

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

In the Matter of )
Implementation of Sections 309(j) and ) WT Docket No. 99-87
337 of the Communications Act of 1934 )
as Amended )
Promotion of Spectrum Efficient ) RM-9332
Technologies on Certain Part 90 )
Frequencies )
Establishment of Public Service Radio ) RM-9405
Pool in the Private Mobile )
Frequencies Below 800 MHz )
Petition for Rule Making of The American Mobile ) RM-9705
Telecommunications Association )

REPORT AND ORDER
AND FURTHER NOTICE OF PROPOSED RULE MAKING

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## I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In this Report and Order and Further Notice of Proposed Rule Making, we adopt rules and policies to implement Sections 309(j) and 337 of the Communications Act of 1934 (“Communications Act”), as amended by the Balanced Budget Act of 1997 (“Balanced Budget Act”),<sup>1</sup> which was signed into law on August 5, 1997. The Balanced Budget Act significantly revised Section 309(j) of the Communications Act, which is the principal statutory provision that governs the Commission’s auction authority for the licensing of radio services. With the *Notice of Proposed Rule Making* in WT Docket No. 99-87, we initiated this proceeding and requested comment on changes to the Commission’s rules and policies to implement our revised auction authority.<sup>2</sup>

<sup>1</sup> Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997).

<sup>2</sup> See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz, WT Docket No. 99-87, RM-9332, RM-9405, (continued....)

2. Specifically, this Report and Order sets out the general framework for exercise of the Commission's auction authority in light of the Balanced Budget Act's revisions to Section 309(j) of the Communications Act.<sup>3</sup> First, we examine how the Balanced Budget Act revised the statutory language of Section 309(j). In particular, we consider amended Section 309(j)(1)'s directive to use competitive bidding to resolve mutually exclusive license applications for those radio services that do not fall within one of Section 309(j)(2)'s auction exemptions. These statutory changes are considered in light of our continuing obligation under Section 309(j)(6)(E) to avoid mutual exclusivity and to fulfill the public interest objectives enumerated in Section 309(j)(3).

3. In this Report and Order, we conclude that in non-exempt services, the Commission's authority under the Balanced Budget Act continues to permit it to adopt licensing processes that result in the filing of mutually exclusive applications where the Commission determines that such an approach would serve the public interest. We do not, however, make any changes to license assignment procedures in existing services that preclude or limit the likelihood of mutually exclusive applications, nor do we make any specific determination about what licensing procedures to adopt for future services. Rather, we will reserve for future service-specific rulemaking proceedings the question of what type of licensing mechanism to use in each case, *e.g.*, geographic area licensing, site-by-site licensing, or any other licensing process. Moreover, any consideration of whether we should use licensing procedures in a particular service that increase the likelihood of mutually exclusive applications will be based on careful analysis of the public interest considerations of Section 309(j)(3) as they apply to the specific characteristics, uses, and demands of the service.

4. We also conclude that in addition to other licensing mechanisms we have used previously, we should consider the use of band manager licensing as a future option for private as well as commercial services. We used the band manager concept for the first time in the 700 MHz guard bands,<sup>4</sup> and believe that it has the potential in other new spectrum allocations to provide private users with greater flexibility to access spectrum in amounts of bandwidth, periods of time, and geographic areas that best suit their needs. For example, we have recently initiated a proceeding to reallocate 27 MHz of spectrum in bands below 3 GHz from Federal Government to non-government use, and have sought comment on whether this spectrum could address demand in the congested private radio bands.<sup>5</sup> In that proceeding, we seek comment on the possibility of using band managers for some of those bands, as well as other licensing options.

5. We also define the scope of the Balanced Budget Act's exemption from auctions for licenses and permits issued for "public safety radio services." We conclude that this "public safety" exemption

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*Notice of Proposed Rule Making*, 14 FCC Rcd 5206 (1999) ("*Notice*"). For the reasons discussed in the *Notice*, this proceeding does not address satellite services. See *Notice* at ¶ 65.

<sup>3</sup> See 47 U.S.C. § 309(j) (1999).

<sup>4</sup> See Service Rules for the 746-764 and 776-794 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, 5311-12 at ¶ 26 (2000) ("*700 MHz Second Report and Order*") (establishing specific requirements for Guard Band Manager licenses for the 700 MHz guard bands).

<sup>5</sup> See Reallocation of 27 Megahertz of Spectrum Transferred from Government Use, ET Docket No. 00-221, RM-9267, RM-9692, RM-9797, RM-9854, *Notice of Proposed Rule Making*, FCC 00-395, at ¶ 1 (rel. Nov. 20, 2000) ("*27 MHz Reallocation Order*").

from auctions was intended to apply not only to traditional public safety services such as police, fire, and emergency medical services, but also to spectrum usage by entities such as utilities, railroads, transit systems, and others that provide essential services to the public at large and that need reliable communications in order to prevent or respond to disasters or crises affecting their service to the public. We also conclude, however, that the public safety exemption applies only to services in which these public safety uses, *i.e.*, protection of safety of life, health, and property within the meaning of Section 309(j)(2)(A), comprise the dominant use of the spectrum. Thus, services in which such uses are not dominant (and in which mutual exclusivity occurs) will not be exempt from auctions, even if some individual licensees in the service use the spectrum for public safety purposes as defined by the statute.

6. The Report and Order also addresses a number of proposals to amend our licensing and eligibility rules for existing private services.<sup>6</sup> In general, we conclude that the existing rules should be retained. Specifically, we decline a request by the American Mobile Telecommunications Association (“AMTA”) to establish geographic area licensing and competitive bidding rules in the 450-470 MHz band. We also decline the Utilities Telecommunications Council’s (“UTC’s”)<sup>7</sup> request to create a separate radio pool of private land mobile frequencies for entities that do not qualify for the existing Public Safety Radio Pool spectrum, but that fall within the broader “public safety” exemption established by Section 309(j)(2)(A).

7. We do make a limited change, however, to our use restrictions affecting 800 MHz Business and Industrial/Land Transportation (“BI/LT”) channels, which currently prohibit commercial use by licensees. We conclude that subject to certain safeguards, BI/LT licensees should be allowed to modify their licenses to permit commercial use, or to assign or transfer their licenses to CMRS operators for commercial use. To prevent trafficking, we will not allow such modifications, assignments, or transfers until five years after the initial grant date of the license, and we will prohibit a licensee who modifies or transfers a license under this provision from obtaining new BI/LT spectrum in the same location for one year.

8. In addition, we address issues relating to the awarding of licenses under Section 337 of the Communications Act, which allows public safety entities (defined more narrowly than in Section 309(j)(2)(A)) to apply for “unassigned” spectrum not otherwise allocated for public safety use. We conclude that where the Commission has proposed rules for the licensing of particular spectrum by auction, requests for licensing under Section 337 should not be deemed in the public interest once the competitive bidding process has begun except under extraordinary circumstances. Moreover, we conclude that Section 337 relief should only be available if the applicant demonstrates that there is no available public safety spectrum in any band in the geographic area where the public safety use is proposed.

9. Finally, in the *Further Notice of Proposed Rule Making*, we seek comment on a petition for rulemaking filed by AMTA proposing that certain Part 90 licensees be required to employ new spectrum-efficient technologies.<sup>8</sup> In particular, we seek further comment on the effectiveness of the Part 90 rules that

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<sup>6</sup> A list of the parties that filed pleadings and *ex parte* notices in the captioned proceedings, and the abbreviations used to refer to such parties, is attached at Appendix A.

<sup>7</sup> UTC is now known as the United Telecom Council.

<sup>8</sup> AMTA Petition for Rulemaking (RM-9332) at 3 (filed June 19, 1998) (“AMTA Petition I”).

have been adopted in the course of the Commission's *Refarming* proceeding, PR Docket No. 92-235,<sup>9</sup> the current pace of migration to narrowband technology, and on whether enough time has elapsed to allow us to evaluate the effectiveness of our current rules. We also seek comment on whether to permit 900 MHz BI/LT licensees to modify their licenses to permit CMRS use.

## II. BACKGROUND

### A. Commission Implementation of the 1993 Auction Standard

10. The Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act")<sup>10</sup> added Section 309(j) to the Communications Act, authorizing the Commission to award licenses for use of the electromagnetic spectrum through competitive bidding where mutually exclusive applications are filed. The 1993 Budget Act expressly authorized, but did not require, the Commission to use competitive bidding to choose among mutually exclusive applications for initial licenses or construction permits.<sup>11</sup> As we described in detail in the *Notice*, the Commission in a series of rulemaking proceedings adopted rules and policies to implement Section 309(j).<sup>12</sup>

11. Pursuant to the 1993 Budget Act, Section 309(j)(1), "General Authority," only permitted the Commission to use competitive bidding for subscriber-based services if mutual exclusivity existed among initial license applications. Section 309(j)(6)(E) also made clear that the Commission was not relieved of its obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations and other means to avoid mutual exclusivity.<sup>13</sup> The Commission has determined that applications are "mutually exclusive" if the grant of one application would effectively

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<sup>9</sup> See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, PR Docket No. 92-235, *Report and Order and Further Notice of Proposed Rule Making*, 10 FCC Rcd 10,076 (1995) ("*Refarming Report and Order and Further Notice*"); *Memorandum Opinion and Order*, 11 FCC Rcd 17,676 (1996); *Second Report and Order*, 12 FCC Rcd 14,307 (1997); *Second Memorandum Opinion and Order*, 14 FCC Rcd 8642 (1999); *Third Memorandum Opinion and Order*, 14 FCC Rcd 10,922 (1999); *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 16,673 (2000) (collectively, the "*Refarming Proceeding*").

<sup>10</sup> Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993).

<sup>11</sup> 47 U.S.C. § 309(j)(1) (1996). As added by the 1993 Budget Act, Section 309(j)(1) stated:

(1) General Authority. -- If mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum described in paragraph (2), then the Commission shall have the authority, subject to paragraph (10), to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection.

Paragraph (10) provided a number of conditions precedent and conditions subsequent to the Commission's use of competitive bidding, which are moot. See 47 U.S.C. § 309(j)(10).

<sup>12</sup> See *Notice* at 5208-21 ¶¶ 3-22. See also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348 (1994) ("*Competitive Bidding Second Report and Order*"); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994) ("*Competitive Bidding Second M O & O*").

<sup>13</sup> 47 U.S.C. § 309(j)(6)(E).

preclude the grant of one or more of the other applications.<sup>14</sup> Where the Commission receives only one application that is acceptable for filing for a particular license that is otherwise auctionable, there is no mutual exclusivity, and thus no auction. Therefore, mutual exclusivity is established when competing applications for a license are filed.

12. Section 309(j)(1) also restricted the use of competitive bidding to applications for “initial” licenses or permits.<sup>15</sup> In addition, Section 309(j)(2) set forth conditions beyond mutual exclusivity that had to be satisfied in order for spectrum to be auctionable.<sup>16</sup> Generally speaking, these conditions subjected to auction those services in which the licensee was to receive compensation from subscribers for the use of the spectrum.<sup>17</sup> Former Section 309(j)(2) further directed the Commission, in evaluating the “uses to which bidding may apply,” to determine whether “a system of competitive bidding will promote the [public interest] objectives described in [Section 309(j)(3)].”<sup>18</sup> Employing these criteria, the Commission identified a number of services and classes of services that were auctionable and not auctionable under the 1993 Budget Act, provided mutually exclusive applications were filed.<sup>19</sup> As we explained in the *Notice*, the

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<sup>14</sup> See *Notice* at 5210 ¶ 4 (citing *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2350 n.5).

<sup>15</sup> Renewal licenses were excluded from the auction process. See H.R. Rep. No. 103-111, at 253. See *also id.* at 2355.

<sup>16</sup> See 47 U.S.C. § 309(j)(2)(A) (1996).

<sup>17</sup> Among the services found to be auctionable under the 1993 Budget Act were narrowband and broadband Personal Communications Services, Public Mobile Services, 218-219 MHz Service, Specialized Mobile Radio Services (SMR), Private Carrier Paging (PCP) Services, Multipoint Distribution Service (MDS), Local Multipoint Distribution Service (LMDS), 2.3 GHz Wireless Communications Service (WCS), satellite Digital Audio Radio Service (DARS), Direct Broadcast Satellite (DBS) Service,<sup>17</sup> 220-222 MHz radio service, Location and Monitoring Service (LMS), and VHF Public Coast Stations, all of which involve commercial use of the spectrum. See *Notice* at 5212-13 ¶ 8; see also *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2359 ¶¶ 62-63. The plain language of the 1993 Budget Act also excluded traditional broadcast services from competitive bidding, because broadcast licensees do not receive compensation from subscribers. See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2352 ¶ 22.

<sup>18</sup> 47 U.S.C. § 309(j)(2)(B) (1996). Section 309(j)(3), entitled “Design of Systems of Competitive Bidding,” directs that these factors be addressed in both identifying classes of licenses to be issued by competitive bidding, and designing particular methodologies of competitive bidding. The objectives are listed as follows:

- (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
- (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
- (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and
- (D) efficient and intensive use of the electromagnetic spectrum.

