

discontinuing application of the cellular cross-interest rule in RSAs with more than three competitors to avoid impeding opportunities for financing and investment in rural areas and shift to standard case-by-case review process for RSA cellular license transactions to safeguard competition in these markets.

1. Rural Utilities Service

a. Rural Loan Programs

(i) Background

73. The U.S. Department of Agriculture's RUS Telecommunications Program assists the private sector in developing, planning, and financing the construction of telecommunications infrastructure in rural America. Programs administered by RUS include: (1) infrastructure loans; (2) broadband loans and grants; (3) distance learning and telemedicine loans and grants; (4) weather radio grants; (5) local TV loan guarantees; and (6) digital translator grants. The largest of these programs are the infrastructure loan program and the broadband loan program.

74. The infrastructure loan program is technology neutral, requires broadband-capable facilities, and provides financing for infrastructure (*e.g.*, building and equipment), but not financing for the costs of operating the business. Within the infrastructure loan program, there are four types of financing: (1) hardship loans; (2) cost-of-money loans; (3) rural telephone bank loans; and (4) federal financing bank loans.¹⁴³ For fiscal year 2003, the total authorized loan level for these four programs is \$670 million.¹⁴⁴

75. The broadband loan program is technology neutral; requires provision of high-quality data transmission service and may provide voice, graphics, and video; and must enable a subscriber to transmit and receive at a rate of no less than 200 kilobits per second.¹⁴⁵ Similar to the infrastructure loan program, the broadband loan program finances the construction or acquisition of new facilities and facility improvements.¹⁴⁶ RUS makes broadband loans available to any legally organized entity that has sufficient authority to enter into a contract with RUS and carry out the purposes of the loan, so long as the entity is providing or proposes to provide service to an area that meets the following criteria: (1) there are no more than 20,000 inhabitants, and (2) the service area does not fall within a standard metropolitan statistical area.¹⁴⁷ For fiscal year 2003, RUS has \$80 million for 4 Percent loans,¹⁴⁸ \$80 million for

¹⁴³ 7 C.F.R. §§ 1735.30 – 1735.33

¹⁴⁴ See Slides of Roberta D. Purcell, Assistant Administrator, Telecommunications Program, Rural Utilities Service, Kick Off Meeting of the Federal Rural Wireless Outreach Initiative, July 2, 2003, available at <http://wireless.fcc.gov/outreach/presentations/JointFCC-RUSPresentation_1.pdf> (Purcell Slides). See also <<http://wireless.fcc.gov/outreach/ruralinitiative/event20030702.html>>

¹⁴⁵ 7 C.F.R. § 1738.

¹⁴⁶ 7 C.F.R. § 1738.10(a).

¹⁴⁷ 7 C.F.R. §§ 1738.2, 1738.16. Individuals or partnerships of individuals are not eligible entities. An entity is not eligible if it serves more than 2 percent of the telephone subscriber lines installed in the United States. A State or local government, including any agency, subdivision, or instrumentality thereof (including consortia thereof) shall be eligible for a broadband loan only if, not later than April 30, 2002, no other eligible entity is already offering or has committed to offer broadband service to the eligible rural community. RUS will determine whether the commitment is sufficient for purposes of this paragraph. 7 C.F.R. § 1738.16.

Guaranteed loans, and \$1.3 billion for Treasury Rate loans.¹⁴⁹ In fiscal year 2004, the total loan level is anticipated to be \$418 million.¹⁵⁰

76. The Commission's Wireless Telecommunications Bureau (WTB) has partnered with RUS to sponsor the "Federal Rural Wireless Outreach Initiative" (FCC/RUS Outreach Partnership).¹⁵¹ The FCC/RUS Outreach Partnership is designed to exchange program and regulatory information about rural development and wireless telecommunications access in rural areas. The four key goals of the FCC/RUS Outreach Partnership are to: (1) exchange information about products and services each agency offers to promote the expansion of wireless telecommunications services in rural America; (2) harmonize rules, regulations and processes whenever possible to maximize the benefits for rural America; (3) educate partners and other agencies about Commission, WTB and USDA/RUS offerings; and (4) expand the FCC/WTB and USDA/RUS partnership, to the extent that it is mutually beneficial, to other agencies and partners.

(ii) Discussion

77. We seek methods to help facilitate access to capital in rural areas in order to increase the ability of wireless telecommunications providers to offer service in rural areas. An important part of accomplishing this goal is through the promotion of federal government financing programs. We seek comment on how the Commission can assist in making the RUS loan programs more effective. We seek comment on whether there are any Commission regulations or policies that should be reexamined or modified to facilitate participation in the RUS programs by wireless licensees and service providers. In addition, we ask for comment on whether the FCC/RUS Outreach Partnership could be expanded to include other federal, state, or local government programs and, if so, which programs should be included in this FCC/RUS Outreach Partnership. We further seek comment on whether there is a role for non-governmental entities in the FCC/RUS Outreach Partnership and how such entities might be able to participate.

78. We also ask for suggestions regarding effective outreach programs and the groups that should be targeted. For example, we ask service providers; federal, state, and local governments; and other interested parties what outreach initiatives they have found most effective in the past. In addition, we ask for submission of lists of associations, government agencies, or other interested parties that would want to join in this FCC/RUS Outreach Partnership or receive future information regarding this program.

(Continued from previous page)

¹⁴⁸ To be eligible for a direct loan bearing a fixed interest rate of 4 percent, the applicant must be proposing to serve a community of 2,500 people or less, located in a county where the per capita income is 55 percent of the national average, with a population density is no more than 10 people per square mile, and where there is not currently broadband service (as defined by 7 CFR § 1738.11(b)). The loans are capped at \$5 million. See Purcell Slides; 7 CFR § 1738.30(b).

¹⁴⁹ 7 C.F.R. § 1738.30. Some loan types have additional eligibility criteria. *Id.*

¹⁵⁰ See Purcell Slides.

¹⁵¹ See *Federal Rural Wireless Outreach Initiative News Release*.

b. Security Interests

(i) Background

79. As a historical matter, the Commission has not permitted third parties to take a security interest in spectrum licenses. At the same time, the Commission's legal and policy bases for various restrictions on transactions involving licenses have evolved over the years. For instance, at one time, the policy of prohibiting the sale of bare licenses, as well as the policies against security and reversionary interests in licenses, were based on the Commission's interpretation of the Communications Act.¹⁵² In various decisions, the Commission modified its views on the statutory basis for these policies in the context of cellular and other wireless licenses.¹⁵³ In 1992, the Commission examined these policies in connection with capital formation issues facing the broadcasting industry.¹⁵⁴ For all spectrum-based services, the Commission has expressly permitted licensees to grant security interests in the stock of the licensee, in the physical assets used in connection with its licensed spectrum, and in the proceeds from operations associated with the licensed spectrum.¹⁵⁵ The Commission and the courts have likewise determined that security interests in the proceeds of the sale of a license do not violate Commission policy.¹⁵⁶ In connection with the auction installment payment program, the Commission itself has taken an exclusive security interest in licenses subject to installment payments and a senior security interest in the proceeds of a sale of an auctioned license. In such circumstances, the Commission has allowed licensees to provide their lenders a subordinated security interest in the proceeds of a license sale.¹⁵⁷

¹⁵² See generally Stephen F. Sewell, Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934, 43 Fed. Comm. L.J. 277, 330-31 (1991); William L. Fishman, *Property Rights, Reliance, and Retroactivity under the Communications Act of 1934*, 50 Fed. Comm. L.J. 1, 16-20 (1997); Nancy R. Selbst, "Unregulation" and Broadcast Financing: New Ways for the Federal Communications Commission to Serve the Public Interest, 58 U. Chi. L. Rev. 1423, 1439 (1991).

¹⁵³ See Bill Welch, *Memorandum Opinion and Order*, 3 FCC Rcd 6502, 6503 (1988) (approving for-profit sale of a permit for construction of a cellular telephone facility on ground that relevant provisions of the Communications Act of 1934 "do[] not bar the for-profit sale to a private party, subject to prior Commission approval, of whatever private rights a permittee has in its license") (footnotes omitted); Application of Walter O Cheskey, Trustee-in-Bankruptcy for N.C.P.T. Cellular, Inc. (Assignor) and Triad Cellular L.P. (Assignee), *Memorandum Opinion and Order*, 9 FCC Rcd 986 (Mobile Serv. Div., Comm. Car. Bur. 1994), application for review denied, 13 FCC Rcd 10656, 10660 (1998), application for review denied, *Amarillo CellTelCo v FCC*, 1998 WL 796204 (D.C. Cir. 1998) (Cheskey).

¹⁵⁴ Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, *Notice of Proposed Rule Making and Notice of Inquiry*, 7 FCC Rcd 2654 (1992) (*Broadcasting Capital Formation Notice*). See also Petition for Declaratory Ruling filed by Hogan & Hartson (Feb. 21, 1991), available at <http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1035940001> and <http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1035940002> (Hogan & Hartson Petition).

¹⁵⁵ See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 99 FCC 2d 1249, 1254 (1985)

¹⁵⁶ See Cheskey, 13 FCC Rcd at 10659-60 ¶ 7.

¹⁵⁷ 47 C.F.R. § 1.2110(g)(3).

Courts and commentators have been closely watching these policy developments.¹⁵⁸ In its *Secondary Markets Policy Statement*, the Commission considered ways in which licensees may be able to maximize their efficient use of spectrum by leveraging “the value of their retained spectrum usage rights to increase access to capital.”¹⁵⁹ Specifically, the Commission said “we plan to evaluate our policies prohibiting security and reversionary interests in licenses.”¹⁶⁰

(ii) Discussion

80. Pursuant to our stated intent in the *Secondary Markets Policy Statement*, we initiate a discussion regarding whether we should permit RUS to obtain security interests in the spectrum licenses of their borrowers. We seek comment on whether, and to what extent, licensees in rural areas would benefit from the opportunity to pledge their licenses to RUS as collateral as a means of overcoming their difficulties in raising capital. Would modifying our current policy to allow RUS to take limited security interests in wireless licenses be likely to provide licensees seeking to build out and serve rural and underserved areas with additional assistance in capital formation?

81. As an initial matter, we limit the scope of our inquiry to commercial and private terrestrial wireless services.¹⁶¹ We further limit our inquiry concerning security interests to licenses and licensees in rural and underserved areas that are seeking federal financial assistance through RUS loan programs. We believe that such licensees will benefit most in light of their apparently greater need for lower-cost capital and the new opportunities presented by RUS loans discussed below. Also with regard to the scope of our inquiry, we note that we do not intend to implement any policy change that would, in the case of a licensee operating under the installment payment program, compromise the Commission’s exclusive or senior secured position with respect to the license and the proceeds of the sale of such license. Nevertheless, we seek comment on whether permitting RUS to obtain security interests in the spectrum licenses of their borrowers, as described below, could have unintended effects on installment licensees and the Commission’s rights under these arrangements.

82. Our primary goal is to determine whether further relaxation of the security interest restrictions – by allowing at least a modified form of collateralization of FCC licenses by licensees

¹⁵⁸ See, e.g., *FCC v NextWave Personal Communications Inc*, 123 S.Ct. 832, 842 (2003), *MLQ Investors, L.P. v. Pacific Quadracasting, Inc.*, 146 F.3d 746, 748 (9th Cir. 1998) (*MLQ Investors*); *Beach Television Partners v. George F. Mills, Jr.*, 38 F.3d 535, 537 (11th Cir. 1994) (*Beach Television Partners*); *In re PBR Communications Systems, Inc.*, 172 B.R. 132, 135 (Bankr. S.D. Fla. 1994); Timothy F. Boyce, *Collateralizing Nonassignable Contracts, Licenses, And Permits: Half a Loaf is Better Than No Loaf*, 52 Bus. Law. 559, 575 (1997); William L. Fishman, *Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934*, 50 Fed. Comm. L.J. 1, 52 (1997); Lorin Brennan, *Financing Intellectual Property Under Revised Article 9: National And International Conflicts*, 23 Hastings Comm. & Ent. L.J. 313, 455 (2001); Edwin E. Smith, *Article 9 In Revision: A Proposal For Permitting Security Interests In Nonassignable Contracts and Permits*, 28 Loy. L.A. L. Rev. 335, 349 (1994); Thomas Hutton, *Lenders Seeking to Take a Security Interest in FCC Licenses Obtain Only Limited Protection By Structuring Loans Through Subsidiaries That Will Hold The Licenses*, 20 Nat’l L.J. B5, col. 1 (Jan. 26, 1998).

