 10 MHz and lower 230 channels) and 900 MHz SMR have been approved by the SBA. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. We assume, for our purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz (upper 10 MHz) and 900 MHz SMR bands. There were 60 winning bidders that qualified as small and very small entities in the 900 MHz auction. Of the 1,020 licenses won in the 900 MHz auction, 263 licenses were won by bidders qualifying as small and very small entities. In the 800 MHz SMR auction, 38 of the 524 licenses awarded were won by small and very small entities.

9. *Estimates for PLMR Licensees*. Private land mobile radio systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the Commission has not developed a definition of small entities specifically applicable to PLMR users, nor has the SBA developed any such definition. The SBA rules do, however, contain a

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licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities and emergency repair of public communication facilities. 47 C.F.R. §§ 90.33 through 90.55.

¹² See 13 C.F.R. § 121.201 (SIC Code 4812).

¹³ See 5 U.S.C. § 601(5) (including cities, counties, towns, townships, villages, school districts, or special districts).

¹⁴ 5 U.S.C. § 601(5).

¹⁵ U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

¹⁶ *Id.*

definition for small radiotelephone (wireless) companies.¹⁷ Included in this definition are business entities engaged in radiotelephone communications employing no more than 1,500 persons.¹⁸ Entities engaged in telegraph and other message communications with no more than \$5 million in annual receipts also qualify as small business concerns.¹⁹ According to the Bureau of the Census, only twelve radiotelephone firms of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. For the purpose of determining whether a licensee is a small business as defined by the SBA, each licensee would need to be evaluated within its own business area. The Commission's fiscal year 1994 annual report indicates that, at the end of fiscal year 1994, there were 1,101,711 licensees operating 12,882,623 transmitters in the PLMR bands below 512 MHz.²⁰

10. *Equipment Manufacturers.* We anticipate that at least six radio equipment manufacturers will be affected by our decisions in this proceeding. According to the SBA's regulations, a radio and television broadcasting and communications equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern.²¹ Census Bureau data indicate that there are 858 U.S. firms that manufacture radio and television broadcasting and communications equipment, and that 778 of these firms have fewer than 750 employees and would therefore be classified as small entities.²²

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

11. Possible requirements under consideration in this Further Notice would impose new compliance requirements for certain 900 MHz PLMR licensees regulated under Part 90 of the Commission's rules that seek to modify their licenses to for use in CMRS systems. Assuming the rules adopted in the Report and Order are a good model for 900 MHz PLMR (which assumption has yet to be established), the Commission might require applicants, upon submitting a modification application, to: (a) certify that the co- or adjacent channel 800 MHz public safety licensees in the same geographic area have been notified of the application; and (b) commit that they will take affirmative steps to avoid harmful interference to such public safety licensees. These steps may be necessary to reduce risks of increased interference.

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

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

¹⁷ See 13 C.F.R. § 121.201 (SIC Code 4812).

¹⁸ *Id.*

¹⁹ *Id.* (SIC Code 4822).

²⁰ See Federal Communications Commission, 60th Annual Report, Fiscal Year 1994 at 120-121.

²¹ 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 3663.

²² U.S. Dept. of Commerce, *1992 Census of Transportation, Communications and Utilities* (issued May 1995), SIC 3663.

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.²³

13. The Commission believes that migration to narrowband technologies, *see paras. 137-42, supra*, should benefit all entities, as it will result in more efficient use of the spectrum by allowing a greater number of entities to share existing spectrum. However, requiring the use of narrowband equipment by a date certain, or prohibiting the manufacture or import of non-compliant equipment, could impact some small entities requiring them to upgrade their communications systems before they would otherwise do so. An alternative would be to maintain the current rules, which are intended to foster migration to narrowband technology by way of progressively more stringent type certification requirements. We issue this Further Notice in order to consider whether a change in the Rules would benefit small entities and other PLMR licensees.

14. In the Report and Order portion of this item, we amended our rules to allow 800 MHz BI/LT licensees to assign or transfer their spectrum to CMRS licensees for use in CMRS operations, or to modify the licenses to CMRS use in their own systems. We also adopted rules to safeguard against trafficking in 800 MHz Business and I/LT licenses, and notification procedures to avoid interference to 800 MHz public safety operations. This Further Notice now seeks comment on whether this flexibility in use of PLMR channels should be extended to the 900 MHz band.

15. In the context of 800 MHz PLMR, we have found that allowing licensees to convert their frequencies to CMRS use or assign or transfer these frequencies to CMRS entities will not affect the supply of available PLMR spectrum for licensing from the PLMR pool, and thus should not further exacerbate the current shortage of private spectrum available to small business entities and other PLMR eligibles. An alternative approach might permit such modifications without restriction:²⁴ however, this might affect the supply of available PLMR spectrum which might, in turn, have possible adverse effects on small businesses.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules:

16. None.

²³ See 5 U.S.C. §603(c).

²⁴ See *supra* ¶¶ 113-16.