47 U.S.C. § 309(j)(3)(A)-(D).

<sup>19</sup> See *Notice* at 5212-14 ¶¶ 8-9.

services deemed nonauctionable under the 1993 Budget Act were non-subscriber based, private and noncommercial offerings operating on a variety of frequency bands.<sup>20</sup>

### B. The Balanced Budget Act of 1997

13. In 1997, Congress revised the Commission's auction authority. Specifically, the Balanced Budget Act of 1997 amended Section 309(j)(1) to require the Commission to award mutually exclusive applications for initial licenses or permits using competitive bidding procedures, except as provided in Section 309(j)(2). Sections 309(j)(1) and 309(j)(2) now state:

(1) General Authority.--If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions.--The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission--

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that--

(i) are used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in section 397(6)<sup>21</sup> of this title.<sup>22</sup>

As mentioned above, prior to the Balanced Budget Act of 1997, Sections 309(j)(1) and 309(j)(2) granted the Commission the authority to use competitive bidding to resolve mutually exclusive applications for initial licenses or permits if the principal use of the spectrum was for subscription-based services and competitive bidding would promote the objectives described in Section 309(j)(3).<sup>23</sup> As amended by the Balanced Budget Act of 1997, Section 309(j)(1) states that the Commission *shall* use competitive bidding to resolve mutually exclusive initial license or permit applications, unless one of the three exemptions provided in the statute applies.<sup>24</sup>

14. As noted above, the Balanced Budget Act of 1997 left unchanged the restriction that competitive bidding may only be used to resolve mutually exclusive applications. Moreover, the general auction authority provision of Section 309(j)(1) now references the obligation under Section 309(j)(6)(E) to

<sup>20</sup> See Notice at 5214-19 ¶¶ 10-17.

<sup>21</sup> 47 U.S.C. § 397(6). Section 397(6) defines the terms "noncommercial educational broadcast station" and "public broadcast station."

<sup>22</sup> 47 U.S.C. § 309(j)(1), (2) (as amended by Balanced Budget Act, § 3002) (footnote added).

<sup>23</sup> See 47 U.S.C. § 309(j)(1) and (2) (1996).

<sup>24</sup> See 47 U.S.C. § 309(j)(2) (emphasis added).

use engineering solutions, negotiation, threshold qualifications, service regulations, or other means to avoid mutual exclusivity where it is in the public interest to do so. In addition, the portion of the Conference Report that accompanies this section of the legislation emphasizes that notwithstanding the Commission's expanded auction authority, its determinations regarding mutual exclusivity must still be consistent with and not minimize its obligations under Section 309(j)(6)(E).<sup>25</sup>

15. Section 309(j)(2), as amended by the Balanced Budget Act of 1997, exempts from auctions licenses and construction permits for public safety radio services, digital television service licenses and permits given to existing terrestrial broadcast licensees to replace their analog television service licenses, and licenses and construction permits for noncommercial educational broadcast stations and public broadcast stations. The Commission has found that the list of exemptions from our general auction authority set forth in Section 309(j)(2) is exhaustive, rather than merely illustrative, of the types of licenses or permits that may not be awarded through a system of competitive bidding.<sup>26</sup> Left unchanged by the Balanced Budget Act of 1997 is Section 309(j)(3)'s directive to consider the public interest objectives in identifying classes of licenses and permits to be issued by competitive bidding.

16. The Conference Report for Section 3002(a) of the Balanced Budget Act of 1997 states that the exemption for public safety radio services includes "private internal radio services" used by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, volunteer fire departments, and not-for-profit organizations that offer emergency road services, such as the American Automobile Association ("AAA").<sup>27</sup> The Conference Report also notes that the exemption is "much broader than the explicit definition for 'public safety services'" included in Section 337(f)(1) of the Communications Act,<sup>28</sup> for the purpose of determining eligibility for licensing in the 24 MHz of spectrum reallocated for public safety services.<sup>29</sup>

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<sup>25</sup> The conferees expressed concern that the Commission not interpret its expanded auction authority in a manner that overlooks engineering solutions or other tools that avoid mutual exclusivity. See H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572 (1997) ("Conference Report").

<sup>26</sup> Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, *First Report and Order*, 13 FCC Rcd 15920, 16000 ¶ 199 (1998) ("*Commercial Broadcast Competitive Bidding First Report & Order*").

<sup>27</sup> See Conference Report at 572. The 1997 amendments also eliminate the Commission's authority to issue licenses or permits by random selection after July 1, 1997, with the exception of licenses or permits for noncommercial educational radio and television stations. See Balanced Budget Act at § 3002(a)(2)(B)(5).

<sup>28</sup> 47 U.S.C. § 337(f)(1), *added by* Balanced Budget Act § 3004. See Conference Report at 572.

<sup>29</sup> Conference Report at 572. For purposes of comparison, the definition of "public safety services" included in Section 337(f)(1) provides:

The term "public safety services" means services--

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

(continued....)



17. As we discuss in greater detail below, the statutory changes to the Commission's auction authority brought about by Balanced Budget Act primarily affect those classes of radio service that are referred to generically as "private services." Our use of the term "private services" in the context of the 1993 Budget Act's auction exemption referred to those radio services "that did not involve the payment of compensation to the licensee by subscribers, *i.e.*, that were for internal use."<sup>30</sup> Generally, the private radio services are used by government or business entities to meet their own internal communications needs or by individuals for personal communications, rather than to provide communications services to others.<sup>31</sup> In this Report and Order, we use the term "private services" broadly to refer to the family of non-broadcast, non-subscriber based fixed or mobile radio services (*i.e.*, radio services that are for internal uses).<sup>32</sup> This Report and Order does not revisit any determinations made pursuant to the 1993 Budget Act of those radio services subject to competitive bidding. Rather, here we establish a framework for our future determinations of which radio services may be subject to competitive bidding. For example, we intend to use this framework to guide our decisions in regard to the spectrum bands that are the subject of a separate *Notice of Proposed Rule Making* in which we are proposing to reallocate 27 MHz of spectrum in bands below 3 GHz from Federal Government to non-government use.<sup>33</sup>

### III. REPORT AND ORDER

#### A. Framework for Determining Whether Licenses Are Subject to Auction

18. In this Report and Order, we evaluate the scope of our spectrum auction authority under Section 309(j) and establish a framework for determining whether licenses are subject to auction. First, we consider how the Balanced Budget Act's revision of our auction authority under Section 309(j) of the Communications Act affects future determinations of which services may be subject to auction. In particular, this analysis focuses on the application of the public interest factors enumerated in Section 309(j)(3) and the Commission's Section 309(j)(6)(E) obligation in the public interest to avoid mutual exclusivity in application and licensing proceedings for those radio services that are not specifically exempt from auction under Section 309(j)(2).<sup>34</sup> We also recognize the potential for band manager licensing of

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47 U.S.C. § 337(f)(1).

<sup>30</sup> See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2352 ¶¶ 23-25.

<sup>31</sup> Many different entities use private systems for a variety of purposes, and the systems themselves operate on a number of different spectrum bands. As was explained in detail in the *Notice*, to date, the Commission has employed a variety of alternative licensing approaches for these private radio services. See *Notice* at 5214-19 ¶¶ 11-17.

<sup>32</sup> Broadly speaking, the category of "private services" includes the Private Land Mobile Radio Services; parts of the Maritime and Aviation Services; the Private Operational Fixed Service; Amateur and Personal Radio Services. When used in this general sense, "private services" also includes the public safety radio services (which fall within the three aforementioned service classifications) as well as frequencies allocated to the Public Safety Radio Pool.

<sup>33</sup> Among other things, that *Notice of Proposed Rule Making* seeks comment on whether that spectrum could address demand in the congested private radio bands. See *27 MHz Reallocation Order*.

<sup>34</sup> See 47 U.S.C. §§ 309(j)(6)(E), 309(j)(2). See also *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2352-53 ¶¶ 21-28.

auctionable private radio services where that licensing mechanism is likely to serve the public interest and otherwise satisfy the Commission's overall spectrum management responsibilities and obligations under the Communications Act.

### 1. Obligation to Avoid Mutual Exclusivity

19. Background. In the *Notice*, the Commission sought comment broadly on how the Balanced Budget Act's amendments to Section 309(j) affect its determinations of which services may be subject to auction.<sup>35</sup> In particular, we asked whether the express reference in Section 309(j)(1) to the Commission's obligation to avoid mutual exclusivity under Section 309(j)(6)(E) changes the scope or content of that obligation.<sup>36</sup> We also asked how we should apply the public interest factors in Section 309(j)(3) in establishing licensing schemes or methodologies under the Balanced Budget Act for both new and existing, commercial and private services.<sup>37</sup> We inquired whether the Commission's previous analysis of its obligation under Section 309(j)(6)(E) is still appropriate in view of the revisions to Section 309(j)(1) and 309(j)(2), *i.e.*, whether we should continue to evaluate our obligation to avoid mutual exclusivity by weighing the public interest objectives of Section 309(j)(3).<sup>38</sup> With respect to services currently using licensing schemes in which mutually exclusive applications are not filed, we asked whether Congress, in emphasizing our obligation to avoid mutual exclusivity, intended that we give greater weight to that obligation and less to other public interest objectives.<sup>39</sup>

20. Discussion. Private radio service interests generally argue that the Balanced Budget Act has not expanded the Commission's auction authority, particularly as it applies to private wireless services.<sup>40</sup> They argue that the added reference in Section 309(j)(1) to the Commission's obligation under Section 309(j)(6)(E) to consider alternatives to mutual exclusivity requires the Commission to give greater weight to the goal of avoiding mutual exclusivity and less to other public interest objectives in determining which wireless services are potentially auctionable.<sup>41</sup> Under these commenters' proposed interpretation, the

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<sup>35</sup> *Notice*, 14 FCC Rcd at 5222 ¶ 25.

<sup>36</sup> *Id.* at 5235 ¶ 60.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 5239 ¶ 64.

<sup>39</sup> *Id.* at 5235 ¶ 60.

<sup>40</sup> *See, e.g.*, AAR Comments at 8; API Comments at 14-16; API Reply Comments at 3-4; Blooston Comments at 5-10; Blooston Reply Comments at 2-3; Boeing at 2, 4 (“[a]ny implementation of the Balanced Budget Act amendments of 1997 must first acknowledge that Congress flatly restricted the Commission’s competitive bidding authority with Section 309(j)(6)(E)...”); Boeing Reply Comments at 1-2; CellNet Reply Comments at 2-4; Cinergy Comments at 4-5; Cinergy Reply Comments at 2-3; ComEd Comments at 4-6; ComEd Reply Comments at 2-3; CSAA Reply Comments at 4; Entergy Comments at 4-5; Entergy Reply Comments at 2-3; Ford Reply Comments at 2; FIT Comments at 1-4; Intek Comments at 4-6; ITA Comments at 4-7; ITA Reply Comments at 2-5; Kenwood Comments at 2-3; LMCC Comments at 5-6; Motorola Comments at 7-8; Motorola Reply Comments at 2; MRFAC Comments at 6-8; NTCC Comments at 4-5; PCIA Comments at 4-5; SCANA Comments at 5-6; SCANA Reply Comments at 2-3; Trimble Comments at 3-6; UEC Comments at 4-5; UTC Comments at 6.

<sup>41</sup> *See, e.g.*, AAR Comments at 8 (“the Commission’s first obligation under Section 309(j)(1) (referencing Section 309(j)(6)(E)) is to use all appropriate methods to avoid mutual exclusivity”); API Comments (continued....)

Commission's first objective in establishing a licensing mechanism for any non-auction exempt service must be to seek a method that avoids mutual exclusivity.<sup>42</sup> In the view of these commenters, only if the Commission determines that mutual exclusivity cannot be avoided, *i.e.*, that the service can *only* be licensed through processes that result in the filing of mutually exclusive applications, can it consider the public interest factors set forth in Section 309(j)(3) for purposes of determining the appropriate methodology to award licenses through competitive bidding.<sup>43</sup>

21. We disagree with the interpretation of amended Section 309(j)(1) advanced by these commenters. The obligation to consider alternatives to mutual exclusivity set forth in Section 309(j)(6)(E) has existed since the Commission was first authorized to conduct auctions of spectrum licenses by the 1993 Budget Act.<sup>44</sup> The Commission has consistently interpreted this provision to mean that it has an obligation to attempt to avoid mutual exclusivity by the methods prescribed therein only when doing so would further the public interest goals of Section 309(j)(3).<sup>45</sup> We conclude that the amendment of Section 309(j)(1) by

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at 15 ("the Commission must give prior, independent consideration to its obligation to avoid mutual exclusivity, rather than continuing to weigh this obligation against the 'public interest factors' set forth in Section 309(j)(3)"); Boeing Comments at 4-5 ("Congress intended the obligations specified in the Commission's general auction authority of Section 309(j)(1) to take priority over the public interest criteria found in Section 309(j)(3)"); Boeing Reply Comments at 2; CellNet Reply Comments at 2-4; Cinergy Comments at 5; Cinergy Reply Comments at 2-3; ComEd Comments at 6; ComEd Reply Comments at 2-3; Entergy Comments at 5; Entergy Reply Comments at 2-3; Intek Comments at 4-5; ITA Comments at 4; ITA Reply Comments at 3 ("before using competitive bidding as a licensing mechanism, the Commission *must* first consider ways to avoid mutual exclusivity"); Kenwood Comments at 2-3; LMCC Comments at 6 ("it is clear that the Commission must first seek to avoid mutual exclusivity"); Motorola at 4-8; MRFAC Comments at 6-8; NTCC Comments at 4-5; PCIA Comments at 4-5; PIRSC Comments at 3, 10; SBT Comments at 8; SCANA Comments at 6; SCANA Reply Comments at 2-3; UEC Comments at 5; UTC Comments at 6.

<sup>42</sup> See, e.g., API Comments at 15; Boeing Comments at 4-5; Boeing Reply Comments at 2 ("the Commission has a threshold responsibility to resolve mutual exclusivity before ever considering the use of competitive bidding"); CellNet Reply Comments at 2-4; Cinergy Comments at 5; ComEd Comments at 6; CSAA Comments at 5; Entergy Comments at 5; Ford Reply Comments at 2; Intek Comments at 4-5; ITA Comments at 4-7; ITA Reply Comments at 3; Kenwood Comments at 2-3; MRFAC Comments at 6-8; NTCC Comments at 4-5; PCIA Comments at 4-5; PIRSC Comments at 7; SBT Comments at 8; SBT Reply Comments at 32; SCANA Comments at 6; UTC Comments at 6.