¹⁵⁹ Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, *Policy Statement*, 14 FCC Rcd 24178, 24187 ¶ 23 (2000) (*Secondary Markets Policy Statement*).

¹⁶⁰ *Id.* at 24187-88.

¹⁶¹ See n.1, *supra*.

obtaining RUS funds – could increase opportunities to raise capital or avoid financial collapse. We therefore seek comment on the extent to which a licensee’s ability to grant RUS a security interest directly in an FCC license would, in fact, create new financing opportunities and facilitate the construction, deployment and continuity of new and existing wireless services in rural and underserved areas. We also ask how this change in our policy would affect the ability of small businesses to obtain much needed startup capital

83. On the other hand, despite these potential benefits, we recognize that a licensee’s current ability to grant security interests in its stock and in the proceeds of a license sale may already provide it with financing opportunities that are similar to those we seek to foster by our proposal below. If so, it would appear that we may not significantly enhance financing opportunities. We ask all interested parties, including licensees, vendors, RUS, lenders and others to comment on these potential benefits and to identify any other specific benefits that could accrue from such a policy change.

84. We further note that any security interest granted to RUS would be expressly conditioned, in writing as part of all applicable financing documents, on the Commission’s prior approval of any assignment of the license or any transfer of *de jure* or *de facto* control of the licensee to RUS. We discuss below the reasons for this limitation and seek comment on some specific concerns.

85. First, in addition to the benefits from lower costs of and greater access to capital, we seek comment on whether modifying our policy to permit RUS to take a security interest in FCC licenses is a natural outgrowth of the Commission and judicial developments discussed above, which recognize the value and ability of a lender obtaining a security interest in the licensee’s stock, proceeds and other assets without infringing upon the Commission’s statutory obligations.¹⁶² For instance, in *MLQ Investors*, the U.S. Court of Appeals for the Ninth Circuit determined that a security interest in the proceeds of the sale of a broadcast license can be perfected prior to the sale of the license, and that “[g]overnment licenses, as a general rule, are considered to be ‘general intangibles’ under the Uniform Commercial Code, ‘i.e., personal property interests in which security interests may be perfected.’”¹⁶³ The Ninth Circuit identified the Commission’s primary policy concern by stating that “[t]he FCC may prohibit security interests in licenses themselves because the creation of such an interest could result in foreclosure and transfer of the license without FCC approval.”¹⁶⁴ The Ninth Circuit went on to explain that the Commission’s interest in regulating spectrum to promote the public interest is not implicated “by a security interest in the proceeds of licenses, which does not grant the creditor any power or control over the license.”¹⁶⁵ We also note that application of state laws under Article 9 of the Uniform Commercial Code is generally limited in connection with the treatment of security interests of non-assignable “personal property” governed by federal law.¹⁶⁶ We seek comment on how cases like *MLQ Investors* and

¹⁶² See *Cheskey, Beach Television Partners*.

¹⁶³ See *MLQ Investors*, 146 F.3d at 749.

¹⁶⁴ *Id.* at 748

¹⁶⁵ *Id.*

¹⁶⁶ See U.C.C. § 9-104(a)(1995); U.C.C. [Revised] § 9-109(c)(1)(2000); see also Brennan, Financing Intellectual Property Under Revised Article 9: National And International Conflicts, 23 Hastings Comm. & Ent. L.J. 313 (2001) (noting that the UCC drafting committee modeled its approach on the “well-established” law that applies to FCC licenses); Weise, *The Financing of Intellectual Property Under Revised Article 9*, 74 Chi -Kent L. Rev 1077, 1092-93 (1999) (noting same).

the application of the UCC provisions have affected lending practices for FCC licensees and what, if any, impact the grant of security interests in spectrum licenses to RUS might have on established law in this area, including the appropriate method of how RUS would perfect a security interest in FCC licenses.

86. Next, we address the concerns that have led us to propose that any security interest granted to RUS be expressly conditioned on the Commission's prior approval of any assignment of the license or any transfer of *de jure* or *de facto* control. We ask whether it may be feasible for a licensee to grant RUS a security interest in an FCC license without compromising our obligation to maintain control of spectrum in the public interest, so long as we are completely able to fulfill our applicable mandates under the Communications Act of 1934, as amended.¹⁶⁷ For example, we must and will preserve our authority under Section 310(d) to review and approve license assignments and transfers of control, to assess and confirm the basic qualifications of assignees and transferees, and, more generally, to exercise our statutory responsibility to determine whether the Section 310(d) transaction in question will serve the public interest, convenience and necessity.¹⁶⁸ The Commission has historically disallowed granting security interests in FCC licenses, based upon its concern that such financing arrangements may interfere with its ability to regulate the assignment of licenses, the transfer of control over licenses, and, more generally, the use of spectrum.¹⁶⁹ If, however, we can ensure that appropriate prior approval of assignments and transfers is obtained, and if we further limit any grant of a security interest to RUS, a federal loan agency, do commenters believe that our policy and statutory concerns would be satisfactorily addressed, thus enabling us to promote flexibility and financing opportunities for licensees serving rural and underserved areas? In this regard, we note that we have seen no detectable erosion of our regulatory authority from our current policy of permitting licensees to engage in a very similar type of financing arrangement – that is, a licensee grant of a third party security interest in its stock and the proceeds of the sale of the license, along with third party perfection of that interest, *prior* to the sale of the subject license. We seek comment on the relative impact that such developments may have on our ability to implement and enforce our statutory obligations.

87. We recognize that permitting RUS to obtain security interests in FCC licenses would provide RUS with greater rights vis-à-vis the license and licensee than it currently can obtain. We therefore ask whether our proposed condition requiring prior FCC approval before RUS can foreclose on the license would satisfactorily and adequately preserve existing regulatory relationships. The type of security interest that we are seeking comment on would be a right between the licensee and RUS, exercisable only upon Commission approval. Would such a right be fully consistent with our responsibilities under the Communications Act? We ask whether it would not be different than granting RUS an option to purchase a license, for example. We note that we would review and require our approval of an assignment to RUS in accordance with our transfer and assignment policies *before* RUS could assume control of a license. Such a process is designed to ensure that the federal government

¹⁶⁷ See 47 U.S.C. §§ 301, 304. Section 301 of the Act provides that the government can authorize the use but not the ownership of the spectrum ("channels of radio transmission"). Section 304 requires that any license applicant waive any claim to the use of the spectrum as against the regulatory power of the United States.

¹⁶⁸ See 47 U.S.C. § 310(d); see also 47 U.S.C. §§ 308, 309; Hogan & Hartson Petition, *supra* n. 154 at 25 ("Transfer of a license would continue to be subject to prior Commission approval."). In the *Secondary Markets* proceeding, we ask whether we should forbear from requiring prior Commission approval for certain categories of transfers of control and license assignments that do not raise public interest issues requiring prior Commission review. See *Secondary Markets News Release*.

¹⁶⁹ See *Beach Television Partners* at 537, *Broadcasting Capital Formation Notice* at ¶¶ 22-23.

retains appropriate control over use of the spectrum consistent with Sections 301 and 304 of the Act, and that the perfection of a security interest in a license does not interfere with these or other statutory obligations and policy prerogatives. For example, would a security interest in a license give RUS any rights that might conflict with the Commission's regulatory oversight (other than an unapproved foreclosure or assertion of control) that it could exercise against the licensee? Furthermore, in light of the fact that RUS is a federal government agency, we ask whether we may have greater statutory latitude to grant it a security interest while still ensuring that the federal government retains control over spectrum.

88. Our next concern relates to any unintended consequences that may result from this potential policy change, especially as it relates to existing and future financial and regulatory relationships and any new claims or conflicts that may arise. It appears that one of the main conceptual differences between the current limits on the scope of permissible security interests and our proposal is that a security interest in a license itself would link the secured party more directly to the Commission. It is our understanding that under current financing practices involving FCC licensees, the secured party's rights stem from its relationship as a lender (and possibly an equipment vendor, bondholder or stockholder) to the licensee, not directly to the Commission, even after default and foreclosure on the secured assets. We seek comment on whether the grant by a licensee of a contingent interest in a Commission authorization to RUS – without the Commission's permission or review – would undermine our regulatory authority embodied in Sections 301 and 304. We also ask how the existence of RUS, as a secured creditor, may affect the ability of the licensee to seek financing from other sources in this situation? In sum, we seek comment on what, if any, difference from the perspective of RUS, a third-party lender, or the licensee, would there be on a relaxation of the current security interest policies in the circumstances described above.

89. Finally, we seek comment on one other concern that had been raised in the past by the Commission in connection with prior similar proposals. In particular, in the context of broadcast licenses, the Commission expressed concern about the independence of broadcast stations and about the ability of creditors to have substantial influence over a borrower station.¹⁷⁰ We seek comment on whether such dangers exist in the connection with RUS's attainment of security interests in non-broadcasting wireless licenses, especially as it relates to preserving and protecting facilities-based competition and innovation by and among wireless service providers.

2. Cellular Cross-Interests in Rural Service Areas

90. We seek comment regarding whether our current rule against cellular cross-interests in all RSAs,¹⁷¹ as set forth in Section 22.942 of the Commission's rules,¹⁷² remains in the public interest. Given the importance of increasing capital formation options for licensees, we request comment on whether continued application of the existing cellular cross-interest rule in all RSAs may be impeding financing to and investment in rural areas. We seek comment below on a range of options for modifying or eliminating the current rule in a way that balances the need to safeguard competition in these markets with our efforts to remove unnecessary regulatory barriers to financing, constructing, and operating wireless systems in rural areas. Further, as discussed below, we tentatively conclude to retain the current

¹⁷⁰ *Broadcast Capital Formation Notice* at ¶ 23.

¹⁷¹ For additional background regarding the adoption of RSAs, see our discussion at n. 11 and ¶¶ 10-11, *supra*.

¹⁷² 47 C F R § 22.942.

cellular cross-interest rule in RSAs with three or fewer CMRS competitors, and we seek comment on removing the rule as it applies to other RSAs and to non-controlling investments in all RSA licensees.

a. Background

91. Section 22.942 of the Commission's rules substantially limits the ability of parties to have interests in cellular carriers on different channel blocks in the same rural geographic area.¹⁷³ To the extent licensees on different channel blocks have any degree of overlap between their respective cellular geographic service areas (CGSAs) in an RSA,¹⁷⁴ Section 22.942 prohibits any entity from having a direct or indirect ownership interest of more than 5 percent in one such licensee when it has an attributable interest in the other licensee.¹⁷⁵ An attributable interest is defined generally to include an ownership interest of 20 percent or more or any controlling interest.¹⁷⁶ An entity may have a non-controlling and otherwise non-attributable direct or indirect ownership interest of less than 20 percent in licensees for different channel blocks in overlapping CGSAs within an RSA.¹⁷⁷

92. The Commission initiated a comprehensive review of the cellular cross-interest rule in January 2001 as part of its 2000 biennial regulatory review of spectrum aggregation limits.¹⁷⁸ In addition to considering to what extent there was then meaningful economic competition in CMRS markets,¹⁷⁹ the Commission sought comment on whether spectrum management and other regulatory considerations justified retaining, modifying, or eliminating prophylactic spectrum aggregation limits.¹⁸⁰ In December

¹⁷³ 47 C.F.R. § 22.942. The original cellular cross-interest rule was adopted in 1991. See Amendment of Part 22 of the Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, *First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 6185, 6228-29 ¶¶ 103-06.

¹⁷⁴ Application of the cellular cross-interest rule requires comparison of the CGSAs of cellular licensees operating on A Block frequencies in an RSA with those of cellular licensees operating on B Block frequencies in the same RSA. Because cellular licensees are authorized on frequencies in either one or the other of these channel blocks, any geographic area within an RSA will fall within the CGSAs of no more than two cellular licensees (one on each channel block).

¹⁷⁵ 47 C.F.R. § 22.942(a).