<sup>43</sup> See, e.g., API Comments at 15; Boeing Comments at 4-5; Boeing Reply Comments at 2; CellNet Reply Comments at 2-4; Cinergy Comments at 5; ComEd Comments at 6; Entergy Comments at 5; Kenwood Comments at 2-3; LMCC Comments at 5-6; PCIA Comments at 4-5; SCANA Comments at 6; SBT Reply Comments at 32; UEC Comments at 4-5; UTC Comments at 7; UTC Reply Comments at 2.

<sup>44</sup> See 47 U.S.C. § 309(j)(6)(E) (1994).

<sup>45</sup> See, e.g., Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz Bands, PR Docket No. 93-253, *Memorandum Opinion and Order*, 14 FCC Rcd 12428, 12441-12445 ¶¶ 22-28 (1999); Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PR Docket No. 93-253, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030 (1999); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Second Report and Order*, 12 FCC Rcd 19079, 19104 ¶ 62, 19154 ¶ 230 (1997); (continued....)

the Balanced Budget Act to add a cross-reference to Section 309(j)(6)(E) serves to underscore the Commission's pre-existing obligation, but did not change its fundamental scope or content.<sup>46</sup> More specifically, we conclude that the Balanced Budget Act amendments to Section 309(j) do not preclude the Commission from using licensing mechanisms for private services that permit the filing of mutually exclusive license applications if the Commission determines that it is in the public interest to do so.

22. We base our conclusion on several factors. First, nothing in the statutory language suggests that Congress intended to narrow the Commission's discretion to use licensing mechanisms based on mutual exclusivity. The addition of a cross-reference to Section 309(j)(6)(E) does not turn avoidance of mutual exclusivity into the paramount goal of the statute, but simply underscores that the Commission should continue to consider alternatives to mutual exclusivity as it did prior to the Balanced Budget Act, *i.e.*, based on whether such alternatives would promote the public interest objectives in Section 309(j)(3). Moreover, Congress did not change the language of Section 309(j)(6)(E) itself, indicating that it did not intend to change the scope of the Commission's obligation under that provision. Indeed, Section 309(j)(6)(E) itself continues to state – as it did prior to the Balanced Budget Act – that the Commission has the “obligation in the *public interest*... to avoid mutual exclusivity,”<sup>47</sup> which underscores that the Commission is required to avoid mutual exclusivity only if it is in the public interest to do so.

23. Finally, the plain language of Section 309(j)(3) negates the contention that Congress intended that section to be subordinate to Section 309(j)(6)(E). Specifically, Section 309(j)(3) directs the Commission to consider the public interest objectives specified therein in “identifying classes of licenses and permits to be issued by competitive bidding, in specifying the eligibility and other characteristics of such licenses and permits, and in designing methodologies for use under this subsection.”<sup>48</sup> This language makes clear that the public interest objectives of Section 309(j)(3) apply broadly to the threshold issue of which licenses should be subject to auction, which necessarily requires consideration in each case of whether to adopt a licensing mechanism based on mutual exclusivity.

24. Our interpretation of Section 309(j) is also supported by the legislative history of the Balanced Budget Act. In the Conference Report, Congress explicitly stated that the Balanced Budget Act *expanded* the scope of the auction authority previously conferred by the 1993 Budget Act.<sup>49</sup> However, Congress also

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Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 9972, 10009-10 ¶ 115 (1997).

<sup>46</sup> See, e.g., *DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997)(affirming FCC decision establishing an auction procedure for assigning DBS spectrum, and noting that “[n]othing in 309(j)(6)(E) requires the FCC to adhere to a policy it deems outmoded ‘in order to avoid mutual exclusivity in ... licensing proceedings’”(decided prior to enactment of the Balanced Budget Act); *Benkelman Telephone Co. v. FCC*, 220 F.3d 601, *petition for rehearing on other grounds pending* (D.C. Cir. 2000) (denying petitions for review of FCC rulemaking orders establishing geographic area licensing system for certain paging licenses and adopting a competitive bidding procedure for mutually exclusive applications) (decided after enactment of the Balanced Budget Act).

<sup>47</sup> 47 USC § 309(j)(6)(E) (emphasis added).

<sup>48</sup> 47 U.S.C. § 309(j)(3) (emphasis added).

<sup>49</sup> The portion of the Conference Report that discusses the statute's amendments to the Commission's auction authority is entitled “Section 3002(a) -- *extension and expansion* of auction authority.” Conference Report, at 572 (emphasis added).

expressed concern that the Commission not interpret its expanded auction authority in a way that would reduce its Section 309(j)(6)(E) obligations:

[T]he conferees emphasize that, notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.<sup>50</sup>

This language from the Conference Report makes clear that Congress sought continuity rather than change in the Commission's application of Section 309(j)(6)(E). Contrary to the assertions of some private services commenters,<sup>51</sup> Congress did not intend to create a new and greater obligation to avoid mutual exclusivity, but rather sought to ensure that in exercising its expanded auction authority, the Commission would continue to give Section 309(j)(6)(E) the same weight it had prior to the Balanced Budget Act.<sup>52</sup>

25. We also conclude that this interpretation of the Balanced Budget Act is consistent with the Commission's spectrum management responsibilities. Section 309(j)(3)(D) requires the Commission to promote efficient use of the spectrum, which is a valuable and finite public resource.<sup>53</sup> To accomplish these objectives, the Commission must have the freedom to consider all available spectrum management tools and the discretion to evaluate which licensing mechanism is most appropriate for the services being offered.<sup>54</sup> Thus, as the D.C. Circuit has recognized, the Commission is not required to adopt a licensing process that avoids mutual exclusivity but undermines the public interest goals embodied in the statute.<sup>55</sup> Subsequent to the adoption of the Balanced Budget Act, the D.C. Circuit concluded that the Section 309(j)(6)(E) obligation does not foreclose new licensing schemes that are likely to result in mutual exclusivity.<sup>56</sup> If the Commission finds such schemes to be in the public interest, the court states, it may

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<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., Cinergy Comments at 5; ComEd Comments at 6; Entergy Comments at 5; PIRSC Comments at 7; SCANA Comments at 6; UEC Comments at 4-5.

<sup>52</sup> H.R. Conf. Rep. No. 105-217, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 572 (1997) ("Conference Report") (emphasis added).

<sup>53</sup> 47 U.S.C. § 309(j)(3)(D).

<sup>54</sup> See Amendment of the Commission's Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Report and Order*, 15 FCC Rcd 11,956, 11,962-63 ¶¶ 12, 13-15 (2000) ("*MAS Report and Order*") ("[W]e believe that Section 309(j)(6)(E) allows us to determine the licensing approach that is most appropriate for the services being offered, taking into account the dominant use of the spectrum, administrative efficiency and other related licensing issues.").

<sup>55</sup> See *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997) (Section 309(j)(6)(E) does not require Commission to adhere to policy it deems outmoded in order to avoid mutual exclusivity in licensing proceedings); *Benkelman Telephone Co., et al. v. FCC*, 220 F.3d 601, 606 *petition for rehearing on other grounds pending* (D.C. Cir. 2000).

<sup>56</sup> *Benkelman Telephone Co., et al. v. FCC*, 220 F.3d 601, 606, *petition for rehearing on other grounds pending* (D.C. Cir. 2000).

implement them “without regard to [S]ection 309(j)(6)(E) which imposes an obligation only to minimize mutual exclusivity ‘in the public interest’ and ‘within the framework of existing policies.’”<sup>57</sup> In the past, the Commission has found with respect to many services that the adoption of a licensing scheme that results in the filing of mutually exclusive applications encourages efficient use of the spectrum as mandated by Section 309(j)(3).<sup>58</sup> In other instances, the Commission has determined that a licensing approach that avoids mutual exclusivity, *e.g.*, site-based, first-come, first-served licensing, best serves the public interest. For instance, we recently decided to license certain bands of spectrum designated for Multiple Address Systems (“MAS”) on a first-come, first-served, site-by-site basis.<sup>59</sup> We conclude that the Balanced Budget Act did not change the nature of the public interest analysis required of the Commission when deciding the licensing process for a particular service. Therefore, in establishing processes for assigning initial licenses, the Commission will continue to fulfill its obligation under Section 309(j)(6)(E) and consider the public interest goals of Section 309(j)(3).

26. We emphasize that our conclusion applies to decisions regarding the licensing of existing services as well as future services. We recognize that many private wireless licensees contend that we should avoid auctioning private wireless spectrum that is currently licensed through processes that avoid mutual exclusivity.<sup>60</sup> These commenters assert that where the Commission has used licensing methods in the private services that avoid the filing of mutually exclusive applications (*e.g.*, first-come, first-served licensing, shared use, frequency coordination), the Balanced Budget Act requires us to continue using these methods and prohibits us from converting to licensing methods that would result in mutual exclusivity.<sup>61</sup>

27. We reject this interpretation of the statute. Prohibiting the Commission from considering

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<sup>57</sup> *Id.* (citations omitted) (citing *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997)).

<sup>58</sup> *See, e.g.*, Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 9972, 10009-10010 ¶ 115 (1997).

<sup>59</sup> *MAS Report and Order*, 15 FCC Rcd at 11,973-74 ¶ 45. *See also Commercial Broadcast Competitive Bidding First Report and Order*, 13 FCC Rcd at 15,920 ¶ 17 (allowing a limited period for engineering solutions or settlements by competing applicants).

<sup>60</sup> *See, e.g.*, AAA Comments at 6 (“the existing system has worked well for private radio licensees, generally enabling widespread and efficient use of shared channels by many different users without interference.”); API Comments at 16; API Reply Comments at 3-4; Blooston Comments at 7-10; ITA Comments at 24; ITA Reply Comments at 4; Blooston Comments at 10 (“[t]he current system of frequency coordination and first-come, first-served filing is fast, efficient and rarely results in mutual exclusivity”); Boeing Comments at 4-8; Boeing Reply Comments at 1-3; CellNet Comments at 6-9; CellNet Reply Comments at 2-4; Cinergy Reply Comments at 2-3; ComEd Reply Comments at 2-3; CSAA Reply Comments at 4; Entergy Reply Comments at 2-3; FIT Comments at 1-4; Intek Comments at 4-5; ITA Comments at 4-7; ITA Reply Comments at 2-5; Kenwood Comments at 3-5; LMCC Comments at 3-6; Mark IV Comments at 5, 10-11; Motorola Comments at 7-8; Motorola Reply Comments at 2; MRFAC Comments at 5; NTCC Comments at 2-5; PCIA Comments at 2-4; SCANA Reply Comments at 2-3; Trimble Comments at 3-6.

<sup>61</sup> *See, e.g.*, API Comments at 16; Blooston Comments at 7 (“[t]he express language of Section 309(j), and its legislative history, unequivocally establish that the Commission is obligated to preserve the shared use licensing methodology in the private internal radio services”); Blooston Reply Comments at 3; Boeing Comments at 4-8; Boeing Reply Comments at 1-3; CellNet Comments at 6-9; CellNet Reply Comments at 2-4; ITA Comments at 4-6;

changes to licensing methodologies applicable to existing services would contravene the intent of the Balanced Budget Act and restrict the Commission's ability to act in the public interest.<sup>62</sup> Thus, we believe it remains fully within the Commission's authority to convert from a licensing method that avoids mutual exclusivity to one that is based on mutual exclusivity and auctions, as we have done in the case of certain services in the past.<sup>63</sup> At the same time, as discussed below, we believe that in order for this option to be considered in any service, the Commission, as part of its public interest analysis, should give significant consideration to the effectiveness of existing licensing mechanisms that avoid mutual exclusivity, and should weigh the potential costs of changing such mechanisms against the potential benefits.

## 2. License Scope

28. Background. In the *Notice*, the Commission sought comment on whether the use of geographic area licensing for non-exempt private radio services would further the public interest goals of Section 309(j)(3).<sup>64</sup> We solicited comment on the costs and benefits of implementing geographic area licensing in the private radio frequency bands and asked whether licensing schemes other than geographic area licensing would better serve the public interest.<sup>65</sup> In deciding if geographic area licensing would be appropriate for a given radio service or class of frequencies, we asked whether we should consider the actual purpose for which the spectrum is used or proposed to be used, as well as the purpose for which the spectrum is currently allocated.<sup>66</sup> We inquired whether the use of geographic area licensing would speed the assignment of new channels and facilitate further build-out of wide-area systems.<sup>67</sup> We also suggested that the shared private service bands may be so heavily used that adopting a geographic area licensing scheme may not serve any purpose because so little "white space" would be available to geographic area licensees that there would be no interest in applying for the geographic area licenses.<sup>68</sup> The Commission further sought comment on the likely effects of geographic area licensing on incumbent systems and potential new entrants for private radio services.<sup>69</sup>

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<sup>62</sup> See *Benkelman Telephone Co., et al. v. FCC*, 220 F.3d 601, 606, *petition for rehearing on other grounds pending* (D.C. Cir. 2000) (Section 309(j)(6)(E) imposes an obligation only to minimize mutual exclusivity in the public interest and within the framework of existing policies); *Orion Communications Ltd. v. FCC*, 213 F.3d 761, 763 (D.C. Cir. 2000) (notwithstanding other means of avoiding mutual exclusivity, "the statute cannot be read to direct the FCC to adopt *all* other means available").

<sup>63</sup> See, e.g., Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Second Report and Order*, 12 FCC Rcd 19079 (1997); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Report and Order and Second Notice of Further Rule Making*, 12 FCC Rcd 18600 (1997) ("39 GHz Report and Order").

<sup>64</sup> *Notice*, 14 FCC Rcd at 5241 ¶¶ 66-67.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 5241-5242 ¶ 69.

<sup>67</sup> *Id.* at 5241 ¶ 67.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

29. Discussion. The Commission has previously concluded with respect to many commercial services that geographic area licensing is a highly efficient licensing scheme.<sup>70</sup> Among other benefits, it facilitates aggregation by licensees of smaller service areas into seamless regional and national service areas, allows development of strategic and regional business plans, provides licensees with greater build-out flexibility and is efficient for the Commission to administer. Our decisions to establish geographic area licensing in commercial services have been based on our commitment to serve the public interest as required by Section 309(j)(3).