¹⁷⁶ 47 C.F.R. § 22.942(d)(1), (2). Other rules for determining attributable interests are set forth elsewhere in Section 22.942(d). See 47 C.F.R. §§ 22.942(d)(3)-(9).

¹⁷⁷ 47 C.F.R. § 22.942(b).

¹⁷⁸ See 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Notice of Proposed Rulemaking*, 16 FCC Rcd 2763 (2001) (*Spectrum Cap Sunset NPRM*). Staff had recommended that the Commission consider cellular cross-ownership issues as part of the 2000 biennial regulatory review proceeding reviewing the need for the CMRS spectrum cap, 47 C.F.R. § 20.6. See Federal Communications Commission Biennial Regulatory Review 2000, CC Docket No. 00-175, *Updated Staff Report*, app IV at 34, 69 (rel. Jan. 17, 2001).

¹⁷⁹ See *Spectrum Cap Sunset NPRM* at 2771-77 ¶¶ 13-25.

¹⁸⁰ For example, the Commission sought comment on any costs that prophylactic limits may impose on the development of advanced wireless services, the costs and benefits of bright-line standards, and whether such limits promote efficiency. See *id.* at 2777-83 ¶¶ 26-39.

2001, pursuant to Section 11 of the Communications Act,¹⁸¹ the Commission released its *Spectrum Cap Sunset Order*¹⁸² and, on the basis of the state of competition in CMRS markets, sunset the CMRS spectrum cap rule in all markets effective January 1, 2003.¹⁸³ In that order, the Commission also determined that cellular carriers in urban areas no longer enjoyed first-mover, competitive advantages, and it therefore eliminated the cellular cross-interest rule in MSAs on that basis, also pursuant to Section 11 of the Act.¹⁸⁴ While the Commission left the cross-interest rule in place in RSAs, it indicated that it would consider waiver requests and reassess the need for the rule at a future date.¹⁸⁵

93. In March 2002,¹⁸⁶ the Commission sought comment on petitions filed by Dobson Communications Corporation, Western Wireless Corporation, and Rural Cellular Corporation (Dobson/Western/RCC) and Cingular Wireless LLC (Cingular) seeking reconsideration of the decision in the *Spectrum Cap Sunset Order* to retain the cellular cross-interest rule in RSAs.¹⁸⁷ Petitioners and commenting parties focused on the sufficiency of the competitive market analysis underlying the decision to retain the cellular cross-interest rule in RSAs, as well as the consequences of relying on case-by-case review to examine cellular competition in rural areas.¹⁸⁸ Parties also asserted that the waiver process established in the *Spectrum Cap Sunset Order* creates regulatory uncertainty and discourages potential transactions and financing that could benefit rural consumers.¹⁸⁹ These petitions remain pending and are

¹⁸¹ Section 11 of the Communications Act requires the Commission, every two years, to review all regulations that apply to “the operations or activities of any provider of telecommunications service” and to “determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.” 47 U.S.C. §§ 161(a)(1), (2)

¹⁸² See 2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd 22668 (2001) (*Spectrum Cap Sunset Order*).

¹⁸³ *Id.* at 22669 ¶ 1.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 27708 ¶ 88.

¹⁸⁶ See “Petitions for Reconsideration of Action in Rulemaking Proceeding,” *Public Notice*, Report No. 2540 (Mar. 15, 2002).

¹⁸⁷ Petition for Reconsideration filed by Cingular, WT Docket No. 01-14 (Feb. 13, 2002) (Cingular Petition); Petition for Reconsideration filed by Dobson/Western/RCC, WT Docket No. 01-14 (Feb. 13, 2002) (Dobson/Western/RCC Petition).

¹⁸⁸ See generally *id.* Sprint PCS L.P. d/b/a Sprint PCS (Sprint PCS) filed comments opposing the petitions. See generally Sprint PCS Opposition filed by Sprint PCS, WT Docket No. 01-14 (Apr. 5, 2002) (Sprint PCS Opposition). The Cellular Telecommunications & Internet Association (CTIA) and Verizon Wireless filed comments supporting the petitions. See generally Comments of the Cellular Telecommunications & Internet Association in Support of Petitions Seeking Reconsideration filed by CTIA, WT Docket No. 01-14 (Apr. 5, 2002) (CTIA Comments); Reply Comments on Petitions for Reconsideration filed by Verizon Wireless, WT Docket No. 01-14 (Apr. 15, 2002) (Verizon Wireless Reply Comments).

¹⁸⁹ Cingular Petition at 5; Dobson/Western/RCC Petition at 8-10; see also Reply to Opposition to Petition for Reconsideration filed by Cingular, WT Docket No. 01-14, 6-7 (Apr. 18, 2002) (Cingular Reply to Opposition); Reply to Sprint PCS Opposition filed by Dobson/Western/RCC, WT Docket No. 01-14, 4 (Apr. 18, 2002) (Dobson/Western/RCC Reply to Opposition); CTIA Comments at 4.

being consolidated into the instant rulemaking.¹⁹⁰

94. In its December 2002 *Rural NOI*, the Commission sought comment on the cellular cross-interest rule as it reviewed its policies to encourage the provision of wireless services in rural areas. The Commission explained that its retention in 2001 of the cellular cross-interest rule in RSAs was designed to protect against the cellular incumbents developing cross interests that might create the incentive and ability to restrict the availability of spectrum-based services in those areas and thereby raise prices.¹⁹¹ It then solicited comment on the extent to which retention of the rule actually advances the provision of such services to rural areas,¹⁹² including whether the rule should be changed to further the provision of wireless services to rural areas.¹⁹³ The Commission received comments supporting either modification or elimination of the rule so as to facilitate investment and financing arrangements for rural cellular providers.¹⁹⁴

b. Discussion

95. Adequate financing is a vital precondition for the development of wireless infrastructure and offering of services in both urban and rural CMRS systems. We seek comment on whether the continued application of the cellular cross-interest rule in all RSAs may impede market forces that drive investment and economic development in rural areas. The recent downturn in telecommunications markets, worsening financial condition of many carriers, and the ongoing need for capital investment to keep up with technological and regulatory changes, has made it more difficult for wireless carriers, especially those serving rural areas, to obtain financing. In light of the foregoing, we seek comment regarding whether we should modify the cellular cross-interest rule to promote investment while protecting against potential competitive harms. Specifically, we tentatively conclude to retain the cellular cross-interest rule as it applies only in RSAs with three or fewer CMRS competitors and we seek comment on removing the rule as it applies to other RSAs and to non-controlling investments in all RSA licensees.

96. In the *Spectrum Cap Sunset Order*, the Commission concluded that it would be more efficient and less costly to the Commission to maintain a prophylactic cross-interest rule applicable to all RSAs and to entertain waiver requests for the small subset of transactions in RSAs where competition

¹⁹⁰ In addition to incorporating submissions from these parties into the instant proceeding, pursuant to the recommendation of staff, see Federal Communications Commission 2002 Biennial Regulatory Review, WT Docket No. 02-310, GC Docket No. 02-390, *Staff Report of the Wireless Telecommunications Bureau*, DA 03-129, app. IV at 56 (rel. Mar. 14, 2003), we also incorporate the comments of parties seeking elimination of the cellular cross-interest rule in the context of our 2002 biennial regulatory review. See generally 2002 Biennial Regulatory Review, *Report*, 18 FCC Rcd 4726 (2003).

¹⁹¹ See *Rural NOI*, 17 FCC Rcd at 25561, ¶ 10.

¹⁹² See *id.* at 25568, ¶ 24.

¹⁹³ *Id.*

¹⁹⁴ See United States Cellular Corporation Comments at 12-16 (supporting an increase in the permissible controlling interest threshold from 5 to 20 percent and adoption of a waiver criteria similar to that found in former Section 20.6, note 3 of the Commission's rules); Dobson Communications Corporation Comments at 8-9 ("Complete repeal of the cellular cross-interest rule will help rural carriers attract capital and promote the deployment of wireless services in rural areas.").

was more robust.¹⁹⁵ As a consequence of that decision, cellular licensees in MSAs are free to procure financing that involves ownership interests that fall below the threshold that triggers the cross-interest rule,¹⁹⁶ while cellular licensees in all RSAs are not. While the Commission attempted to address this barrier to investment in rural areas by providing a specific waiver process,¹⁹⁷ the transactions costs and regulatory uncertainty surrounding any waiver procedure may deter some beneficial investment in these areas.¹⁹⁸ For example, Dobson/Western/RCC claim that the cross-interest rule interferes with investment in rural areas by presumptively prohibiting certain financing in the RSA portions of a regional market but not in the MSA portions.¹⁹⁹

97. We seek comment on whether changing the cellular cross-interest rule for RSAs that enjoy a greater degree of competition will spur needed investment in these rural areas and foster even more competition in others. As an initial matter, we seek comment regarding what constitutes a “competitor” for purposes of this rule. For example, we ask whether a “competitor” might be any CMRS provider with significant geographic overlap with the cellular licensee.²⁰⁰ We also seek comment regarding whether, in the event we do eliminate the cellular cross-interest rule for RSAs with greater than three competitors, we should adopt a transition period after which time the rule would sunset for these RSAs. In the event that commenters support such a sunset period, we seek comment regarding the appropriate length of the sunset period.

98. We also ask commenters for additional suggestions regarding how we may modify our cellular cross-interest rule to promote investment in rural areas while retaining adequate competitive safeguards. For example, should we eliminate the cellular cross-interest restriction for all RSAs where the ownership interest being transferred, assigned or acquired is not a controlling interest (*i.e.*, where the interest is a non-controlling interest and where the transaction otherwise would not require prior FCC approval)? We ask parties to focus their comments on the effect of the cross-interest rule on licensees’ acquisition of adequate capital in these areas. Commenters should also consider whether financing arrangements and investment deals are being hindered because of the transaction costs or the uncertainty of the existing waiver process. Because we received little empirical evidence on these questions and issues in response to our *Rural NOI* and our public notice seeking comment on the petitions for reconsideration of the *Spectrum Cap Sunset Order*, we stress that commenters supporting our proposal should identify and discuss specific past instances in which they have had difficulty obtaining financing in rural areas due to the cellular cross-interest rule. In answering these questions, we also request parties

¹⁹⁵ See *Spectrum Cap Sunset Order* at 22696 ¶ 56

¹⁹⁶ 47 U.S.C. § 310(d).

¹⁹⁷ See *Spectrum Cap Sunset Order* at 22709 ¶ 90.

¹⁹⁸ Earlier this year, the Wireless Telecommunications Bureau (Bureau) did grant a request for waiver of the cellular cross-interest rule to allow CenturyTel Wireless, Inc. to acquire a 14 percent non-controlling limited partnership interest in Lafayette MSA LP. See CenturyTel Wireless, Inc. and Century Tel, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 1260 (WTB 2003). The Bureau found that the cellular cross-interests in the RSA overlap area did not involve a substantial likelihood of significant competitive harm, because the local market was generally competitive with six providers offering service at similar prices. *Id.* at 1266 ¶ 19.

¹⁹⁹ See Dobson/Western/RCC Petition at 7-10; see also CTIA Comments at 4

²⁰⁰ We have used “significant overlap” in the context of applying the CMRS spectrum cap rule and ask whether a similar concept could be used in the context of the cellular cross-interest rule. See 47 C.F.R. § 20.6(c).

to provide examples of the extent to which the waiver process has deterred or prevented acquisition of capital in a rural market(s). Thus, we seek specific market data and historical examples to assist our public interest determination of the extent to which application of the cellular cross-interest rule in RSAs impedes market forces that drive development in these rural and underserved areas.

99. We also seek comment on whether extension of the case-by-case review, as established in the *Spectrum Cap Sunset Order*, will promote investment and is sufficient to safeguard competition in RSAs with more than three competitors. Although we recognize the role that the cellular cross-interest rule has provided in the past against the possibility of significant additional consolidation of cellular providers in rural areas, we ask whether the public interest may be better served by the benefits of pure case-by-case review. In the *Spectrum Cap Sunset Order*, the Commission concluded that case-by-case review under Section 310(d) of the Act,²⁰¹ properly performed and with appropriate enforcement mechanisms, allows greater regulatory flexibility and greater attention to the actual circumstances of a particular transaction, thus promoting economic efficiency by reducing the possibility both of approving secondary market transactions that are not in the public interest and of impeding transactions that are actually in the public interest.²⁰² In the markets still covered by the cellular cross-interest rule, for example, the rule prevents the two cellular licensees from merging regardless of the competitive circumstances in a given market, but does not prevent one cellular licensee from merging with a PCS licensee, even though the competitive effect of both transactions might be very similar. We seek comment on whether this inequity may distort the market in any area in which more than just the two cellular licensees are operating and whether the better approach to safeguarding competition is to take account of the particular circumstances of each market through case-by-case competitive review. While case-by-case review does place greater resource demands on parties and the Commission, we are gaining significant experience performing case-by-case review with regard to other markets, and we believe that we can utilize this tool to promote competition and investment.