30. Private wireless licensees generally urge the Commission to retain the current non-geographic licensing schemes employed in the private radio bands.<sup>71</sup> They assert that existing methodologies based on first come/first served, site-by-site licensing, and frequency coordination effectively serve the communications needs of private radio licensees.<sup>72</sup> They further argue that geographic area licensing would be inappropriate and counterproductive in the private radio bands.<sup>73</sup> Private wireless licensees state that unlike commercial service providers that seek to offer the widest possible coverage, the majority of private

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<sup>70</sup> See, e.g., Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732, 2744 ¶ 15 (1997). In addition, in the rule making proceeding implementing competitive bidding to award licenses in the 39 GHz band, the Commission concluded that predetermined service areas provide a more orderly structure for the licensing process and foster efficient utilization of the spectrum in an expeditious manner. *39 GHz Report and Order*, 12 FCC Rcd at 18647 ¶ 101. See also *800 MHz Second Report and Order*, 12 FCC Rcd 19079, 19087 ¶ 10.

<sup>71</sup> See, e.g., Advocacy Comments at 2-3; API Comments at 12-14; API Reply Comments at 3-4; Blooston Comments at 7-10; Blooston Reply Comments at 3-4; Boeing Comments at 4-8; Boeing Reply Comments at 1-3; CellNet Comments at 7-9; CellNet Reply Comments at 2-4; Cinergy Comments at 8, 11; Cinergy Reply Comments at 2-3; ComEd Comments at 9, 13; ComEd Reply Comments at 2-3; CSAA Reply Comments at 4; Entergy Comments at 8, 11; Entergy Reply Comments at 2-3; FIT Comments at 1-4; ICA Comments at 2, 4; Intek Comments at 4-6; ITA Comments at 4-7; ITA Reply Comments at 2-5; Kenwood Comments at 3-5; LMCC Comments at 3-6; Mark IV Comments at 5, 10-11; Motorola Comments at 7-8; Motorola Reply Comments at 2; MRFAC Comments at 5; NTCC Comments at 2-5; PCIA Comments at 2-4; SBT Reply Comments at 2, 7-8, 26; SCANA Comments at 9, 12-13; SCANA Reply Comments at 2-3; Trimble Comments at 3-6; UEC Comments at 8, 11; UTC Comments at 20.

<sup>72</sup> See, e.g., AAA Comments at 6; Advocacy Comments at 3; API Comments at 12-14; Blooston Comments at 7-12; Blooston Reply Comments at 3-4; Boeing Comments at 4-8; Boeing Reply Comments at 1-3; CellNet Comments at 7-9; CellNet Reply Comments at 2-4; Cinergy Comments at 9, 11; Cinergy Reply Comments at 2-3; ComEd Comments at 11, 13; ComEd Reply Comments at 2-3; Entergy Comments at 9, 11; Entergy Reply Comments at 2-3; FIT Comments at 1-4, 7; Ford Reply Comments at 8; ICA Comments at 2, 4; Intek Comments at 4-6; ITA Comments at 24; ITA Reply Comments at 4; Kenwood at 3-5; LMCC Comments at 3-6; Motorola Comments at 7-8; Motorola Reply Comments at 2; NTCC Comments at 2-3; PCIA at 2-4; PIRSC Comments at 19; SCANA Comments at 10, 13; SCANA Reply Comments at 2-3; UEC Comments at 9, 11; UTC Comments at 20-21; UTC Reply Comments at 3.

<sup>73</sup> See, e.g., API Comments at 12-14; Blooston Comments at 7-12; Blooston Reply Comments at 3-12; CellNet Comments at 8-9; CellNet Reply Comments at 2-4; Cinergy Comments at 10-11; ComEd Comments at 12-13; Entergy Comments at 10, 11; FIT Comments at 4-7; ICA Comments at 3; Intek Comments at 5; ITA Comments at 16-17; LMCC Comments at 4-5; MRFAC Comments at 5; SBT Reply Comments at 3; SCANA Comments at 11-12; UEC Comments at 10-11; UTC Comments at 20-21; UTC Reply Comments at 4.



radio licensees are interested in tailoring their operations to specific geographically confined needs.<sup>74</sup> These licensees point out that they serve themselves in the areas in which they conduct their core activities, not the public at large across broad market areas.<sup>75</sup> A number of commenters also argue that the use of geographic area licensing violates Section 309(j)(6)(E), claiming that it creates mutual exclusivity rather than avoids it.<sup>76</sup>

31. As discussed above, we have concluded that Section 309(j)(6)(E) does not prevent the Commission from adopting licensing processes, such as geographic area licensing, that serve the public interest but happen to result in the filing of mutually exclusive license applications.<sup>77</sup> We have also rejected commenters' arguments that the Commission is required by the Balanced Budget Act to retain current site-based licensing schemes in existing private services.<sup>78</sup> Nonetheless, we recognize, as many commenters have pointed out, that the decision to convert from current site-based licensing methods to geographic licensing should not be made unless it is clear that the benefits of making the change outweigh the costs.<sup>79</sup> Based on the record in this proceeding, we see no reason to make such an across-the-board change to existing licensing processes in private services. Therefore, we will not adopt geographic area licensing rules for existing private services in this rulemaking. Instead, with respect to private services, the Commission will continue to make determinations on a service-by-service basis of whether to adopt geographic area licensing, site-by-site licensing, or any other licensing scheme based on its obligation under Section 309(j)(6)(E) and the public interest considerations of Section 309(j)(3).

32. We recognize that some private licensees oppose geographic area licensing because they equate it with the use of competitive bidding, which they strongly oppose in the private services.<sup>80</sup> Blooston, for example, contends that the adoption of auctions in private services would make it difficult for many traditional private users to obtain licenses because they would be unable to outbid commercial service

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<sup>74</sup> See, e.g., API Comments at 12-14; Blooston Comments at 7-12; Blooston Reply Comments at 3-4; CellNet Comments at 8-9; Cinergy Comments at 9; ComEd Comments at 11; Entergy Comments at 9; MRFAC Comments at 5; SCANA Comments at 10-11; UEC Comments at 9.

<sup>75</sup> See, e.g., API Comments at 12-14; Blooston Comments at 8, 10-12; Blooston Reply Comments at 3-4; CellNet Comments at 8-9; MRFAC Comments at 5;

<sup>76</sup> See, e.g., AAR Comments at 7-8; API Comments at 16; Blooston Comments at 7, 10-12; Blooston Reply Comments at 3; Boeing Comments at 4; Boeing Reply Comments at 3; CellNet Comments at 7; CellNet Reply Comments at 3; Intek Comments at 5; ITA Comments at 6.

<sup>77</sup> See Section III.B.2. *supra* (discussing obligation to avoid mutual exclusivity under Section 309(j)(6)(E)). Furthermore, even where we decide in a specific service that it is in the public interest to continue site-by-site licensing, such a decision does not necessarily preclude the use of auctions where competing applicants seek to operate at the same site on the same frequency. See *Commercial Broadcast Competitive Bidding First Report and Order*, 13 FCC Rcd 15920.

<sup>78</sup> See *supra* ¶¶ 25-27.

<sup>79</sup> See e.g., Blooston Comments at 10-17;

<sup>80</sup> See, e.g., Blooston Comments at 5-13; CellNet Comments at 7-9; Cinergy Comments at 11; ComEd Comments at 13; Entergy Comments at 11; ITA Comments at 10; SBT Reply Comments at 26; SCANA Comments at 12-13; UEC Comments at 11; UTC Reply Comments at 1.

providers seeking to use the spectrum for subscriber-based services.<sup>81</sup> This view incorrectly assumes that if the Commission were to adopt geographic area licensing for private radio services, it would also eliminate eligibility restrictions for such services and permit commercial entities to bid for private spectrum for commercial use. In fact, with one limited exception in the 800 MHz band,<sup>82</sup> we have concluded that we should not change existing eligibility and use rules for services that are currently restricted to private radio eligibles.<sup>83</sup>

33. Moreover, even where we choose to retain eligibility restrictions on private spectrum, there may be ways in which geographic licensing could be employed to accommodate the needs of private radio users. For example, as noted above, we intend to use the framework adopted in this Report and Order to guide our decisions in regard to the separate *Notice of Proposed Rule Making* in which we are proposing to transfer 27 MHz of spectrum in bands below 3 GHz to non-government use.<sup>84</sup> In addition, as discussed below, the use of band managers could be an effective means of providing private radio users the flexibility to obtain access to the amount of spectrum, in terms of quantity, length of time, and geographic area, that best suits their needs.<sup>85</sup> In addition, we could tailor our auction designs and procedures in ways that serve the specialized needs of the private wireless industry.<sup>86</sup>

### 3. Band Manager Licenses

34. Background. In the *Notice*, we sought comment on whether to establish a new class of licensee called a “band manager” in the private radio services.<sup>87</sup> We described band managers in the *Notice* as a class of Commission licensee that engages in the business of making its spectrum available for use by others through private, written contracts.<sup>88</sup> We solicited comment on a broad range of issues relating to how band manager licenses should be defined, and whether the public interest would be served by using band manager licensing to address current and projected needs for private internal radio services.<sup>89</sup> We inquired whether the concept of a band manager fits within the Commission’s overall spectrum management responsibilities and obligations under the Communications Act.<sup>90</sup> We also asked a number of questions about whether and when a band manager licensing approach may be more effective relative to alternative

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<sup>81</sup> Blooston Comments at 13; *see also* Boeing Comments at 6-7; PIRSC Comments at 13.

<sup>82</sup> *See* Section III.C.4. *infra* (discussing limited availability of B/ILT channels in the 800 MHz band for use in CMRS systems).

<sup>83</sup> *See* Section III.B.2. *infra* (discussing eligibility requirements for auctionable services currently allocated for private radio use).

<sup>84</sup> *See* 27 MHz Reallocation Order.

<sup>85</sup> *See infra* ¶¶ 35-50.

<sup>86</sup> *See infra* ¶¶ 51-61.

<sup>87</sup> *See Notice*, 14 FCC Rcd at 5247-49 ¶¶ 88-95.

<sup>88</sup> *See id.* at 5247 ¶ 89.

<sup>89</sup> *See id.* at 5247-48 ¶¶ 90-92.

<sup>90</sup> *See id.* at 5247-48 ¶ 90.

methods of licensing private internal communications services.<sup>91</sup> Finally, we sought comment on a full range of license implementation issues, including whether it would be necessary to have more than one band manager in each geographic license area and what types of ownership and control requirements might be appropriate for band managers in the private services.<sup>92</sup>

35. Discussion. For the reasons discussed below, we believe that band manager licensing is a viable mechanism that should be considered for licensing in spectrum allocated for the private services.<sup>93</sup> This Report and Order sets forth a framework to guide our determination in future proceedings concerning private services as to the circumstances under which we might use band manager licensing as an alternative or an addition to other licensing methods. We also review some of the considerations that we might take into account in defining a band manager's rights and responsibilities in the context of particular services. We emphasize that this Report and Order does not adopt band manager licensing in any existing private service, nor do we make any specific decision to do so in any future service. Rather, we reserve for future service-specific rulemaking proceedings the question of whether to use band manager licensing in each case. Such determinations will be based on careful analysis of the public interest considerations of Section 309(j) of the Communications Act as they apply to the specific characteristics, uses, and demands of the service.

36. Since the *Notice* was adopted, we have implemented a form of band manager licensing for the first time in the 700 MHz *Second Report and Order*.<sup>94</sup> In that proceeding, we concluded that band manager licensing would be an effective and efficient way to manage the 700 MHz Guard Band spectrum while minimizing the potential for harmful interference to public safety operations in adjacent bands.<sup>95</sup> We

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<sup>91</sup> See *id.* at 5248 ¶ 92.

<sup>92</sup> See *id.* at 5248-49 ¶¶ 91-94.

<sup>93</sup> We also regard band manager licensing as an option to be considered in spectrum in which commercial services are authorized, as evidenced by our recent decision to license band managers in the 700 MHz guard bands. (The lessees of 700 MHz guard band spectrum may be either commercial service providers or private users.) In addition, we have sought comment on whether band managers licensing would be appropriate in the 3650-3700 MHz band (and in the 4.9 GHz band should we find that the public interest supports the pairing of these bands). See Amendment of the Commission's Rules With Regard to the 3650-3700 MHz Government Transfer Band, ET Docket No. 98-237; 4.9 GHz Band Transferred from Federal Government Use, WT Docket No. 00-32, *First Report and Order and Second Notice of Proposed Rule Making*, FCC 00-363 ¶ 81 (rel. Oct. 24, 2000). However, because licensees in commercial services typically operate with fewer restrictions and in a more market-driven environment than private licensees, there may be less need in some commercial services to designate band managers as a specific "class" of licensees. Instead, a potential issue is the degree to which all commercial licensees should have the option to use some or all of their spectrum in the same manner as a band manager, *i.e.*, to make spectrum available to third party users without the need for prior Commission approval, while retaining primary responsibility for compliance with the Commission's rules. We plan to address this issue more broadly in our upcoming secondary markets proceeding, which will address issues related to spectrum leasing in wireless services generally. See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Notice of Proposed Rule Making*, FCC 00-402 (adopted Nov. 9, 2000) ("*Secondary Markets Notice*") (Commission initiative to develop rules and policies to promote secondary markets in radio spectrum). Therefore, we defer further discussion of band managers in the commercial services context to that proceeding.

<sup>94</sup> See *700 MHz Second Report and Order*, 15 FCC Rcd at 5311-12 at ¶ 26.