G. Infrastructure Sharing

1. Background

100. Both in the United States (U.S.) and the European Union (EU), commercial wireless providers have sought to minimize their capital expenditures and maximize their coverage by engaging in joint ventures with other providers to share infrastructure costs. Such arrangements are generally known as “infrastructure sharing,” and they can take place at various levels. At the most basic level is sharing of passive elements such as antennas and towers, followed by sharing of active or “intelligent” elements of the networks such as switches and nodes, followed by sharing of spectrum.

101. In the United States, several infrastructure sharing arrangements have been announced in the past two years. In October 2001, Cingular Wireless and T-Mobile announced a joint venture to share their existing networks, with T-Mobile launching service using Cingular’s infrastructure in California and Nevada, and Cingular launching service using T-Mobile’s infrastructure in New York.²⁰³ In January 2002, Cingular and AT&T Wireless announced an infrastructure sharing agreement in which these firms

²⁰¹ 47 U.S.C. § 310(d).

²⁰² See *Spectrum Cap Sunset Order*, 16 FCC Rcd at 22670, 22693-94, 22695-96, 22695-96 ¶¶ 4, 49-50, 54.

²⁰³ See *Seventh Competition Report* at 13001.

would cooperate to build a network over 3,000 miles of highways in the West and Midwest.²⁰⁴ Recently, in January 2003, AT&T Wireless and Sprint PCS announced a similar arrangement to share the costs of building and maintaining new wireless towers.²⁰⁵ The providers claim that such infrastructure sharing will allow them to cover a larger geographic area at lower cost.²⁰⁶ In addition, because two or more providers share the infrastructure, these arrangements may allow for more providers to serve a market than otherwise would be possible. Finally, to the extent that these arrangements make it possible for providers to cover a larger geographic area, and thus serve a greater number of consumers, they may provide an important public interest benefit.

102. Infrastructure sharing arrangements that do not involve a transfer of control, as defined under Section 310(d),²⁰⁷ do not require Commission review. Infrastructure sharing arrangements that do involve a transfer of control, like other arrangements, require Commission review. Also, while previous infrastructure sharing arrangements have not required Commission review, the Commission has taken no regulatory action to either promote or create incentives for parties to enter into such arrangements.

103. As compared to the U.S. market, infrastructure sharing has received more attention from regulators in the EU and its Member States, who tend to allow sharing of the passive elements and, to a certain extent, some of the active elements.²⁰⁸ Within the past year, the European Commission announced a preliminary conclusion to favorably view two agreements for the provision of 3G services, one in the United Kingdom and one in Germany.²⁰⁹ The European Commission noted that these arrangements should allow for faster rollout of service and greater coverage, especially in remote and rural areas.²¹⁰

2. Discussion

104. As noted in the Introduction, because of the lower population density and smaller customer base found in rural areas, the economically efficient number of providers for these markets will be fewer than that for urban markets. With fewer customers over which to spread their costs, there will be fewer providers. Because infrastructure sharing helps lower capital costs and thus extend the coverage of providers, this practice may be particularly important in rural areas, for which geographic coverage is especially important. In addition, because infrastructure sharing may make it possible for more providers to operate in a given area, this practice again is important for rural markets that tend to

²⁰⁴ *Id*

²⁰⁵ See *Eighth Competition Report* at 14809 ¶ 46

²⁰⁶ *Id*

²⁰⁷ 47 U.S.C. § 310(d)

²⁰⁸ A summary of EU Member States' policies on infrastructure sharing is available at the European Commission's website, at http://europa.eu.int/information_society/topics/telecoms/radiospec/doc/word/nis_moods_20020823.doc.

²⁰⁹ "Commission intends to clear 3G network sharing agreements between T-Mobile and MM02 in the UK and Germany," press release, European Commission, Brussels, September 10, 2002, IP/02/1277

²¹⁰ *Id* See also, "Commission approves third-generation mobile network sharing in the UK," Europemedia.net, January 5, 2003, available at <http://www.europemedia.net/shownews.asp?ArticleID=16138&Print=true>.

have fewer competitors.

105. We continue to believe that, under certain circumstances, licensees should be able to engage in infrastructure sharing in order to further promote service in these markets. Thus, for infrastructure sharing in rural areas that involve no transfer of control, as defined by Section 310(d),²¹¹ there are no requirements for Commission pre-clearance. For infrastructure sharing arrangements in rural areas that involve a transfer of control, we will maintain Section 310(d) review.²¹² We note that in the *Secondary Markets* proceeding we have significantly streamlined the transfer of control and assignment process,²¹³ and we inquire as to whether there are other steps we should consider to further streamline this process.

106. We seek comment on the extent to which infrastructure sharing may promote service in rural markets. Are there particular types of infrastructure sharing arrangements that may be most effective in promoting this goal? Are there specific policy steps we should take as a regulatory matter to promote infrastructure sharing arrangements that, in turn, promote service in rural areas? We encourage comments from providers involved in infrastructure sharing in the U.S. and EU as well as those familiar with such arrangements.

107. We also seek comment on the potential costs and benefits of this proposed policy. With regard to the potential benefits, we note that comments by European Commission regulators in support of such arrangements in the E.U. generally focus on the ability of carriers to lower costs and increase their coverage area, especially to rural markets.²¹⁴ Can we assume similar benefits for rural areas in the U.S.? We recognize that the Commission has stressed the value of facilities-based competition, and that infrastructure sharing by definition limits competition between two potential competitors.²¹⁵ We note that, with the recent infrastructure sharing arrangement in the United Kingdom, an EU Competition Commissioner remarked that their decision to allow the venture “strikes the right balance between infrastructure competition in 3G markets and the immediate consumer benefit of having faster and wider rollout of advanced 3G services.”²¹⁶ We seek comment on the factors we should consider in evaluating infrastructure sharing arrangements that require Section 310 approval so as to effectively balance promoting competition among providers and promoting expanded coverage in rural areas.

108. In addition, we recognize that, as in the case of secondary market spectrum leasing, infrastructure sharing may require reconsideration of our regulatory definitions of spectrum use. As described above, we propose that licensees that make their spectrum in rural areas available to other

²¹¹ 47 U.S.C. § 310(d).

²¹² *Id*

²¹³ See *Secondary Markets News Release*.

²¹⁴ “Commission approves third-generation mobile network sharing in the UK,” Europemedia.net, January 5, 2003, available at <<http://www.europemedia.net/shownews.asp?ArticleID=16138&Print=true>>.

²¹⁵ The Commission has discussed the value of facilities-based competition in various proceedings. See, e.g., *Eighth Competition Report* at 14786-91 ¶¶ 3-8; *Spectrum Cap Sunset Order* at 22679-85 ¶¶ 27-34.

²¹⁶ “Commission approves third-generation mobile network sharing in the UK,” Europemedia.net, January 5, 2003, available at <http://www.europemedia.net/shownews.asp?ArticleID=16138&Print=true>, quoting EU Competition Commissioner Marlo Monti.

parties *via* secondary markets are, in a sense, using that spectrum. Should we similarly consider spectrum involved in infrastructure sharing arrangements to be “used” and thus not subject to re-licensing or any other mechanism to make the spectrum available to third parties?

H. Rural Radiotelephone Service and Basic Exchange Telecommunications Radio Service

1. Background

109. The Rural Radiotelephone Service (RRS) was established to permit the use of certain VHF and UHF spectrum to provide radio telecommunications services, in particular, basic telephone service, to subscribers in locations generally deemed so remote that traditional wireline service or service by other means is not feasible.²¹⁷ The RRS operates in the paired 152/158 MHz and 454/459 MHz bands, which are also used by paging services.²¹⁸ In 1987, the Commission adopted rules that authorized the establishment of the Basic Exchange Telecommunications Radio Service (BETRS) within the RRS.²¹⁹ BETRS is authorized in the same paired spectrum bands as RRS and in addition, on fifty channel pairs in the 816-820/861-865 MHz band.²²⁰ BETRS, which is essentially a type of technology used to provide RRS, utilizes a digital system that is more spectrally efficient than traditional analog RRS, provides private calling, and has a much lower call blocking rate than RRS. Only local exchange carriers that have been state certified to provide basic exchange telephone service (or others having state approval to provide such service) in the pertinent area are eligible to hold authorizations for BETRS.²²¹

110. The *BETRS R&O* provided that traditional RRS and BETRS would be co-primary with other services that were authorized to use the same spectrum. Prior to the establishment of BETRS, RRS was licensed on a secondary, non-interfering basis. In 1997, the Commission established rules to auction the 152/158 MHz and 454/459 MHz bands and issue paging licenses on a geographic basis.²²² As a result, existing RRS and BETRS licensees authorized for these spectrum bands were afforded protection as incumbent licensees and could continue operating on a primary basis. However, we indicated that subsequent RRS and BETRS licenses in these bands would be issued on a secondary basis to the geographic area licensee. Similarly, in 1997, the Commission established rules to auction the 816-

²¹⁷ 47 C.F.R. § 22.99.

²¹⁸ These spectrum bands are allocated on a primary basis to the Paging and Radiotelephone Service. *See* 47 C.F.R. § 22.561.

²¹⁹ *See* Basic Exchange Telecommunications Radio Service, *Report and Order*, 3 FCC Rcd 214 (1988) (*BETRS R&O*).

²²⁰ The Commission recently proposed to eliminate the assignment of 800 MHz frequencies for BETRS. *See* Amendment of Part 22 of the Commission’s Rules To Benefit the Consumers of Air-ground Telecommunications Services and Biennial Regulatory Review – Amendment of Parts 1, 22, and 90 of the Commission’s Rules, *Notice of Proposed Rule Making*, 18 FCC Rcd 8380, 8408 ¶ 71 (2003). This spectrum band is allocated on a primary basis to the Specialized Mobile Radio (SMR) service. *See* 47 C.F.R. § 90.617(d).

²²¹ 47 C.F.R. § 22.702.

²²² *See* Revision of Part 22 and Part 90 of the Commission’s Rules To Facilitate Future Development of Paging Systems - Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732 (1997) (*Paging Second R&O*).

820/861-865 MHz bands and issue SMR licenses on a geographic basis.²²³ As a result, existing BETRS licensees authorized in the 800 MHz band were afforded protection as incumbent licensees and could continue operating on a primary basis. Again, we indicated subsequent BETRS licenses in these bands would be issued on a secondary basis to the geographic area licensee.²²⁴ Today new RRS and BETRS licenses are issued on a secondary, non-interfering basis.

2. Discussion

111. Although RRS and BETRS have been available for some time to provide basic telecommunications services in rural areas where wireline service is not feasible or practical, we have very limited information about their effectiveness in addressing the telecommunications needs of rural consumers. We seek to establish a more complete record regarding these services in order to allow us to determine if certain rules and policy changes are needed to facilitate the use of RRS and BETRS. As discussed below, we seek comment on whether: (1) there is a current demand for RRS and BETRS; (2) other wireless services have supplanted RRS and BETRS as alternatives to wireline service; (3) access to spectrum is a limiting factor for RRS and BETRS and (4) current Commission rules and policies are prohibiting/limiting the effectiveness of RRS and BETRS to provide service in rural areas.