<sup>95</sup> *Id.* at 5313 ¶ 30.

also found that band manager licensing in the 700 MHz guard bands would enable parties to more readily acquire spectrum with a minimum of Commission involvement.<sup>96</sup> We adopted licensing rules for Guard Band Managers that were based on specific policy objectives that we considered relevant to those bands. To ensure that Guard Band Managers would make their spectrum available to third parties, we required that Guard Band Managers act solely as spectrum brokers, prohibited them from using spectrum for their own private internal communications or to provide telecommunications services, and limited the amount of spectrum that they may lease to affiliated entities.<sup>97</sup> To further our objective of making the 700 MHz guard band spectrum available to a wide range of users, we adopted certain requirements to ensure fair and nondiscriminatory access to the spectrum by potential users.<sup>98</sup>

37. Our recent adoption of Guard Band Manager licensing in the 700 MHz proceeding should help guide us in evaluating whether to adopt band manager licensing in future proceedings.<sup>99</sup> Nevertheless, a number of private radio commenters in the present proceeding argue that band manager licensing of private services is contrary to the public interest.<sup>100</sup> We agree that the use of band managers in spectrum restricted to private services may raise different issues from those that led to our decision for the 700 MHz guard band spectrum, which was open to all users, including commercial service providers and private radio eligibles.<sup>101</sup> There may be instances where we determine that band manager licensing is not appropriate, and where band manager licensing is adopted, we may adopt rules governing band manager activity that differ from those applicable to Guard Band Managers. As discussed below, however, we reject the view that band managers are inappropriate for private services generally.

38. A principal argument advanced by opponents of band manager licensing in private services is that in comparison to other licensing methods, band manager licensing will necessarily make it more difficult and costly for private spectrum users to obtain spectrum.<sup>102</sup> We do not agree. Band manager licensing is a potential response to the underlying scarcity of spectrum for private radio services. Repeatedly, we have recognized this problem and have attempted to address it through regulatory initiatives aimed at increasing spectral and economic efficiencies in the use of private radio spectrum.<sup>103</sup> In the absence of market-based mechanisms to promote efficient spectrum use, however, private radio spectrum has become congested and “users have little incentive to use that resource more efficiently because any privately initiated attempt to improve efficiency would confer benefits on all users of the shared spectrum,

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<sup>96</sup> *See id.*

<sup>97</sup> *See id.* at 5324-26 ¶¶ 56-60.

<sup>98</sup> *See id.* at 5327-28 ¶¶ 63-67.

<sup>99</sup> *See id.* at 5311-23 ¶¶ 25-51.

<sup>100</sup> *See* Boeing Comments at 11; FIT Comments at 6; RRS Comments at 7; SBT Comments at 21; API Reply Comments at 7.

<sup>101</sup> We note that, even if we choose to restrict band managers in a particular service to lease only to private radio eligibles for permissible private uses, a band manager would still be considered to be engaged in a commercial activity.

<sup>102</sup> *See generally* Boeing Comments at 10-14; Western Resources 4-5; AWWA Comments at 9.

<sup>103</sup> *See, e.g., Refarming Proceeding.*

with only a fraction of these benefits accruing to the party undertaking the effort.”<sup>104</sup> By contrast, band manager licensing is a market-based mechanism that can create incentives for efficient spectrum use. Because band managers would be able to charge private users for spectrum use, users would likely be discouraged from engaging in spectrally inefficient and low value uses. In addition, band managers may realize greater economies of scale than existing private radio licensees. Finally, as in the case of the 700 MHz guard bands, we have the option of licensing more than one band manager in each license area, if we think it important to ensure that potential spectrum users have a choice of band managers. These factors will help ensure that efficiencies and cost savings associated with band manager licensing are passed on to private spectrum users.

39. We also disagree with the view that band manager licensing inevitably results in a concentration of private spectrum in the hands of a few licensees while depleting the spectrum available to others.<sup>105</sup> To the contrary, we believe that band manager licensing can increase the diversity of users of private spectrum. With a band manager, different types of spectrum users would have broad flexibility to satisfy their particular spectrum needs with fewer transactional costs and regulatory burdens than are associated with acquiring a full-term license under the Commission’s existing license assignment and partial assignment procedures. Because band manager licensing may result in different types of users being able to access the same spectrum, we believe that this mechanism is consistent with the congressional intent underlying Section 309(j)’s directive to encourage diversity in licensing.<sup>106</sup>

40. In addition to allowing for wider variety of users, band manager licensing is intended to facilitate apportionment of spectrum in a more dynamic fashion than existing licensing procedures permit, thus making spectrum more responsive to market demands and technological changes.<sup>107</sup> We note that the marketplace is increasingly responding to such demands, with system operators increasingly offering services that have historically been provided only over private radio frequencies.<sup>108</sup> Band manager licensing is likely to accelerate this trend toward more efficient use of private radio spectrum. Rather than deplete spectrum, band manager licensing approaches will be developed with the objective of affording spectrum users additional options to access spectrum to meet their particularized needs.

41. In light of these considerations, we find no merit in SBT’s assertion that band manager licensing would be “an economic disaster for local users” and small businesses.<sup>109</sup> We see no reason to

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<sup>104</sup> Gregory L. Rosston & Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest*, 50 Fed. Comm. L.J. 87, 109 (1997)(“*Market-Based Spectrum Policy*”).

<sup>105</sup> See, e.g., Blooston Reply Comments at 10-11; SBT Comments at 23; Boeing Comments at 11.

<sup>106</sup> See 47 U.S.C. §309(j)(3)(B).

<sup>107</sup> See Principles for Reallocation of Spectrum To Encourage the Development of Telecommunications Technologies For the New Millenium, *Policy Statement*, 14 FCC Rcd 19,868, 19,871-72 ¶ 12 (1999)(“*Spectrum Policy Statement*”).

<sup>108</sup> Some commenters note that they are increasing relying on commercial service providers to supply some of their communications needs. See, e.g., AAR Reply Comments at 9. On a similar note, News Corp. has unveiled plans to develop set-top boxes capable of linking electric meters to networks, a telemetry function which has historically been handled wirelessly via private radio spectrum. See “Murdoch Sees Satellites as Way to Keep News Corp. Current,” *New York Times* C1, C7 (June 16, 2000).

<sup>109</sup> See SBT Comments at 18.

believe that small businesses would not be awarded band manager licenses. Indeed, in our recently-concluded auction of 700 MHz Guard Band Manager licenses, five of the nine winning bidders claimed small business status.<sup>110</sup> When licenses are awarded through competitive bidding, the Commission may – and usually does – award bidding credits and other preferences to small businesses.<sup>111</sup> We also disagree with SBT’s assertion that band managers would have no incentive to deal with small businesses. Band managers would be in the business of marketing and providing access to spectrum directly to eligible entities, which would give rise to economic incentives to intensively use the spectrum and permit access to as many users and types of users as possible.

42. Some commenters argue that band manager licensing is an improper delegation of the Commission’s spectrum management and licensing authority under the Communications Act.<sup>112</sup> We previously concluded in the 700 MHz guard band proceeding that band manager licensing is fully consistent with our statutory spectrum management obligations.<sup>113</sup> For a number of reasons, we continue to believe that conclusion is correct, and we reiterate it today. First, because band managers are to be licensed and regulated by the Commission, the Commission fulfills its statutory obligation under Section 309(a) to determine whether licensing of spectrum will serve the public interest, convenience, and necessity.<sup>114</sup> Second, we do not regard the creation of band managers as an improper delegation of our regulatory authority over the use of spectrum. Band managers must operate and make spectrum available subject to the Commission’s rules and oversight. Allowing band managers to make frequencies available to end users is analogous to the present frequency coordination process that requires applicants in some private services to use a frequency coordinator to select a frequency that will most effectively meet the applicant’s needs while minimizing interference to licensees already using a given frequency band.<sup>115</sup> We view band managers as engaging in activities similar to those of a coordinator, though with greater rights and responsibilities to manage the spectrum covered by its license, consistent with technical limitations and other regulations for the licensed radio bands.

43. We also reject the view that band manager licensing is inherently inconsistent with the requirements of Section 310(d) of the Communications Act.<sup>116</sup> Section 310(d) prohibits the transfer of a radio license or any rights thereunder without Commission approval.<sup>117</sup> Generally speaking, one of the

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<sup>110</sup> See “700 MHz Guard Band Auction Raises \$519,892,575.00,” *News Release* (Sept. 21, 2000). Additional information on the results of this auction may be found on the Commission’s Auctions Web page: <<http://www.fcc.gov/wtb/auctions/>>.

<sup>111</sup> See 47 C.F.R. §1.2109(e).

<sup>112</sup> See Cinergy Comments at 25; ComEd Comments at 26; Entergy Comments at 24; SCANA Comments at 26-27; SBT Comments at 19; Ameren Comments at 25; Boeing Reply Comments at 3; Blooston II Reply Comments at 11. See generally AWWA Comments at 9; PIRSC Comments at 18.

<sup>113</sup> See *700 MHz Second Report and Order*, 15 FCC Rcd at 5319-21 ¶¶ 42-47.

<sup>114</sup> See 47 U.S.C. § 309(a)(Commission authority to grant applications found to serve the public interest, convenience, and necessity).

<sup>115</sup> See *700 MHz Second Report and Order*, 15 FCC Rcd at 5320-21 ¶ 45.

<sup>116</sup> See 47 U.S.C. §§ 310(d). See also *id.* at 5321 ¶ 46.

<sup>117</sup> 47 U.S.C. §§ 310(d). In any examination of control, the Commission considers both legal (*de jure*) and actual (*de facto*) control.

Commission's primary concerns in any analysis under Section 310(d) is to determine what party or parties may be held accountable for activities undertaken pursuant to a Commission license.<sup>118</sup> In the *700 MHz Second Report and Order*, we concluded that our Guard Band Manager rules allowing licensees to lease spectrum to third parties were consistent with the requirement that licensees retain ultimate control of their licenses.<sup>119</sup> For example, we provided Guard Band Managers with full authority and the duty to take whatever actions are necessary to ensure third-party compliance with the Act and our rules.<sup>120</sup> We also stated that a Guard Band Manager has the right to suspend or terminate its lessee's operations if the lessee's system is causing harmful interference or otherwise violating Commission rules.<sup>121</sup> We believe that the approach taken in the 700 MHz Guard Band proceeding demonstrates that band manager licensing can be implemented consistently with the requirements of Section 310(d). To the extent that we adopt alternative models for band manager licensing in future service-specific proceedings, we believe that issues relating to the statutory framework for such models can and should be addressed in those proceedings.<sup>122</sup>

44. While we conclude that band manager licensing should be considered as an option in the licensing of private services, we recognize that there are also arguments in favor of retaining the current

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<sup>118</sup> *Id.* For example, in the case of broadcast auxiliary facilities, the Commission has emphasized that it would hold the broadcast licensee responsible for any interference or misuse of the facilities that occurs during operation by the non-licensed user. See Amendment of Part 74, Subpart F of the Commission's Rules to Permit Shared Use of Broadcast Auxiliary Facilities with Other Broadcast and Non-broadcast Entities and to Establish New Licensing Policies for Television Broadcast Auxiliary Stations, BC Docket No. 81-794, *Report and Order*, FCC 83-153, at 12, 53 Rad. Reg. 2d (P & F) 1101, 1983 WL 183062 (1983). The principle of licensee responsibility may be found throughout the Commission's rules. See, e.g., Implementation of Section 3(n) of the Communications Act – Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1430-31 (1994); 47 C.F.R. §§ 90.179(b)(licensee of shared radio station is responsible for assuring that facility is used in compliance with Commission rules); 21.13(f)(licensee must retain effective control where day-to-day management and operation of facilities are carried out by manager). We emphasize, however, that any analysis of *de facto* control over a band manager license must be considered in the context of this unique licensing scheme, and our express authorization of these activities pursuant to a band manager license application.

<sup>119</sup> See *700 MHz Second Report and Order*, 15 FCC Rcd at 5321 ¶ 46. We also required Guard Band spectrum use agreements to contain provisions under which the spectrum lessee agrees to comply with all applicable Commission rules, accept FCC oversight and enforcement consistent with the Guard Band Manager's license, and cooperate fully with any investigation or inquiry conducted by either the Commission or the Guard Band Manager. *Id.* These provisions ensure that the Commission has an additional means of enforcing its rules directly against the lessee. They do not, however, diminish the rights or obligations of the Guard Band Manager to exercise control as licensee.

<sup>120</sup> *Id.*, 15 FCC Rcd at 5322-23 ¶ 50.

<sup>121</sup> See *700 MHz Second Report and Order*, 15 FCC Rcd at 5322-23 ¶ 50. We also required Guard Band spectrum use agreements to contain provisions under which the spectrum lessee agrees to comply with all applicable Commission rules, accept FCC oversight and enforcement consistent with the Guard Band Manager's license, and cooperate fully with any investigation or inquiry conducted by either the Commission or the Guard Band Manager. *Id.* These provisions ensure that the Commission has an additional means of enforcing its rules directly against the lessee. They do not, however, diminish the rights or obligations of the Guard Band Manager to exercise control as licensee.

<sup>122</sup> We also address issues relating to Section 310(d) as it applies to spectrum leasing in our secondary markets proceeding. See *Secondary Markets Notice* at ¶¶ 70-82.

site-by-site licensing approach in existing private radio services, as many commenters advocate.<sup>123</sup> Commenters raise legitimate concerns about the costs to spectrum users, both in terms of financial costs and delays in making spectrum accessible, that may be associated with changing a licensing scheme in an existing service. In light of these considerations, we have no plans at this time to implement band manager licensing in existing private radio bands that are licensed on a site-by-site basis.<sup>124</sup> We will continue to evaluate this issue on an ongoing basis, however. As many of the commenters who oppose band manager licensing acknowledge, demand for private radio spectrum is increasing and available spectrum is scarce.<sup>125</sup> Thus, while existing licensing schemes in the private radio services may tend to avoid mutually exclusive applications, such approaches may also raise barriers to new demands for access to private radio spectrum that may have significant public benefits. Compared with transactional costs and time periods associated with acquiring a full-term license under the Commission's existing licensing regimes, band manager licensing may have advantages because band managers may be able to complete frequency coordination and authorize wireless operations with significantly lower transactional costs and in less time. A number of commenters have observed that past Commission initiatives, such as refarming and authorization of infrastructure sharing, have increased spectral efficiency in the private radio services.<sup>126</sup> We believe that band manager licensing is another method that under some circumstances can help us progress towards greater efficiency in the use of private radio bands.<sup>127</sup>

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<sup>123</sup> See, e.g., PCIA Comments at 2-5; SBT Reply Comments at 17; API Reply Comments at 7.

<sup>124</sup> Our experience is that the use of geographic overlay licenses in private radio services may promote spectrum efficiency. See, e.g., *Refarming Report and Order*, 10 FCC Rcd at 10138-39 ¶¶ 141-143. Indeed, one may conceive of many scenarios under which this flexible licensing tool might be employed to alleviate congestion in encumbered frequency bands. By way of illustration, a band manager overlay licensee might aggregate unencumbered spectrum from one band with spectrum leased from an incumbent licensee in another frequency band within its geographic license service area. The band manager could then lease the aggregated spectrum to third parties. This is not to imply that the incumbent would suffer a degradation in service, as the band manager might provide the incumbent with equipment that is more spectrally efficient or might offer to operate the incumbent's system over other licensed frequencies as part of its bargain, provided such uses are otherwise consistent with the Commission's rules.

<sup>125</sup> See, e.g., Cinergy Comments at ii ("Private radio spectrum is already insufficient to meet the needs of eligibles..."); API Comments at 22; PCIA Comments at 21-22; Motorola Comments at 9.

<sup>126</sup> See Motorola Comments at 9; NTCC Comments at 7-8.

<sup>127</sup> Indeed, we are currently considering a proposal advanced by the Association of American Railroads under which a large number of incumbent private radio licenses would be aggregated into a single band manager-type license. See "Wireless Telecommunications Bureau Seeks Comment on Association of American Railroads Petition for Modification of Licenses for Use in Advanced Train Control Systems and Positive Train Control Systems," *Public Notice*, DC 00-1171 (rel. May 26, 2000)(seeking authority to modify 1069 land mobile base stations using six 900 MHz channel pairs into single geographic license whose total area would be defined as a 140-mile zone centered on the rights-of-way of all operating rail lines in the United States). We also note that some public safety and private radio users have been required to seek regulatory relief from certain regulatory requirements in order to have the flexibility to engage in some of the types of arrangements that might be accommodated under a band manager licensing. See, e.g., "Wireless Telecommunications Bureau Seeks Comment on Western Resources, Inc. Request for Waiver to Permit Sharing of Its 900 MHz Industrial and Land Transportation Trunked Radio System With Public Safety Users," *Public Notice*, DA 00-1405 (rel. June 23, 2000).



45. While we are hopeful that band manager licensing can yield efficiencies in existing spectrum use, we also agree with private radio users that this is a complement to rather than a substitute for pursuing new spectrum allocations.<sup>128</sup> We therefore intend to continue to explore the need for new spectrum allocations to address the needs of private and public safety users. We also believe that band manager licensing should be carefully considered as a licensing option for newly-allocated spectrum. For example, we have recently initiated a proceeding to reallocate 27 MHz of spectrum in bands below 3 GHz from Federal Government to non-government use, and have sought comment on proposals for band manager licensing in portions of that spectrum.<sup>129</sup>

46. We also believe that band manager licensing can be structured to prevent the types of problems that some commenters contend will occur, including problems of interference,<sup>130</sup> loss of spectrum efficiency,<sup>131</sup> and inadequacy of user access and service.<sup>132</sup> Although the rights and obligations of band managers may vary somewhat from service to service, we anticipate that band managers will generally have economic incentives to eliminate interference so as to ensure that end users receive quality service. Band managers will also be required to coordinate the use of frequencies among end user clients to minimize interference, and will be obligated to ensure that their lessees satisfy the interference protection requirements set forth in the Commission's rules both as to incumbent private radio licensees and licensees in adjacent frequency bands. Band managers will also be responsible for resolving interference conflicts among their customers and, in the first instance, among their customers and neighboring users of spectrum licensed to other band managers or other licensees. We have recognized that one way to allow greater flexibility in the use of spectrum is to permit licensees to negotiate arrangements among themselves to control interference rather than rely on mandatory technical rules.<sup>133</sup>

47. Band managers also have the potential to promote more efficient use of their licensed spectrum due to their financial incentive to maximize spectral efficiency and use. This incentive is likely to encourage band managers to reach private commercial agreements with incumbents, other band managers and adjacent licensees on effective spectrum management. The band manager will be responsible for managing a significant portion of spectrum and will attempt to maximize its use by finding additional third party users. In this way, band manager licensing may achieve greater efficiencies than existing licensing schemes in appropriate circumstances. Similarly, we find little merit in assertions that band managers will engage in unfair or discriminatory behavior<sup>134</sup> and warehouse spectrum.<sup>135</sup> We are confident that band managers will have incentives to open the use of the spectrum for all eligible users. Nonetheless, we will

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<sup>128</sup> Some commenters support the use of band manager licensing only for new spectrum allocations. *See, e.g.*, USMSS Comments at 14; Joint Filers Comments at 21-22.

<sup>129</sup> *See 27 MHz Reallocation Order* at ¶¶ 26, 31-32.

<sup>130</sup> *See, e.g.*, UTC Comments at 41.

<sup>131</sup> *See, e.g.*, AWWA Comments at 9.

<sup>132</sup> *See, e.g., id.* at 8-9.

<sup>133</sup> *See Spectrum Policy Statement*, 14 FCC Rcd at 19,870-71 at ¶ 9.

<sup>134</sup> *See, e.g.*, API Comments at 17; SBT Comments at 18; Cinergy Comments at 25; Entergy Comments at 25; SCANA Comments at 27; Ameren Comments at 26; ComEd Comments at 28.

<sup>135</sup> *See* SBT Comments at 17; OSC Comments at 1. *See generally* API Reply Comments at 7.

consider whether it is appropriate for band managers in other bands to be subject to the same types of rules as 700 MHz Guard Band Managers regarding fair and nondiscriminatory access to the band manager's spectrum, and limits on the type of restrictions that band managers may impose on their customers' use of the spectrum.<sup>136</sup> If circumstances warrant, moreover, the Commission might consider imposing reasonable access standards or other requirements to forestall anticompetitive behavior.<sup>137</sup>

48. In assessing whether a band manager licensing mechanism may be appropriate for a specific private services band, we intend to look at a number of factors. For example, we might consider whether there are entities who can effectively perform the functions of a band manager, and whether other licensing options may be overly cumbersome or inefficient. Our decisions on whether and how to license band managers in other bands may also be guided by our experience with the 700 MHz Guard Bands. However, the band manager rules we adopt in other bands may differ in some or all respects from our Guard Band Manager rules. As an initial matter, if we decide to license band managers in other bands, we will determine whether the spectrum should be licensed exclusively to band managers or to band managers along with other types of licensees. In considering band manager licensing, we will decide whether the band manager may be solely a broker of spectrum or may also use its licensed spectrum for its own internal communications or to provide telecommunications services.

49. If we permit band managers to use their spectrum in addition to leasing it, we will also consider whether rules are needed to ensure that band managers continue to perform their core spectrum management functions. Thus, if we determine that a band manager will not be limited to acting as a spectrum broker, we will also consider whether it is appropriate to limit the amount of spectrum that a band manager may retain for its own use.<sup>138</sup> In addition, we will consider whether to adopt rules concerning the types of entities that may lease spectrum from a band manager. For example, if we decide to limit the amount of spectrum that a band manager may employ for its own communications needs or service offerings, we might advance that regulatory objective by limiting the amount of spectrum that a band manager leases to affiliated entities. We may provide the band manager in a given band flexibility to lease its spectrum for a wide range of uses, including fixed or mobile, private or commercial radio services. Alternatively, we could adopt eligibility restrictions for the band managers similar to those we have historically adopted for licensees in existing private radio services.<sup>139</sup>

50. We believe that the framework outlined above presents a workable set of guidelines in our future considerations of whether and how to license band managers in private radio services, and how to advance the policy objectives we establish for the bands under consideration. We emphasize that, where we find band manager licensing to be appropriate, we intend to seek input on how band manager licenses can

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<sup>136</sup> See, e.g., *id.* at 5327-28 ¶¶ 63-67 (establishing standards of fair and nondiscriminatory access for Guard Band Manager leasing activities).

<sup>137</sup> In the 700 MHz proceeding, for example, we require Guard Band Managers to lease the predominant amount of their spectrum to non-affiliates. See *700 MHz Second Report and Order*, 15 FCC Rcd at 5325 ¶ 59. We also remind licensees and spectrum users that state and federal antitrust and consumer protection laws may apply to their conduct.

<sup>138</sup> See, e.g., *id.* at 5326 ¶ 59 (limiting amount of spectrum Guard Band Managers may lease to affiliates).

<sup>139</sup> See, e.g., 47 C.F.R. §90.35(a) (eligibility for Part 90 licenses on Industrial/Business Pool frequencies).

be most appropriately defined for the service in a manner that affords users the broad flexibility to access spectrum, maximizes efficient use of the spectrum, and yields greater benefits than site-by-site or other traditional licensing techniques.

## B. Auction Design for Private Radio Spectrum Deemed Subject to Auction

51. We next discuss issues of auction design and implementation for those services that were not subject to auction under the 1993 Budget Act but may be determined to be subject to auction under our revised auction authority. The services that may be determined to be subject to auction under our expanded auction authority are, by and large, private radio services which are presently licensed under procedures that generally do not result in the filing of mutually exclusive applications. Thus, we next consider issues of auction design and implementation for those services that may be subject to auction in the future.

### 1. Competitive Bidding Methodology and Design

52. Background. We have concluded above that Section 309(j), as amended by the Balanced Budget Act, gives the Commission authority to conduct auctions in the private services if, subject to its obligation to avoid mutual exclusivity, the Commission determines that the use of competitive bidding would serve the public interest.<sup>140</sup> In the event that the Commission adopts a licensing scheme that results in mutual exclusivity, the Commission seeks to develop a competitive bidding process that is tailored to the specific characteristics of the private radio services, the various purposes for which spectrum in those services is used, and the needs of the various types of entities holding licenses in those services.<sup>141</sup> In the *Notice*, we stated that Section 1.2103(a) of our rules sets forth the various types of auction designs from which we may choose to award licenses for services or classes of services subject to competitive bidding.<sup>142</sup>

We also pointed out that under Section 309(j) the Commission has authority to design and test other auction methodologies.<sup>143</sup> In light of these options, we sought comment generally on the types of competitive bidding designs and methodologies to be considered for any private radio services that may be determined to be auctionable as a result of the Balanced Budget Act.<sup>144</sup> We also asked about the frequency with which we should conduct auctions of private radio services spectrum that we determine is auctionable, and whether we should conduct auctions at regularly scheduled intervals.<sup>145</sup> In addition, we asked whether certain procedures such as bidding credits and spectrum caps would be appropriate in the private radio

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<sup>140</sup> See Section III.A.1. *supra*.

<sup>141</sup> See *Notice*, 14 FCC Rcd at 5244 ¶ 77.

<sup>142</sup> *Id.* at 5244-45 ¶ 78; 47 C.F.R. § 1.2103(a). Alternative designs include: (1) sequential multiple-round auctions, using either oral ascending, remote and/or on-site electronic bidding; and (2) sequential or simultaneous single round auctions, using either remote and/or on-site electronic bidding, or sealed bids. See generally 47 C.F.R. § 1.2103(a).

<sup>143</sup> *Id.* at 5244-45 ¶ 78 (citing Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5691 ¶ 6 (1997)).

<sup>144</sup> *Id.* at 5245 ¶ 79.

<sup>145</sup> *Id.* at 5245 ¶ 80.

services.<sup>146</sup>

53. Discussion. Although we received little public comment on these issues, we believe that the specialized nature of private radio services merits consideration of changes to our general auction design and procedures. We intend to consider proposals to amend our competitive bidding methodology for specific private radio services on a service-by-service basis. We may, for instance, decide to implement procedures such as bidding credits, spectrum caps, and auctions at regularly scheduled intervals. We have provided bidding credits to eligible applicants in many of our previous auctions<sup>147</sup> and believe that applicants for licenses in the auctionable private radio services should also be eligible to receive such financial benefits provided they meet the necessary criteria. We further believe that scheduling auctions for licenses in the private services at regular intervals would be particularly beneficial to the private wireless industry. We recognized in the *Notice* that private internal radio service licensees using spectrum to conduct their day-to-day business operations may not be able to wait a significant amount of time to obtain authorizations for the frequencies they need to conduct their businesses.<sup>148</sup> Conducting auctions at regularly scheduled intervals of whatever spectrum we determine to be available in our inventory would ensure that private users have the opportunity to acquire the spectrum they need to operate their businesses. Further, we confirm our determination made in the *Part I Third Report and Order* to continue to define small businesses for purpose of private wireless auction rules based on the characteristics and capital requirements of the specific service.<sup>149</sup>

## 2. Eligibility Requirements

54. Background. The *Notice* solicited comment on a broad range of questions relating to eligibility for participation in spectrum auctions for private radio services.<sup>150</sup> In particular, we sought comment on whether to restrict eligibility to participate in auctions for private wireless services so that we might be able to tailor a competitive bidding system to afford private wireless users reasonable opportunities to obtain sufficient spectrum to meet the needs of their day-to-day business operations. We requested comment on whether participation in private wireless spectrum auctions should be limited to certain types of entities, such as small businesses, non-commercial entities or public safety organizations, and whether to afford certain classes of applicants priority status in an auction.

55. Discussion. With respect to services that are currently restricted to private radio eligibles, we have no plans to change existing eligibility and use rules. Our decision of whether to use competitive bidding to assign licenses is independent of any determination relating to licensee eligibility.