112. As an initial matter, we would like to determine the level of demand for RRS and BETRS. We reviewed licensing data, locations where basic exchange service does not appear to be available, and the availability of equipment for RRS and BETRS. Our records indicate there are RRS licenses covering a total of 520 locations and BETRS licenses covering a total of 71 locations. A majority of the locations are located in the western portions of the U.S. and in Alaska. In the last three years, only seven RRS licenses and three BETRS licenses were issued.²²⁵ It appears, on the surface, certain areas that do not have basic telephone service might benefit from RRS or BETRS. For example, we note that no RRS or BETRS facilities are licensed in Mississippi, which according to 2000 Census data, has the lowest household telephone penetration rate in the U.S.²²⁶ In addition to the relatively low number of licenses issued for these services, we cannot find evidence that 800 MHz BETRS equipment has ever been manufactured and made available in the U.S. Furthermore, we only found one company that claimed it provided new RRS and BETRS equipment.²²⁷ We are very interested in determining if RRS and BETRS are being fully used as a tool to provide basic telecommunications services to rural America. We seek comment on whether there is still a demand for RRS and BETRS, beyond what is currently offered, and whether RRS and BETRS are viable options in the provision of basic telecommunications services. If there is a demand for these services, are there ways that RRS and BETRS could be used more efficiently and/or effectively?

²²³ See Part 90 of the Commission's Rules To Facilitate Future Deployment of SMR Systems in the 800 MHz Frequency Band, *Second Report and Order*, 12 FCC Rcd 19079 (1997).

²²⁴ There is only one 800 MHz BETRS license and the licensee received a waiver to provide service other than BETRS

²²⁵ Two of the BETRS licenses were authorized with rule waivers that allow the licensee to provide services other than BETRS

²²⁶ U.S. Census Bureau, American Fact Finder, Census 2000 Summary File 3 (SF 3) – Sample Data (GCT-H8. Occupancy, Equipment, and Utilization of Occupied Housing Units), <<http://factfinder.census.gov/>>.

²²⁷ The Commission found three companies with equipment authorizations for RRS and/or BETRS.

113. If there is a demand for basic communications services, other than wireline, and it is not being met using traditional RRS and BETRS spectrum, we are interested in exploring how the demand is being met. The Commission has embraced policies that provide many wireless licensees with added flexibility in providing various types of services (*i.e.*, fixed or mobile/voice or data). For example, licensees in the broadband PCS service may provide any mobile services on their assigned spectrum and in addition, may provide fixed services on a co-primary basis with mobile operations.²²⁸ In turn, the added flexibility gives licensees the ability to provide a range of services using spectrum that was previously allocated, for example, for only mobile wireless use or only fixed wireless use. It is now possible that services (*i.e.*, basic exchange service) previously offered only by RRS and BETRS licensees could be offered by licensees in other wireless services, using other spectrum bands. Furthermore, it is possible with the proliferation of mobile telephony throughout the country, individuals that in the past would have been a prime candidate to receive RRS or BETRS may now have access to a mobile telephone that is the sole telephone used within a household. We are not able to determine how many licensees are providing basic exchange service to rural areas using alternative spectrum or how many licensees are providing services (*i.e.*, mobile telephony) and therefore could negate the need for RRS or BETRS in particular areas. We therefore seek comment on the effectiveness of non-RRS and BETRS licensees in providing the same services or alternative services in lieu of RRS and BETRS. Furthermore, we seek comment on whether additional flexibility is necessary in order to fully exploit capabilities of licensees in this context? In addition, we seek comment regarding to what, if any, extent unlicensed spectrum is being used to provide services that have traditionally been provided by RRS and BETRS licensees.

114. In some instances, there may be a demand for a service; however, access to the spectrum needed to provide such services may not be readily available. We noted in the *Secondary Markets* proceeding that facilitating spectrum leasing arrangements permits additional spectrum users to gain access to spectrum.²²⁹ Furthermore, several commenters in the *Secondary Markets* proceeding specifically indicated that facilitating leasing arrangements would increase service offerings to rural customers by enabling rural telephone companies and others to access underutilized spectrum.²³⁰ We seek comment on whether there is a problem for potential providers of RRS or BETRS in accessing spectrum and if so, whether parties feel secondary markets will provide the appropriate means for access to the desired spectrum.

115. We are also interested in determining if the Commission's current rules and policies for RRS and BETRS are limiting factors towards a more expansive use of these services. We note that currently there is an eligibility restriction for BETRS that restricts the issuance of a license to only those

²²⁸ 47 C.F.R. § 24.3.

²²⁹ See *Secondary Markets News Release*

²³⁰ See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, Blooston, Mordkofsky, Dickens, Duffy and Prendergast Comments at 2-3 (relaxation of policies and rules that stand in way of innovative spectrum use arrangements would help eliminate unnecessary inhibitions on secondary markets and create incentives for larger carriers to lease to rural telephone cooperatives, thereby helping to spur rapid deployment of services to all areas of the country); National Telephone Cooperative Association Comments at 1-4, Rural Telecommunications Group Comments at 2 (spectrum leasing would significantly increase the use of already-assigned spectrum bands and allow companies not holding licenses to offer a panoply of wireless services in unserved and underserved areas)).

entities that receive state approval to provide basic exchange telephone service.²³¹ We believe that this rule may be unnecessary and may serve as a potential regulatory hurdle towards a more rapid and efficient use of the BETRS spectrum. We therefore propose to remove the eligibility restrictions contained within Section 22.702 of our rules regarding state approval prior to the issuance of a BETRS license. Furthermore, the current service rules for RRS and BETRS provides that new licenses are issued on a secondary, non-interfering basis. This approach ensures that RRS and BETRS licensees are provided access to spectrum so long as they do not cause harmful interference to the primary licensee and must give up their facilities if the primary licensee decides to construct facilities within the same area. In a Petition for Rulemaking filed by several parties, which eventually lead to the establishment of BETRS, a request was made to provide 2 MHz of dedicated spectrum for the use of BETRS. At the time, we determined that the demand for BETRS was not clear and therefore made the decision not to provide discrete spectrum for the use of BETRS. However, we indicated that if the spectrum that was made available for BETRS proved to be insufficient at a future date, we would revisit the problem at that time.²³² We note that in the *Rural NOI* we sought comment on how we might revise existing RRS and BETRS rules to further facilitate the provision of wireless services to rural areas.²³³ We did not receive any comments that specifically addressed the need to revise RRS or BETRS rules. In section II.D., above, we address the potential for increased power levels in rural areas and seek comment on whether it is beneficial, feasible, and/or advisable to increase the current power limits for stations located in rural areas. We seek comment on our proposal to remove the eligibility restrictions in Section 22.702 of the Commission's rules for BETRS licensees. Based on the current RRS and BETRS licensing scheme, we seek comment on whether there is a need for us to expand the secondary status for RRS and BETRS to other spectrum bands in order to facilitate and encourage construction in rural areas. For example, would allowing RRS and BETRS operations in other bands on a secondary, non-interfering basis provide a viable alternative to increase the level of RRS and BETRS services? If so, what spectrum bands could RRS and BETRS be expanded to include? Although we are not convinced that providing additional spectrum on a primary basis for BETRS is needed at this time, especially since secondary markets has not had a chance to mature, we are, however, interested in seeking comment on this issue. Specifically, if additional spectrum should be designated on a primary basis for BETRS, what band(s) would be viable? How much spectrum would be needed? Is there existing equipment or equipment that can be manufactured and made readily available for use in the band(s)?

116. As a final matter, and in light of the Commission's policies towards a more flexible-use, market-based approach to spectrum management, we believe it is appropriate at this time to determine if the current designation of RRS and BETRS as fixed services creates disincentives towards a more expansive use of the spectrum. Currently, the service rules for RRS and BETRS limit the use of the spectrum to fixed offerings, which are intended primarily to be used as a vehicle to provide basic communications services to rural areas using wireless technologies. We seek comment on whether providing additional flexibility to allow other types of service offerings using RRS and BETRS spectrum on a secondary basis would provide the proper incentives for these spectrum bands to be more fully utilized in providing telecommunications services to rural areas. If a more flexible use policy were created for RRS and BETRS, what considerations must the Commission consider in adopting rules and policies to facilitate such flexible use?

²³¹ 47 C.F.R. § 22.702

²³² See *BETRS R&O* at 216 ¶ 25

²³³ *Rural NOI* at 25569 ¶ 28.

III. PROCEDURAL MATTERS

A. Ex Parte Rules – Permit-But-Disclose Proceeding

117. This is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206.

B. Initial Regulatory Flexibility Analysis

118. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible impact on small entities of the proposals in the Notice of Proposed Rulemaking. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the Notice of Proposed Rulemaking, and they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Commission's Consumer Information Bureau, Reference Information Center, will send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act. *See* 5 U.S.C. § 603(a).

C. Initial Paperwork Reduction Act of 1995 Analysis

119. This NPRM seeks comment on a proposed information collection. As part of the Commission's 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 NPRM, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due at the same time as other comments on this NPRM and must have a separate heading designating them as responses to the Initial Paperwork Reduction Analysis (IPRA). OMB comments are due 60 days from date of publication of this NPRM 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 technology. In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, S.W., Washington, D.C. 20554, or via the Internet to <jboley@fcc.gov> and to Edward Springer, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503, or via the Internet to <edward.springer@omb.eop.gov>.

D. Comment Dates

120. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules,²³⁴ interested parties may file comments on or before 45 days after publication in the Federal Register and reply comments on or before 75 days after publication in the Federal Register. Comments and reply comments should be filed in WT Docket No. 03-202. All relevant and timely

²³⁴ 47 C.F.R. §§ 1.415, 1.419.

comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, interested parties must file an original and four copies of all comments, reply comments, and supporting comments. If interested parties want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies.

121. Comments also may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/cgb/ecfs>>. Generally, only one copy of an electronic submission must be filed. Commenters should transmit one electronic copy of the comments to WT Docket No. 03-202. 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 electronic comments by Internet e-mail. To receive 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.

122. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location will be 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. In addition, parties who choose to file by paper should provide a courtesy copy of each filing to Nicole McGinnis, Attorney Advisor, Commercial Wireless Division, Wireless Telecommunications Bureau, 445 12th Street, SW, Room 6223, Washington, DC 20554 or by email to Nicole McGinnis at Nicole.McGinnis@fcc.gov.

123. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

If you are sending this type of document or using this delivery method...	It should be addressed for delivery to...
Hand-delivered or messenger-delivered paper filings for the Commission's Secretary	236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002 (8:00 to 7:00 p.m.)
Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service Express Mail and Priority Mail)	9300 East Hampton Drive, Capitol Heights, MD 20743 (8:00 a.m. to 5:30 p.m.)
United States Postal Service first-class mail, Express Mail, and Priority Mail	445 12 th Street, SW Washington, DC 20554

124. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW, CY-B402, Washington, DC 20554 (see alternative addresses above for delivery by hand or messenger) (telephone 202-863-2893; facsimile 202-863-2898)

or via e-mail at qualexint@aol.com.

125. The full text of this document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail qualexint@aol.com. Alternative formats (computer diskette, large print, audio cassette and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418-7426, TTY (202) 418-7365, or at brian.millin@fcc.gov.

IV. ORDERING CLAUSES

126. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 4(i), 11, 303(r), 309(j) and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 157, 161, 303(r), and 309(j), this NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

127. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of the Notice of Proposed Rulemaking and Further Notice of Inquiry, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION


Marlene H. Dortch
Secretary

**APPENDIX A:
INITIAL REGULATORY FLEXIBILITY ANALYSIS**

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),²³⁵ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking* (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided in paragraph 123 of the item. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.²³⁶ In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.²³⁷

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

In this NPRM, we continue to examine ways of amending our regulations and policies governing the electromagnetic spectrum and the facilities-based commercial and private wireless services that rely on spectrum, in order to promote the rapid and efficient deployment of these services in rural areas. This NPRM builds upon the work of our Notice of Inquiry, in which we sought comment on how we could modify our policies to encourage the provision of wireless services in rural areas.²³⁸ This NPRM also draws upon the efforts and recommendations of the Spectrum Policy Task Force, which identified and evaluated potential changes in our spectrum policy that would increase public benefits from spectrum-based services.²³⁹ This NPRM proposes several ways in which the Commission can modify and improve its regulations and policies in order to promote such wireless service within rural areas while simultaneously removing any disincentives or other barriers to construction and operation in rural areas.