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<sup>146</sup> *Id.* at 5247 ¶ 87.

<sup>147</sup> See, e.g., Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) (modified by *Erratum*, DA 98-419 (rel. Mar. 2, 1998)) (adopting small business bidding credits). See also 47 C.F.R. § 1.2110 (definition of small business designated entities for purposes of FCC's competitive bidding processes).

<sup>148</sup> *Notice*, 14 FCC Rcd at 5245 ¶ 80.

<sup>149</sup> See *Part I Third Report and Order*, 13 FCC Rcd at 388 ¶ 18.

<sup>150</sup> See *Notice*, 14 FCC Rcd at 5245-47 ¶¶ 81-87.

56. As to newly allocated spectrum, we will make decisions on eligibility at the time we promulgate specific service rules for those bands. In recent years, the Commission has generally favored open eligibility rather than eligibility restricted to particular types of entities. We have taken this approach based on the finding that open eligibility generally promotes efficiency in spectrum markets and results in the award of licenses to those who value them most highly.<sup>151</sup> Nevertheless, we recognize that this general approach may not be appropriate in all cases and we may decide to restrict eligibility in particular cases if such restrictions are consistent with our spectrum management responsibilities under Section 309(j).

### 3. Processing of New Applications

57. Background. In the *Notice*, we posed a number of questions concerning the implementation of competitive bidding for services in which licenses will be assigned by auction for the first time.<sup>152</sup> In particular, we requested comment on measures that might be necessary to prevent applicants from using the current application and licensing processes to engage in speculative activity prior to our adoption of auction rules, such as temporary application freezes or interim rules imposing shorter time periods for construction or build-out.<sup>153</sup>

58. Discussion. In the event we decide to adopt competitive bidding for a private radio service, we will continue to make service-by-service determinations as to whether to temporarily suspend acceptance of applications for new licenses, amendments, or major modifications, or adopt interim rules imposing shorter time periods for construction or build-out. Commenters uniformly oppose the use of application freezes,<sup>154</sup> noting that they can be disruptive to existing operations and can often last longer than initially anticipated. We are mindful that even short-term freezes have the potential to harm incumbents as well as potential new entrants and, by extension, the public.<sup>155</sup>

59. We observe that the Commission has delegated authority to impose application filing freezes in the private wireless services to the Chief of the Wireless Telecommunications Bureau.<sup>156</sup> While we defer to

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<sup>151</sup> See generally *Market-Based Spectrum Policy*, at 92-111.

<sup>152</sup> See *Notice*, 14 FCC Rcd at 5249 ¶¶ 96-97.

<sup>153</sup> See *id.*

<sup>154</sup> See, e.g., Cinergy Comments at 26-27; UTC Comments at 24-25; MRFAC Comments at 13; Ameren Comments at 26-28; CellNet Comments at 17-19; UTC Reply at 20-22.

<sup>155</sup> See, e.g., 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, *First Report and Order*, 11 FCC Rcd 16,570, 16,581-82 (1996). Thus, in declining requests to impose a freeze on certain private wireless license applications, we noted that we are “reluctant to freeze the acceptance of applications without evidence that there is a serious problem that cannot be resolved under current rules and procedures.” Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, PR Docket No. 92-235, *Second Memorandum Opinion and Order*, 14 FCC Rcd 8642, 8649-50 ¶ 14 (1999)(denying requests by API and UTC for imposition of freeze on channels adjacent to those used by Power or Petroleum Radio Services).

<sup>156</sup> See 47 C.F.R. §§ 0.131; 0.331. Such decisions are procedural in nature and therefore not subject to the notice and comment requirements of the Administrative Procedure Act. See 5 U.S.C. §§ 553(b)(A); see also *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 637-38 (D.C. Cir. 1984) (holding Commission's filing freeze is a (continued....))

the Bureau's expertise and experience in making such determinations, we believe that the Bureau should be guided by a principle of using the least restrictive means available to deter speculative applications. Generally, the Bureau has carefully balanced the benefits and costs to incumbent users, new entrants and the public of applying such measures.

60. In exercising its delegated authority, the Bureau has generally refrained from imposing licensing freezes upon applications for private, internal use facilities on the grounds that such applications are not subject to the same speculative pressures that may be present in commercial contexts.<sup>157</sup> In commercial contexts our practice has been to temporarily suspend the acceptance of applications upon the adoption of competitive bidding rules and new geographic licensing schemes;<sup>158</sup> however, in the private wireless services the Bureau has previously found that incentives for speculative abuse are limited.<sup>159</sup> Most commenters contend that the private radio services are not likely to be targeted by speculators and oppose the use of freezes in these services.<sup>160</sup> Nevertheless, we are concerned that for private services in which we decide licenses will be assigned by competitive bidding for the first time, it may be necessary to adopt temporary licensing freezes to prevent applicants from using the current application and licensing processes to engage in speculative activity prior to our adoption of auction rules, thus limiting the effectiveness of our decision.

61. Commenters are divided on the issue of whether short construction deadlines should be used to deter speculative licensing activity.<sup>161</sup> For example, Cinergy asserts that “[t]he current construction periods represent the perfect balance of being short enough to prevent speculation but long enough to allow all types of licensees to secure funding, order equipment and build new communications facilities.”<sup>162</sup> AWWA

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procedural rule not subject to the notice and comment requirements of the Administrative Procedures Act); *Buckeye Cablevision, Inc. v. United States*, 438 F.2d 948, 952-53 (6th Cir. 1971) (same); *Kessler v. FCC*, 326 F.2d 673, 680-82 (D.C. Cir. 1963) (same).

<sup>157</sup> See *Notice*, 14 FCC Rcd at 5249 n. 224.

<sup>158</sup> See, e.g., *MAS Report and Order*, 15 FCC Rcd at 12,005 ¶115 (2000).

<sup>159</sup> See, e.g., 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, 2757-58 ¶ 43 (1997) (exempting private radio applications from paging licensing freeze and prohibiting conversion of private facilities to commercial use). Licensing freezes are not unheard of in the private services, however. For example, the Bureau imposed a temporary freeze on the acceptance of PLMR applications ancillary to its freeze on applications for public coast stations sharing the same spectrum. (Public coast licensees are CMRS providers that allow ships at sea to send and receive messages and interconnect with the public switched network.) See Amendment of the Commission's Rules Concerning Maritime Communications, PR Docket No. 92-257, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 12 FCC Rcd 16949, 17015 ¶ 32(1997). See also Amendment of the Commission's Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Notice of Proposed Rule Making and Order*, 12 FCC Rcd 7973, 8003-8004 ¶¶ 68-71 (1997).

<sup>160</sup> See, e.g., CellNet Comments at 19; UTC Comments at 24-26.

<sup>161</sup> See *id.* at 25-26;

<sup>162</sup> Cinergy Comments at 28. See Ameren Comments at 28 (same); SCANA Comments at 29 (same); Entergy Comments at 27 (same); ComEd Comments at 30 (same);

finds this proposal “problematic” for utilities and public agencies which, it asserts, would be unable to complete the bidding, contracting and construction processes within time frames any shorter provided for under existing rules.<sup>163</sup> Others favor shortened construction periods in the event of a transition to a new licensing scheme,<sup>164</sup> but differ on whether extension requests should be permitted.<sup>165</sup> We have previously recognized that shortened construction deadlines may serve as an effective deterrent to potential speculation by those with no sincere interest in constructing radio facilities.<sup>166</sup> With respect to private radio services, we remain convinced that reduced construction periods may be an appropriate spectrum management tool. However, given the broad range of private services involved in this rulemaking and those services’ differing objectives and needs, the Commission will not adopt a new framework here for making such determinations. Rather, we will retain the discretion to adopt temporary licensing freezes or shorter construction periods as a means of deterring speculative licensing activity on a service-by-service basis.

### C. Exemption from Competitive Bidding for Public Safety Radio Services

62. Since it initially became law, Section 309(j)(2) of the Communications Act has contained provisions qualifying the Commission’s auction authority.<sup>167</sup> As is discussed above, the Balanced Budget Act significantly revised Section 309(j)(2) to enumerate three types of spectrum licenses to which our competitive bidding authority does not apply.<sup>168</sup> Two of the three exemptions relate to categories of broadcast licenses.<sup>169</sup> The auction exemptions for those categories of broadcast licenses have been addressed in other Commission decisions and will not be discussed any further here.<sup>170</sup> Rather, the

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<sup>163</sup> See AWWA Comments at 10.

<sup>164</sup> See, e.g., UTC Comments at 10.

<sup>165</sup> Compare NTCC Comments at 21 (“reducing the construction period is not as critical as ensuring that construction deadlines are not extended for just any reason.”) with CellNet Comments at 20 (urging waiver of deadlines where wide-area or complex networks are involved).

<sup>166</sup> See, e.g., *220 MHz Third Report and Order*, 12 FCC Rcd 10,943, 11,085 ¶ 336 (1997)(requiring full construction and operation of Phase I non-nationwide 220 MHz facilities prior to beginning primary fixed or paging operations); 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, PR Docket No. 89-552, *Fifth Report and Order*, 13 FCC Rcd 24,615, 24,629 (1998)(requiring construction and operation of Phase I non-nationwide 220 MHz systems prior to disaggregation or partitioning).

<sup>167</sup> See discussion at Section II, *supra*. See also *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2352-54.

<sup>168</sup> See discussion at Section II, *supra*.

<sup>169</sup> See 47 U.S.C. § 309(j)(2)(B) and (C) (as amended by Balanced Budget Act, § 3002) (exemptions for digital television services, noncommercial educational broadcast stations, and public broadcast stations).

<sup>170</sup> We addressed Section 309(j)(2)(C)’s statutory exemption for noncommercial and public broadcast stations in the First Report and Order in MM Docket 97-234. See *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission’s Comparative Hearing Process to Expedite the Resolution of Cases*, MM Docket No. 97-234, GC Docket No. 92-52, Gen Docket No. 90-264, *First Report and Order*, 13 FCC Rcd 15,920, 15,928-31 ¶¶ 20-25 (1998).

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following discussion focuses on the scope of Section 309(j)(2)(A)'s exemption for "public safety radio services,"<sup>171</sup> and mechanisms that may be used in the event we receive mutually exclusive applications for public safety radio services.

### 1. Scope of Public Safety Radio Services Exemption

63. Background. Section 309(j)(2)(A), as amended by the Balanced Budget Act, states that the Commission's auction authority does not extend to licenses and permits issued

(A) For public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that –

used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

As we stated in the *Notice*, this exemption from the Commission's auction authority is of particular importance to determining the auctionability of wireless spectrum.<sup>172</sup> In the *Notice*, we sought comment on the various elements of the statutory exemption.

64. Discussion. As discussed in greater detail below, we conclude that the statutory exemption for public safety services applies not only to traditional public safety services such as police, fire, and emergency medical services, but also to services designated for non-commercial use by entities such as utilities, railroads, transit systems, and others that provide essential services to the public at large and that need reliable internal communications in order to prevent or respond to disasters or crises affecting their service to the public. We also conclude that the public safety exemption applies only to services in which these public safety uses comprise the dominant use of the spectrum. Thus, services in which such uses are not dominant (and in which mutual exclusivity occurs) are not statutorily exempt from auctions, even if some individual licensees in the service may choose to use the spectrum for public safety purposes as defined by the statute.

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The statute also exempts initial licenses for digital television (DTV) services. The Commission issued initial DTV licenses simultaneously to all eligible full-power permittees and licensees in the Fifth Report and Order in the DTV proceeding (MM Docket 87-268). See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fifth Report and Order*, 12 FCC Rcd 12809 (1997). The DTV license assignments were made pursuant to Section 336(a)(1) of the Communications Act, which was added by the Telecommunications Act of 1996; these assignments were made prior to the enactment of the Balanced Budget Act. As we observed in our *Notice of Proposed Rule Making* in MM Docket No. 97-234, competitive bidding procedures for future digital television services that do not fall within Section 309(j)(2)(B)'s exemption for DTV licenses will be the subject of a future rulemaking. See *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, MM Docket No. 97-234, GC Docket No. 92-52, Gen Docket No. 90-264, *Notice of Proposed Rule Making*, 12 FCC Rcd 22,363, at 22,368-69 ¶ 10 (1997).

<sup>171</sup> See 47 U.S.C. § 309(j)(2)(A).

<sup>172</sup> *Notice*, 14 FCC Rcd at 5222 ¶ 26.



65. As set forth in greater detail below, in applying this analysis to existing private services, we conclude that spectrum currently allocated to the Public Safety Radio Pool, to the extent it is licensed on an exclusive basis, is within the scope of the statutory exemption. We also conclude that the exemption does not apply to exclusively licensed spectrum in the 220, 800, and 900 MHz bands allocated to Industrial/Land Transportation and Business Radio use, nor does it apply to exclusive private land mobile radio frequencies in the 470-512 MHz band,<sup>173</sup> because the dominant use of these bands is not “public safety” use as defined by Section 309(j)(2)(A). With respect to other private services that are not exclusively licensed, we do not need to determine the applicability of the public safety exemption at this time because mutual exclusivity does not occur in these services.

66. We do provide, however, the following guidance regarding our interpretation of the public safety exemption, and discuss the factors we will consider in assessing its applicability to future situations. As a threshold matter, we find that the exemption should be evaluated in terms of its application to particular services rather than to particular classes or groups of licensees within a service. The statutory language provides that the exemption applies to “public safety radio services.”<sup>174</sup> While the legislative history of the Balanced Budget Act refers to particular “users” as being exempt, we believe that this language is best interpreted as illustrating the types of services that fall within the new statutory term, *i.e.*, services like those used by the entities referenced in the legislative history. Because the applicability of the exemption to any service must be decided before the service is licensed, our analysis in each case must be based on the use and eligibility rules that we establish for the service. We therefore agree with the majority of commenters that delineating the scope of the exemption is a matter of determining whether the rules for a particular service cause it to fall within the definition of a “public safety radio service,” rather than attempting to predict the uses of spectrum that will develop after licensing occurs.<sup>175</sup> We therefore conclude that the exemption can apply only to spectrum that the Commission specifically allocates for the particular uses that Congress intended to benefit.<sup>176</sup> We note that the public safety radio services exemption does not preclude the Commission from allocating additional spectrum only for traditional public safety services as defined by Part 90 of the Commission’s Rules. We discuss each of the elements of the statutory exemption in turn.