As a complement to the measures the Commission has already taken, we seek to minimize regulatory costs and eliminate unnecessary regulatory barriers to the deployment of spectrum-based services in rural areas. As reflected in the proposals set forth in this NPRM, we believe there are additional spectrum policy initiatives the Commission can adopt to reduce the overall cost of regulation and increase flexibility in a manner that will facilitate access, capital formation, build-out and coverage in rural areas. Specifically, in this NPRM, we seek comment on the appropriate definition of what constitutes a “rural area” for the purposes of this proceeding.²⁴⁰ We also seek comment on how to define “built” spectrum and we inquire as to

²³⁵ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612 has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

²³⁶ See 5 U.S.C. § 603(a).

²³⁷ See 5 U.S.C. § 603(a).

²³⁸ Facilitating the Provision of Spectrum-Based Service to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Notice of Inquiry*, 17 FCC Rcd 25554 (2002) (“*Rural NOI*”)

²³⁹ See Federal Communications Commission, Spectrum Policy Task Force Report, ET Docket No. 02-135 (released Nov. 2002) (“*SPTF Report*”). This report can be found at www.fcc.gov/sptf.

²⁴⁰ NPRM at ¶¶ 10-12, *supra*

whether the most efficient approach may be to rely on providers' filings of their construction notifications, an approach used with broadband PCS. Notably, we propose that spectrum in rural areas that is leased by a licensee, and for which the lessee meets the performance requirements that are applicable to the licensee, should be construed as "used" for the purposes of this proceeding and any performance requirements we adopt. Furthermore, we seek comment on ways the Commission could modify its regulations pertaining to unused spectrum.

In this NPRM, we propose the adoption of a "substantial service" construction benchmark during the initial license term for all wireless services that are licensed on a geographic area basis and that are subject to performance requirements. We also propose a substantial service safe harbor for rural areas. We also seek comment on whether we should adopt a geography-based benchmark for wireless services that are licensed on a geographic area basis and that currently do not have a geographic area coverage option. In addition, we seek comment on whether we should impose performance requirements in subsequent license terms after initial renewal. We also seek comment on measures that may be taken to increase power flexibility for licensed services. We also seek comment as to the relative effect on service in rural areas of the Commission's use of small versus large geographic service areas.

In this NPRM, we seek comment on what, if any, regulatory or policy changes should be made to complement the Rural Utilities Service's (RUS) financing programs. We also ask whether we should allow RUS to take security interests in spectrum licenses, provided that any security interest is expressly conditioned on the Commission's prior approval of any assignment of the license from the licensee to the secured party. We also seek comment on whether we should eliminate the cellular cross-interest rule in Rural Service Areas with greater than three competitors, and we seek comment on what should constitute a "competitor." In addition, we seek comment on whether clarifying the Commission's policy on infrastructure sharing may promote service in rural areas. Finally, we propose ways of modifying our rules governing Rural Radiotelephone Service (RRS) and Basic Exchange Telephone Radio Systems (BETRS) to expand the use of these services, including removing eligibility restrictions on the use of BETRS spectrum.

B. Legal Basis.

We tentatively conclude that we have authority under Sections 4(i), 11, 303(r), 309(j) and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 157, 161, 303(r), and 309(j), to adopt the proposals set forth in the NPRM.

C. Description and Estimate of the Number of Small Entities to which the Rules Will Apply.

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 rules adopted herein.²⁴¹ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."²⁴² In addition, the term "small business" has the same meaning as

²⁴¹ 5 U.S.C. § 604(a)(3)

²⁴² 5 U.S.C. § 601(6)

the term “small business concern” under the Small Business Act.²⁴³ 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 Small Business Administration (SBA).²⁴⁴

Cellular Licensees. The SBA has developed a small business size standard for small businesses in the category “Cellular and Other Wireless Telecommunications.”²⁴⁵ Under that SBA category, a business is small if it has 1,500 or fewer employees.²⁴⁶ According to the Bureau of the Census, only twelve firms out of a total of 1,238 cellular and other wireless telecommunications firms operating during 1997 had 1,000 or more employees.²⁴⁷ Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers are small businesses under the SBA’s definition.

220 MHz Radio Service – Phase I Licensees. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to “Cellular and Other Wireless Telecommunications” companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.²⁴⁸ According to the Census Bureau data for 1997, only twelve firms out of a total of 1,238 such firms that operated for the entire year, had 1,000 or more employees.²⁴⁹ If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA’s small business standard.

220 MHz Radio Service – Phase II Licensees. The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for defining “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment

²⁴³ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

²⁴⁴ 15 U.S.C. § 632.

²⁴⁵ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517212.

²⁴⁶ *Id.*

²⁴⁷ U.S. Census Bureau, 1997 Economic Census, Information – Subject Series, Establishment and Firm Size, Table 5 (Employment Size of Firms Subject to Federal Income Tax), NAICS code 517212 (2002).

²⁴⁸ 13 C.F.R. § 121.201, NAICS code 517212.

²⁴⁹ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form Organization), Table 5, NAICS code 517212 (2002)

payments.²⁵⁰ This small business standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.²⁵¹ A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.²⁵² The SBA has approved these small size standards.²⁵³ Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.²⁵⁴ In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.²⁵⁵ Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.²⁵⁶ A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.²⁵⁷

Lower 700 MHz Band Licenses. We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.²⁵⁸ We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.²⁵⁹ A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.²⁶⁰ Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than

²⁵⁰ Amendment of Part 90 of the Commission’s Rules to Provide For the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Third Report and Order*, 12 FCC Rcd 10943, 11068-70 ¶¶ 291-295 (1997).

²⁵¹ *Id.* at 11068 ¶ 291.

²⁵² *Id.*

²⁵³ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

²⁵⁴ See generally “220 MHz Service Auction Closes,” *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

²⁵⁵ See “FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made,” *Public Notice*, 14 FCC Rcd 1085 (WTB 1999).

²⁵⁶ See “Phase II 220 MHz Service Spectrum Auction Closes,” *Public Notice*, 14 FCC Rcd 11218 (WTB 1999).

²⁵⁷ See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

²⁵⁸ See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022 (2002).

²⁵⁹ *Id.* at 1087-88 ¶ 172.

²⁶⁰ *Id.*

\$3 million for the preceding three years.²⁶¹ The SBA has approved these small size standards.²⁶² An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.²⁶³ A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 CMA licenses.²⁶⁴ Seventeen winning bidders claimed small or very small business status and won sixty licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.²⁶⁵

Upper 700 MHz Band Licenses. The Commission released a *Report and Order* authorizing service in the upper 700 MHz band.²⁶⁶ This auction, previously scheduled for January 13, 2003, has been postponed.²⁶⁷

Paging. In the *Paging Second Report and Order*, we adopted a size standard for “small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²⁶⁸ A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.²⁶⁹ The SBA has approved this definition.²⁷⁰ An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold.²⁷¹

²⁶¹ *Id.* at 1088 ¶ 173.

²⁶² See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999.

²⁶³ See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 17 FCC Rcd 17272 (WTB 2002).

²⁶⁴ See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

²⁶⁵ *Id.*

²⁶⁶ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Memorandum Opinion and Order*, 16 FCC Rcd 1239 (2001)

²⁶⁷ See “Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) Is Rescheduled,” *Public Notice*, 16 FCC Rcd 13079 (WTB 2003)

²⁶⁸ Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems, *Second Report and Order*, 12 FCC Rcd 2732, 2811-2812 ¶¶ 178-181 (*Paging Second Report and Order*); see also Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 10030, 10085-10088 ¶¶ 98-107 (1999).

²⁶⁹ *Paging Second Report and Order*, 12 FCC Rcd at 2811 ¶ 179.

²⁷⁰ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

²⁷¹ See “929 and 931 MHz Paging Auction Closes,” *Public Notice*, 15 FCC Rcd 4858 (WTB 2000)

Fifty-seven companies claiming small business status won 440 licenses.²⁷² An auction of Metropolitan Economic Area (MEA) and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.²⁷³ 132 companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.²⁷⁴ Currently, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service*, 608 private and common carriers reported that they were engaged in the provision of either paging or “other mobile” services.²⁷⁵ Of these, we estimate that 589 are small, under the SBA-approved small business size standard.²⁷⁶ We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

Broadband Personal Communications Service (PCS). The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.²⁷⁷ For Block F, an additional small business size standard for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.²⁷⁸ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.²⁷⁹ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 “small” and “very small” business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.²⁸⁰ On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning

²⁷² See *id.*

²⁷³ See “Lower and Upper Paging Band Auction Closes,” *Public Notice*, 16 FCC Rcd 21821 (WTB 2002).

²⁷⁴ See “Lower and Upper Paging Bands Auction Closes,” *Public Notice*, 18 FCC Rcd 11154 (WTB 2003).

²⁷⁵ See *Trends in Telephone Service*, Industry Analysis Division, Wireline Competition Bureau, Table 5.3 (Number of Telecommunications Service Providers that are Small Businesses) (May 2002)

²⁷⁶ 13 C.F.R. § 121.201, NAICS code 517211.

²⁷⁷ See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7850-7852 ¶¶ 57-60 (1996); see also 47 C.F.R. § 24.720(b).

²⁷⁸ See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7852 ¶ 60.

²⁷⁹ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

²⁸⁰ FCC News, “Broadband PCS, D, E and F Block Auction Closes,” No 71744 (rel. January 14, 1997).

bidders.²⁸¹

Narrowband PCS. The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less.²⁸² Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses.²⁸³ To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.²⁸⁴ A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.²⁸⁵ A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.²⁸⁶ The SBA has approved these small business size standards.²⁸⁷ A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses.²⁸⁸ Three of these claimed status as a small or very small entity and won 311 licenses.

Specialized Mobile Radio (SMR). The Commission awards “small entity” bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than \$15 million in each of the three previous calendar years.²⁸⁹ The Commission awards “very small entity” bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years.²⁹⁰ The SBA has approved these small business size

²⁸¹ See “C, D, E, and F Block Broadband PCS Auction Closes,” *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

²⁸² Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 196 ¶ 46 (1994).

²⁸³ See “Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674,” *Public Notice*, PNWL 94-004 (rel. Aug. 2, 1994); “Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787,” *Public Notice*, PNWL 94-27 (rel. Nov. 9, 1994).

²⁸⁴ Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476 ¶ 40 (2000).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

²⁸⁸ See “Narrowband PCS Auction Closes,” *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

²⁸⁹ 47 C.F.R. § 90.814(b)(1).

²⁹⁰ *Id.*

standards for the 900 MHz Service.²⁹¹ The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.²⁹² A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.²⁹³

The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed "small business" status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR 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 purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by the SBA.

Private Land Mobile Radio (PLMR). PLMR systems serve an essential role in a 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, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we could use the definition for "Cellular and Other Wireless Telecommunications." This definition provides that a small entity is any such entity employing no more than 1,500 persons.²⁹⁴ The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. Moreover, because PLMR licensees generally are not in the business of providing cellular or other wireless

²⁹¹ See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999. We note that, although a request was also sent to the SBA requesting approval for the small business size standard for 800 MHz, approval is still pending.

²⁹² See "Correction to Public Notice DA 96-586 'FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,'" *Public Notice*, 18 FCC Rcd 18367 (WTB 1996).

²⁹³ See "Multi-Radio Service Auction Closes," *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

²⁹⁴ See 13 C.F.R. § 121.201, NAICS code 517212

telecommunications services but instead use the licensed facilities in support of other business activities, we are not certain that the Cellular and Other Wireless Telecommunications category is appropriate for determining how many PLMR licensees are small entities for this analysis. Rather, it may be more appropriate to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.²⁹⁵

The Commission's 1994 Annual Report on PLMRs²⁹⁶ indicates that at the end of fiscal year 1994, there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Because any entity engaged in a commercial activity is eligible to hold a PLMR license, the revised rules in this context could potentially impact every small business in the United States.

Fixed Microwave Services. Fixed microwave services include common carrier,²⁹⁷ private-operational fixed,²⁹⁸ and broadcast auxiliary radio services.²⁹⁹ Currently, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this FRFA, we will use the SBA's definition applicable to "Cellular and Other Wireless Telecommunications" companies – that is, an entity with no more than 1,500 persons.³⁰⁰ The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer small common carrier fixed licensees and 61,670 or fewer small private operational-fixed licensees and small broadcast auxiliary radio licensees in the microwave services that may be affected by the rules and policies adopted herein. The Commission notes, however, that the common carrier microwave fixed licensee category includes some large entities.

Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of \$15

²⁹⁵ See generally 13 C.F.R. § 121.201.

²⁹⁶ Federal Communications Commission, 60th Annual Report, Fiscal Year 1994, at ¶ 116.

²⁹⁷ 47 C.F.R. §§ 101 *et seq.* (formerly, part 21 of the Commission's Rules).

²⁹⁸ Persons eligible under parts 80 and 90 of the Commission's rules can use Private Operational-Fixed Microwave services. See generally 47 C.F.R. parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

²⁹⁹ Auxiliary Microwave Service is governed by part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

³⁰⁰ 13 C.F.R. § 121.201, NAICS code 517212.

million for each of the three preceding years.³⁰¹ The SBA has approved these definitions.³⁰² The FCC auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670-1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

39 GHz Service. The Commission defines “small entity” for 39 GHz licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.³⁰³ “Very small business” is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.³⁰⁴ The SBA has approved these definitions.³⁰⁵ The auction of the 2,173 39 GHz licenses began on April 12, 2000, and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses.

Local Multipoint Distribution Service. An auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined “small entity” for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.³⁰⁶ An additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.³⁰⁷ These regulations defining “small entity” in the context of LMDS auctions have been approved by the SBA.³⁰⁸ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winning bidders that

³⁰¹ Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (WCS), *Report and Order*, 12 FCC Rcd 10785, 10879 ¶ 194 (1997).

³⁰² See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

³⁰³ See Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Band, *Report and Order*, 12 FCC Rcd 18600 (1997).

³⁰⁴ *Id.*

³⁰⁵ See Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Hector Barreto, Administrator, Small Business Administration, dated January 18, 2002.

³⁰⁶ See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making*, 12 FCC Rcd 12545, 12689-90 ¶ 348 (1997).

³⁰⁷ *Id.*

³⁰⁸ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

won 119 licenses.

218-219 MHz Service. The first auction of 218-219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs).³⁰⁹ Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.³¹⁰ In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding \$15 million for the preceding three years.³¹¹ A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding \$3 million for the preceding three years.³¹² The SBA has approved of these definitions.³¹³ At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this FRFA that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

Location and Monitoring Service (LMS). Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$15 million.³¹⁴ A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$3 million.³¹⁵ These definitions have been approved by the SBA.³¹⁶ An auction for LMS licenses commenced on February 23, 1999, and closed on March 5, 1999. Of the 528 licenses auctioned, 289

³⁰⁹ See "Interactive Video and Data Service (IVDS) Applications Accepted for Filing," *Public Notice*, 9 FCC Rcd 6227 (1994).

³¹⁰ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994).

³¹¹ Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497 (1999).

³¹² *Id.*

³¹³ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

³¹⁴ Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order*, 13 FCC Rcd 15182, 15192 ¶ 20 (1998); see also 47 C.F.R. § 90.1103.

³¹⁵ Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order*, 13 FCC Rcd at 15192 ¶ 20; see also 47 C.F.R. § 90.1103.

³¹⁶ See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated February 22, 1999.

licenses were sold to four small businesses. We cannot accurately predict the number of remaining licenses that could be awarded to small entities in future LMS auctions.

Rural Radiotelephone Service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons.³¹⁷ There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

Air-Ground Radiotelephone Service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons.³¹⁸ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and the Commission estimates that almost all of them qualify as small entities under the SBA definition.

Offshore Radiotelephone Service. This service operates on several ultra high frequency (UHF) TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons.³¹⁹ The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition. The Commission assumes, for purposes of this FRFA, that all of the 55 licensees are small entities, as that term is defined by the SBA.

Multiple Address Systems (MAS). Entities using MAS spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, the Commission defines "small entity" for MAS licenses as an entity that has average gross revenues of less than \$15 million in the three previous calendar years.³²⁰ "Very small business" is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$3 million for the preceding three calendar years.³²¹ The SBA has approved of these definitions.³²² The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of January 20, 1999, there were a total of 8,670 MAS station authorizations. Of these, 260 authorizations were associated with common carrier service. In addition, an auction for 5,104 MAS licenses in 176 EAs began November 14, 2001, and closed on November 27, 2001.³²³ Seven winning

³¹⁷ 13 C.F.R. § 121.201, NAICS code 517212.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ See Amendment of the Commission's Rules Regarding Multiple Address Systems, *Report and Order*, 15 FCC Rcd 11956, 12008 ¶ 123 (2000).

³²¹ *Id.*

³²² See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated June 4, 1999.

³²³ See "Multiple Address Systems Spectrum Auction Closes," *Public Notice*, 16 FCC Rcd 21011 (2001).

bidders claimed status as small or very small businesses and won 611 licenses.

With respect to the second category, which consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definitions developed by the SBA would be more appropriate. The applicable definition of small entity in this instance appears to be the "Cellular and Other Wireless Telecommunications" definition under the SBA rules. This definition provides that a small entity is any entity employing no more than 1,500 persons.³²⁴ The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

Incumbent 24 GHz Licensees. The rules that we adopt could affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The Commission did not develop a definition of small entities applicable to existing licensees in the 24 GHz band. Therefore, the applicable definition of small entity is the definition under the SBA rules for "Cellular and Other Wireless Telecommunications." This definition provides that a small entity is any entity employing no more than 1,500 persons.³²⁵ The 1992 Census of Transportation, Communications and Utilities, conducted by the Bureau of the Census, which is the most recent information available, shows that only 12 radiotelephone (now Wireless) firms out of a total of 1,178 such firms that operated during 1992 had 1,000 or more employees.³²⁶ This information notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent³²⁷ and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

Future 24 GHz Licensees. With respect to new applicants in the 24 GHz band, we have defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding \$15 million.³²⁸ "Very small business" in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.³²⁹ The SBA has approved these

³²⁴ See 13 C.F.R. § 121.201, NAICS code 517212.

³²⁵ See *id*.

³²⁶ 1992 Census, Series UC-92-S-1 at Firm Size 1-123.

³²⁷ Teligent acquired the Digital Electronic Message Service (DEMS) licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

³²⁸ Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules To License Fixed Services at 24 GHz, *Report and Order*, 15 FCC Rcd 16934, 16967 ¶ 77 (2000) (24 GHz Report and Order); see also 47 C.F.R. § 101.538(a)(2).

³²⁹ 24 GHz Report and Order, 15 FCC Rcd at 16967 ¶ 77; see also 47 C.F.R. § 101.538(a)(1).

definitions.³³⁰ The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

700 MHz Guard Band Licenses. In the 700 MHz Guard Band Order, we adopted a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.³³¹ A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.³³²

Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service. Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as “wireless cable,” transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).³³³ In connection with the 1996 MDS auction, the Commission defined “small business” as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.³³⁴ The SBA has approved of this standard.³³⁵ The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).³³⁶ Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to

³³⁰ See Letter to Margaret Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Gary Jackson, Assistant Administrator, Small Business Administration, dated July 28, 2000.

³³¹ See Service Rules for the 746-764 MHz Bands, and Revisions to part 27 of the Commission’s Rules, WT Docket No. 99-168, Second Report and Order, 15 FCC Rcd 5299 (2000), 65 FR 17599 (Apr. 4, 2000).

³³² Public Notice, “700 MHz Guard Band Auction Closes,” DA 01-478 (rel. Feb. 22, 2001).

³³³ Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Report and Order*, 10 FCC Rcd 9589, 9593 ¶ 7 (1995) (*MDS Auction R&O*)

³³⁴ 47 C.F.R. § 21.961(b)(1).

³³⁵ See Letter to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Bureau, from Gary M. Jackson, Assistant Administrator for Size Standards, Small Business Administration, dated March 20, 2003 (noting approval of \$40 million size standard for MDS auction).

³³⁶ Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. See *MDS Auction R&O*, 10 FCC Rcd at 9608 ¶ 34.

the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities.³³⁷ After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 MDS licensees that are defined as small businesses under either the SBA's or the Commission's rules. Some of those 440 small business licensees may be affected by the proposals in the Further Notice.

In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution,³³⁸ which includes all such companies generating \$12.5 million or less in annual receipts.³³⁹ According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.³⁴⁰ Of this total, 1,180 firms had annual receipts of under \$10 million, and an additional 52 firms had receipts of \$10 million or more but less than \$25 million.³⁴¹ Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies proposed in the Further Notice.

Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities.³⁴² There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

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

The NPRM does not propose any specific reporting, recordkeeping or compliance requirements. However, we seek comment on what, if any, requirements we should impose if we adopt the proposals set forth in the NPRM.

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

³³⁷ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for "other telecommunications" (annual receipts of \$12.5 million or less). See 13 C.F.R. § 121.201, NAICS code 517910.

³³⁸ 13 C.F.R. § 121.201, NAICS code 517510

³³⁹ *Id*

³⁴⁰ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4 (issued October 2000).

³⁴¹ *Id*

³⁴² In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000) 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in developing its 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.³⁴³

As stated earlier, we seek to minimize regulatory costs and eliminate unnecessary regulatory burdens to the deployment of spectrum-based services in rural areas. Therefore, we believe that modifying or eliminating certain rules should decrease the costs associated with regulatory compliance for licensees and increase flexibility in a manner that will facilitate access, capital formation, build-out and coverage in rural areas. We therefore anticipate that, although it seems likely that there will be a significant economic impact on a substantial number of small entities, there will be no adverse economic impact on small entities. In fact, certain of the proposed rules may particularly benefit small entities.

For example, the NPRM proposes that spectrum in rural areas that is leased by a licensee, and for which the lessee meets the performance requirements that are applicable to the licensee, should be construed as “used” for the purposes of this proceeding and any performance requirements we adopt.³⁴⁴ Although adoption of this proposal would benefit both small and large entities in the radio services where leasing is allowed, the majority of businesses in these radio services are small entities.

The NPRM further proposes a “substantial service” construction benchmark for all wireless services licensed on a geographic basis.³⁴⁵ We believe this proposal, if adopted, will affect small and large entities alike by providing increased flexibility, particularly in rural areas, for licensees to meet their performance requirements.

In addition, the NPRM proposes to modify the eligibility restrictions on the use of spectrum within the Basic Exchange Telephone Radio Systems (BETRS) to allow more flexible use of the spectrum.³⁴⁶ We believe this proposal, if adopted, will provide a particular benefit to small entities by providing current BETRS licensees, of which a majority are small entities, with increased flexibility to use BETRS spectrum.

³⁴³ 5 U.S.C. § 603 (c).

³⁴⁴ NPRM at ¶ 20, *supra*.

³⁴⁵ NPRM at ¶ 35, *supra*.

³⁴⁶ NPRM at ¶ 115, *supra*.

In the NPRM, then, the Commission has set forth various options it is considering for each rule, from modifying them to eliminating them all together. We seek comment on any additional appropriate alternatives and especially alternatives that may further reduce economic impacts on small entities.

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

None.

**APPENDIX B:
PROPOSED RULE CHANGES**

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY. 47 U.S.C. 154, 222, 303, 309 and 332.

2. Section 22.702 is amended to read as follows:

§ 22.702 Eligibility.

Existing and proposed communications common carriers are eligible to hold authorizations to operate conventional central office, interoffice and rural stations in the Rural Radiotelephone Service. Subscribers are also eligible to hold authorizations to operate rural subscriber stations in the Rural Radiotelephone Service.

Part 24 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 24 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 301, 302, 303, 309 and 332.

2. Section 24.203(a) is amended to read as follows:

§ 24.203 Construction requirements.

(a) Licensees of 30 MHz blocks must serve with a signal level sufficient to provide adequate service to at least one-third of the population in their licensed area within five years of being licensed and two-thirds of the population in their licensed area within ten years of being licensed. Alternatively, licensees may provide "substantial service" to their licensed area within ten years. Licensees may choose to define population using the 1990 census or the 2000 census. Failure by any licensee to meet these requirements will result in forfeiture or non-renewal of the license and the licensee will be ineligible to regain it.

Part 90 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

AUTHORITY: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

2. Section 90.155(d) is amended to read as follows:

§ 90.155 Time in which station must be placed in operation.

(d) Multilateration LMS EA-licensees, authorized in accordance with § 90.353 of this part, must

construct and place in operation a sufficient number of base stations that utilize multilateration technology (see paragraph (e) of this section) to provide multilateration location service to one-third of the EA's population within five years of initial license grant, and two-thirds of the population within ten years. Alternatively, licensees may provide "substantial service" to their licensed area within ten years. In demonstrating compliance with the construction and coverage requirements, the Commission will allow licensees to individually determine an appropriate field strength for reliable service, taking into account the technologies employed in their system design and other relevant technical factors. At the five and ten year benchmarks, licensees will be required to file a map and FCC Form 601 showing compliance with the coverage requirements (see § 1.946).

3. Section 90.685(b) is amended to read as follows:

§ 90.685 Authorization, construction and implementation of EA licenses.

(b) EA licensees in the 806-821/851-866 MHz band must, within three years of the grant of their initial license, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of its EA-based service area. Further, each EA licensee must provide coverage to at least two-thirds of the population of the EA-based service area within five years of the grant of their initial license. Alternatively, EA-based licensees may provide substantial service to their markets within five years of the grant of their initial license. Substantial service shall be defined as: "Service which is sound, favorable, and substantially above a level of mediocre service."

4. Section 90.767 is amended to read as follows:

§ 90.767 Construction and implementation of EA and Regional licenses.

(a) An EA or Regional licensee must construct a sufficient number of base stations (i.e., base stations for land mobile and/or paging operations) to provide coverage to at least one-third of the population of its EA or REAG within five years of the issuance of its initial license and at least two-thirds of the population of its EA or REAG within ten years of the issuance of its initial license. Alternatively, licensees may provide "substantial service" to their licensed area at their five- and ten-year benchmarks.

(b) Licensees must notify the Commission in accordance with § 1.946 of this chapter of compliance with the Construction requirements of paragraph (a) of this section.

(c) Failure by an EA or Regional licensee to meet the construction requirements of paragraph (a) of this section, as applicable, will result in automatic cancellation of its entire EA or Regional license. In such instances, EA or Regional licenses will not be converted to individual, site- by-site authorizations for already constructed stations.

(d) EA and Regional licensees will not be permitted to count the resale of the services of other providers in their EA or REAG, e.g., incumbent, Phase I licensees, to meet the construction requirement of paragraph (a) or (b) of this section, as applicable.

(e) EA and Regional licensees will not be required to construct and place in operation, or commence service on, all of their authorized channels at all of their base stations or fixed stations.

5. Section 90.769 is amended to read as follows:

§ 90.769 Construction and implementation of Phase II nationwide licenses.

(a) A nationwide licensee must construct a sufficient number of base stations (i.e., base stations for land mobile and/or paging operations) to provide coverage to a composite area of at least 750,000 square kilometers or 37.5 percent of the United States population within five years of the issuance of its initial license and a composite area of at least 1,500,000 square kilometers or 75 percent of the United States population within ten years of the issuance of its initial license. Alternatively, licensees may provide "substantial service" to their licensed area at their five- and ten-year benchmarks.

(b) Licensees must notify the Commission in accordance with § 1.946 of this chapter of compliance with the Construction requirements of paragraph (a) of this section.

(c) Failure by a nationwide licensee to meet the construction requirements of paragraph (a) of this section, as applicable, will result in automatic cancellation of its entire nationwide license. In such instances, nationwide licenses will not be converted to individual, site-by-site authorizations for already constructed stations.

(d) Nationwide licensees will not be required to construct and place in operation, or commence service on, all of their authorized channels at all of their base stations or fixed stations.

**SEPARATE STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

Re. Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services

Wireless facilities-based providers are delivering remarkable competition and innovation in rural markets. However, just because the Commission's policies work, does not mean they cannot work better.

Our actions over the past few months dramatically illustrate our resolve to bring competitive, quality, spectrum-based services to rural America. Last month alone, we supported a series of items that: advanced digital TV deployment in rural America, expanded outreach to underserved communities, reported on the state of rural broadband deployment, reported on our partnership with RUS, and announced the Rural Wireless Internet Service Provider Forum for September 18. And today, three items on the agenda – including this one – have elements aimed at advancing the Commission's rural-service vision.

The Notice we adopt today includes initiatives and policies aimed directly at facilitating access to capital and lowering regulatory and market barriers to spectrum and infrastructure in rural areas. This Notice also seeks comment on how we can clarify rules, minimize regulatory costs, and provide other incentives to promote service to rural markets. While a number of past Commission measures have been intended to foster the deployment of wireless services throughout the country, the Notice we adopt today for the first time expands upon these measures and will help ensure that rural Americans can experience the breadth of wireless service offerings currently available and further fulfill the Commission's statutory mandate to make available, in a rapid and efficient manner, communications services to all Americans.

**SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

Re: Facilitating the Provisions of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, Notice of Proposed Rulemaking (WT Docket No. 03-202)

This NPRM is the next step in our examination of how the FCC can amend its spectrum regulations and policies in order to promote the rapid and efficient deployment of spectrum-based services in rural areas. It follows many actions that we have taken in this area, including the recent adoption of an order creating a secondary market for spectrum and increasing the amount of spectrum available for use for unlicensed services, such as wi-fi.

Given the high value consumers place on the ability to communicate anywhere, anytime the Commission wants to ensure that we are promoting and encouraging the efficient utilization of spectrum in rural areas. Wireless services have become pervasive in many of our day-to-day lives as we rely on them for personal, business and safety reasons. Rural America has the same needs and the same demand for better, smarter, faster communications capabilities.

I am looking forward to reviewing the record in this proceeding to understand commenters' views on whether the proposals promote the deployment of efficient spectrum-based services to rural areas.

**SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

RE. Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services; 2000 Biennial Review Spectrum Aggregation Limits for Commercial Mobile Radio Services; and Increasing Flexibility To Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and To Facilitate Capital Formation.

I would like to thank the Chairman for continuing to move forward with this important proceeding. Over the past several years I have noted in statements, along with my colleagues, that we need to redouble our efforts to promote wireless service in rural areas. The Commission has specific and significant statutory obligations to ensure that we manage the spectrum to the benefit of rural Americans. In response, the Chairman agreed to initiate last-year's NOI in this proceeding, which has now yielded this important NPRM. So, I'd like to thank him.

I support this NPRM, whole-heartedly in some places, with reservations in others. We seek comment on how to determine what areas are truly rural. We propose to allow higher power limits in areas where this will not unduly increase interference, in order to give rural carriers more coverage. We discuss the benefits of auctioning spectrum on an RSA basis, and ask where we ought to do so. And we ask how we can work with RUS in a more constructive way. All this goes down the right track.

I have reservations about other parts of this NPRM. For example, we seek comment on whether we should eliminate the cellular cross ownership rule in some rural areas. I am concerned that it may be a mistake to eliminate this rule and rely on an unpredictable case-by-case review process that is not guided by any written Commission standards. I am pleased that we tentatively conclude to keep the rule in markets where there are three or fewer carriers. Remember that while many cities boast six competitors, consumers in more than 25% of U.S. counties have three or fewer wireless carriers to choose from. So because we tentatively conclude to maintain the rule for the most vulnerable markets, and because we make no proposal on whether to eliminate the rule elsewhere, I can support this section of the item.

I am most concerned that the NPRM considers allowing companies to use their FCC licenses as collateral when seeking loans with the RUS. Spectrum and FCC licenses are not property. They should not be property. Congress is clear on this matter. If we allow companies to grant security interests in licenses we will be taking a big step toward spectrum propertization. This NPRM limits its questions to where the RUS, a part of the federal government, is the holder of the security interest. Because of this limitation, and because we do not make any proposal or tentative conclusion on the matter, I will support the item. But my deep concerns with granting authority to use FCC licenses as collateral remain. In fact, they grow every day. This policy could well violate the Communications Act. I do not see how we can allow companies to use licenses as collateral without violating the intent of Congress to keep control and ownership of spectrum and licenses in the hands of American citizens rather than private interests.

From the time I first called for a proceeding on promoting rural wireless up to today, I have supported creative ways of achieving this goal. But we have to do some cost-benefit analysis here. I fear that allowing the use of security interests could provide precious little

benefit compared to the potentially large cost to the spectrum management system. The marginal improvement in access to capital may be small, given that companies today can already grant security interests in stock and in the proceeds of a license sale. But the costs are potentially huge. Allowing security interests could undermine our authority in Sections 301 and 304 of the Act. The FCC's basic ability to develop wireless policy and manage interference could be threatened. If a court is convinced that an FCC decision to require additional CALEA compliance, E-911 public safety actions, or to change operations to reduce interference unduly puts the investment of a security interest holder at risk, could that court tie the Commission's hands? If so, we would be unable to do our job. Finally, after NextWave, we should be wary of decisions that put us at a disadvantage in bankruptcy disputes. Yet, allowing security interests creates great uncertainty in this context, and could lead to the Commission being unable to protect public funds when a licensee declares bankruptcy.

But this section of the item merely asks questions. Because of the limited nature of this section of the item, because we are not considering allowing any party other than RUS to hold a security interest, and because of the presence of these good probing questions, I can support this section of the item.

The Bureau has done a good job seeking comment on each of the worries that I just mentioned. I also want to acknowledge and thank my colleagues for working to make this a better item as we went through the deliberative process. I hope that people will pay attention to this proceeding and file comments. I want to especially encourage folks who share my doubts to respond fulsomely to this NPRM. We need to know the implications of this decision fully before acting. We certainly do not have the answers yet. So we need your help.

**SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

Re: Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services (WT Docket No. 02-381), 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services (WT Docket No. 01-14); and Increasing Flexibility to Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and to Facilitate Capital Formation.

I have always maintained that one of the Commission's most important priorities is to facilitate the deployment of communications services in rural America. Wireless services are particularly critical in rural communities where such technologies may provide not only the most efficient, but sometimes the only practical method of offering communications services. Accordingly, it is crucial that we fulfill our obligation to promote the development and rapid deployment of wireless services in rural America.

The item we consider today raises a broad set of questions, ranging from how to define "rural," to whether technical changes such as modified power limits in rural areas will further our goals, to requesting input on how we can maximize our partnership with the USDA and the Rural Utilities Services program. I am glad we are asking these questions and addressing these important issues. I look forward to seeing the comments responding to this NPRM.

SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services; WT Docket No 02-381

At our last open meeting, we shed an important light on the Commission's ongoing efforts to support the deployment of basic and advanced telecommunications services to those Americans living in our Nation's rural communities. At that time I highlighted my goal of implementing policies that provide for and maintain a rural telecommunications system that is second to none. In that light, I am very pleased to support this Notice of Proposed Rule Making (NPRM) because spectrum-based communications can play such an integral part of that telecommunications network.

The NPRM tackles a number of the issues that I believe are so critical to promoting the provision of spectrum-based services in rural areas. Not only do we address the nuts and bolts of how we define "rural," but we also look at some of the more challenging issues such as performance requirements and relaxed power limits for licensed services.

I am particularly supportive of the request for comment on ways the Commission can support the USDA's Rural Utilities Service (RUS) Telecommunications Program. As I mentioned at our last meeting, I had the privilege of working on legislation authorizing and providing funds to the RUS for deployment of broadband services in rural areas when I was a staffer in the Senate as part of last year's Farm Bill. It is so worthwhile to explore how the Commission can support the wireless applications of this program, as I truly believe that spectrum-based services offer great potential to Rural America.

I also am pleased to support our limited question on the ability of the Commission to allow security interests by RUS in FCC licenses. I very much appreciate the efforts of the Wireless Telecommunications Bureau staff to draft a section that presents a balanced discussion of this novel issue. I take very seriously Congress' charge that we manage the nation's airwaves because spectrum is a finite public national resource, with characteristics unlike that of any other. The Commission always must retain the authority and flexibility to regulate the rights and responsibilities of its licensees. RUS, because it also is part of the Federal Government, may be an appropriate holder of a security interest, particularly as it is my understanding that RUS retains the security interests it holds through its rural loan program. I believe that the document as drafted weighs these important considerations in asking the questions of whether or not we should or even can allow RUS to hold security interests in FCC licenses.

Finally, while I do have some concerns with the question of a possible modification to the cellular-cross ownership rule, I am encouraged by the tentative conclusion to retain the rule for those RSA that are served by three or fewer providers. I believe that we have set the bar sufficiently high to changing the rule for those mobile wireless markets that are served by the fewest providers.