67. *Private Internal Radio Services.* The statutory public safety exemption includes “private internal radio services” used for public safety purposes.<sup>177</sup> In the *Notice*, we proposed to define “private internal radio services” by adapting the Part 90 definition of “internal system” to also include fixed services (which are governed by Part 101).<sup>178</sup> The commenters broadly support adopting the Part 90 definition for

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<sup>173</sup> See 47 C.F.R. § 90.311(a)(1) (permitting a wide variety of users in the 470-512 MHz band, including Business Radio Service eligibles).

<sup>174</sup> 47 U.S.C. § 309(j)(2)(A) (emphasis supplied).

<sup>175</sup> The majority of commenters agree that the exemption applies to “services.” See, *e.g.*, Alliant Energy Comments at 2; AAA Comments at 10; API Comments at 4-8; CellNet Comments at 10; Georgia Comments at 3; DeKalb County, Georgia Water and Sewer and Division Comments at 2; EBMUD Comments at 3. *But see* Cinergy Comments at 13 (exemption applies to certain licensees); *accord* ComEd Comments at 19; Entergy Comments at 13.

<sup>176</sup> *Notice*, 14 FCC Rcd at 5224-25 ¶ 30.

<sup>177</sup> 47 U.S.C. § 309(j)(2)(A).

<sup>178</sup> *Notice*, 14 FCC Rcd at 5225-26 ¶ 32.

purposes of determining this element of the statutory exemption. We therefore adopt this definition, *i.e.*, we define a “private internal radio service” as a service in which the licensee does not make a profit, and all messages are transmitted between fixed operating positions located on premises controlled by the licensee and the associated fixed or mobile stations or other transmitting or receiving devices of the licensee, or between mobile stations or other transmitting or receiving devices of the licensee.<sup>179</sup>

68. We also requested comment on whether the “private internal” use definition should include services in which licensees operate systems on a not-for-profit basis and under a cost-sharing agreement, on a cooperative basis, or as a multiple-licensed system for internal communications to support their own operations.<sup>180</sup> Consistent with most of the comments addressing this issue, we now decide that once we deem a particular service to be a public safety radio service, the spectrum will be auction-exempt even if some of the users operate their systems under some type of cost-sharing arrangement or through multiple licensing.<sup>181</sup> We note, however, that the services on which such use is permitted currently (*e.g.*, Private Land Mobile Radio Services) are licensed in a manner that does not give rise to mutual exclusivity, so that it is not necessary at this time to consider the applicability of the exemption to these services.<sup>182</sup>

69. *State and Local Governments.* The exemption includes “private internal radio services” used by both public and private entities, *i.e.*, “state and local governments and non-government entities.”<sup>183</sup> In the *Notice*, we requested comment on our tentative conclusion that we should presume that all state and local government entities are eligible for licensing in the public safety radio services without any further showing as to eligibility, rather than require all state and local government entities to demonstrate their eligibility for licensing in the public safety radio services.<sup>184</sup> In establishing eligibility for licensing in the public safety spectrum in the 700 MHz band, the Commission concluded that all state and local government entities would be presumed eligible without further showing as to eligibility.<sup>185</sup> The Conference Report accompanying the Balanced Budget Act makes clear that Congress intended the public safety radio services exemption to be broader than the definition of “public safety services” eligible for licensing in the 700 MHz band, *i.e.*, to include a larger universe of services.<sup>186</sup> Commenters addressing this issue agree that the Commission should presume eligibility for state and local government entities.<sup>187</sup> Consequently, we

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 5226 ¶ 33. See *infra* at Section III.D.5. regarding multiple licensing.

<sup>181</sup> See, *e.g.*, ARINC Comments at 3-4; Arizona Public Service Company Comments at 3; BGE Comments at 2; Georgia Comments at 2-3; DeKalb County, Georgia Water and Sewer Division Comments at 3; EBMUD Comments at 3; ITA Joint Commenters Comments at 10-11; SCANA Reply Comments at 5; Ameren comments at 22-24; UTC Comments at 14.

<sup>182</sup> See *infra* at Section III.D.5. for a discussion on multiple licensing.

<sup>183</sup> 47 U.S.C. § 309(j)(2)(A).

<sup>184</sup> See *Notice*, 14 FCC Rcd at 5227 ¶ 36.

<sup>185</sup> See The Development of Operational, Technical and Spectrum Requirements For Meeting Federal, State and Local Public Safety Agency Communication Requirements through the Year 2010, WT Docket No. 96-86, *First Report and Order and Third Notice of Proposed Rule Making*, 14 FCC Rcd 152, 180-81 ¶ 54 (1998).

<sup>186</sup> Conference Report at 572.

<sup>187</sup> See, *e.g.*, APCO Comments at 2-6; MDTA Comments at 4; NJHA Comments at 3; NJTA Comments at (continued....)

conclude that all state and local government entities are eligible for licensing in the public safety radio services without any further showing as to eligibility, subject to the statutory requirements for spectrum to be deemed auction-exempt.

70. *Non-government Entities.* In the *Notice*, we requested comment on whether we should establish any eligibility criteria for non-government entities (NGOs) to ensure that public safety radio services spectrum licensed to these entities is used to protect the safety of life, health, or property and is not made commercially available to the public.<sup>188</sup> Most commenters addressing this issue oppose the imposition of eligibility restrictions, such as governmental approval requirements.<sup>189</sup> We agree. A statutory analysis supports this conclusion. The definition for “public safety services” in Section 337(f) of the Communications Act requires NGOs to be authorized by a governmental entity in order to be eligible for public safety spectrum in the 764-776/794-806 MHz (700 MHz) band, but the public safety radio services exemption in Section 309(j)(2) contains no such condition. This distinction indicates that Congress did not intend to subject NGOs to such requirements in order to be eligible for public safety radio service spectrum.<sup>190</sup> Accordingly, we conclude that we shall not establish any eligibility criteria for NGOs separate and apart from the eligibility requirements for each public safety radio service.<sup>191</sup>

71. Section 309(j)(2)(A) also provides that the exemption includes services used by not-for-profit organizations providing emergency road services. The legislative history to the Balanced Budget Act reflects that this service exemption includes “radio services used by not-for-profit organizations that offer emergency road services, such as the American Automobile Association,” and explains that the Senate “included this particular exemption in recognition of the valuable public safety service provided by emergency road services.”<sup>192</sup> The Conference Report specifies that this exemption was not meant to include “internal radio services used by automobile manufacturers and oil companies to support emergency road services provided by those parties as part of the competitive marketing of their products.”<sup>193</sup> Commenters were divided<sup>194</sup> in response to our question in the *Notice* regarding whether we should exclude

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3-4; NYSTA Comments at 3-4; Nextel Reply Comments at 11; The Peace Bridge Authority Comments at 3; UTC Comments at 15.

<sup>188</sup> *Notice*, 14 FCC Rcd at 5228 ¶ 37.

<sup>189</sup> *See, e.g.*, CII Comments at 13-14; UTC Comments at 15.

<sup>190</sup> *See McGarry v. Secretary of the Treasury*, 853 F.2d 981, 986 (D.C. Cir. 1988) (statutory provisions should be construed as to be consistent with each other) (citing *Citizens to Save Spencer County v. United States Environmental Protection Agency*, 600 F.2d 844, 870 (D.C. Cir. 1979)).

<sup>191</sup> Commercial service providers are not NGOs in this context. Commercial service providers intending to provide telecommunications services to public safety entities will not be able to apply for auction-exempt spectrum. *See infra* ¶¶82-83.

<sup>192</sup> Conference Report at 572.

<sup>193</sup> *Id.*

<sup>194</sup> *See* AAA Comments at 3 (Commission should only include not-for-profit entities under this exemption); *accord* Cal State Reply Comments at 5. *But see* Rocky Mountain Reply Comments at 4-5 (Commission should allow for-profit entities within this exemption).

providers of emergency road services that are not organized as not-for-profit entities from using auction-exempt spectrum.<sup>195</sup> The statute makes a specific distinction between for-profit and not-for-profit entities in this context. The statute does not make this distinction in any other context with respect to the exemptions from competitive bidding. We conclude that a radio service used by for-profit entities providing emergency road services is not auction-exempt. The for-profit nature of such entities takes them outside the scope of the emergency road services exemption, even if they arguably otherwise meet the statutory criteria.<sup>196</sup>

72. *Protection of Life, Health, or Property.* Congress requires that the exemption apply to private internal services used by state and local governments and non-government entities to protect life, health, or property. Thus, the most prominent issue in delineating the scope of the exemption is to determine which services are “used to protect the safety of life, health, or property” within the meaning of the statute.<sup>197</sup>

73. As a threshold question, we must determine what proportion of users in a given service must be the type of user that Congress intended to be able to make use of exempt spectrum, in order for the service to be deemed a public safety radio service. For example, is a service auction-exempt so long as *any* of the users within that service are qualified to obtain such spectrum? Or must all, or the majority, of the entities within the service, be qualified to obtain such spectrum? In the Multiple Address System proceeding, we looked to the “dominant” or “primary” use of each band to determine whether to assign it by competitive bidding.<sup>198</sup> In other words, we examined whether the majority of users within a given band are qualified to obtain auction-exempt spectrum, in order to determine whether that band should be designated as auction-exempt. We will use the same approach here.

74. In order to determine whether a given service is primarily utilized by the type of user Congress intended to exempt from competitive bidding, we must determine what users Congress intended to include within the exemption. In the *Notice*, we tentatively concluded that Congress intended to include those users of spectrum currently allocated for traditional public safety uses.<sup>199</sup> Specifically, we proposed to designate the following spectrum as exempt from assignment by competitive bidding procedures:

1. Private Land Mobile Radio Services currently assigned to the Public Safety Radio

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<sup>195</sup> See *Notice*, 14 FCC Rcd at 5227 ¶ 35.

<sup>196</sup> AAA’s contentions that the Commission may not auction spectrum allocated to either the former Auto Emergency Radio Services (AERS), nor spectrum outside of the former AERS frequencies used by AAA and other non-profit auto emergency users, AAA Comments at 4, are related to this issue. AAA notes that in many locations, the AERS frequencies are so crowded that AAA clubs have been forced to obtain licenses in different private land mobile frequency bands, and contends that under the language of Balanced Budget Act, these frequencies also are included in the exemption when they are used by AAA or another not-for-profit emergency road service provider. *Id.* These comments relate to the larger issues of whether the exemption applies to blocks of spectrum or to classes of users. As explained above, we conclude that the exemption applies to blocks of spectrum, not classes of users. AAA’s concerns regarding frequencies used by non-profit auto emergency users will be addressed at a future date, when we make a service-by-service determination of which services fall within the exemption.

<sup>197</sup> 47 U.S.C. § 309(j)(2)(A)(i).

<sup>198</sup> *MAS Report and Order*, 15 FCC Rcd 11,965, 11,967 ¶¶ 20, 25.

<sup>199</sup> *Notice*, 14 FCC Rcd at 5223-24 ¶¶ 27-29.

Pool. This pool is comprised of those services formerly<sup>200</sup> housed in the Public Safety Radio Services<sup>201</sup> and the Special Emergency Radio Services.<sup>202</sup>

2. Public safety spectrum in the 700 MHz band.<sup>203</sup>
3. The ten 220 MHz band non-nationwide channel pairs allocated for the exclusive use of Public Safety eligibles.<sup>204</sup>
4. The two contiguous channel pairs in each of the thirty-three inland VHF Public Coast areas set aside for public safety users.<sup>205</sup>

Commenters agree that Congress clearly intended to include this spectrum within the exemption.<sup>206</sup> We now conclude that the portions of spectrum listed above are public safety radio services for purposes of eligibility for the exemption. We also find that the five channel pairs in the 932/941 MHz Multiple Address Systems bands designated for Federal Government and/or public safety use as defined by Part 90 of the Commission's rules<sup>207</sup> fall within the exemption.

75. As stated earlier, we believe that Congress intended for the exemption to include a larger universe of uses than traditional public safety and the legislative history of the Balanced Budget Act provides guidance regarding the intended further scope of the exemption. Specifically, the Conference Report states that the exemption for public safety radio services includes the private internal radio services

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<sup>200</sup> The former services were consolidated in the Public Safety Pool in 1997. In the Matter of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, *Second Report and Order*, 12 FCC Rcd 14307, 14317-18 ¶ 20 (1997) (“*Refarming Second Report and Order*”).

<sup>201</sup> See 47 C.F.R. § 90.16. The Public Safety Radio Services included the Local Government, Police, Fire, Highway Maintenance, Forestry-Conservation, and Emergency Medical Radio Services. See 47 C.F.R. Part 90, Subpart B, Note, former § 90.15 (1997).

<sup>202</sup> See 47 C.F.R. § 90.16. The Special Emergency Radio Service covered the licensing of radio communications of hospitals and clinics, ambulance and rescue services, veterinarians, persons with disabilities, disaster relief organizations, school buses, beach patrols, persons or organizations in isolated areas, and emergency standby and repair facilities for telephone and telegraph systems. See 47 C.F.R. Part 90, Subpart C, Note, former § 90.33 (1997).

<sup>203</sup> See *Notice*, 14 FCC Rcd at 5224 ¶ 28.

<sup>204</sup> 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, PR Docket No. 89-552, *Third Report and Order; Fifth Notice of Proposed Rule Making*, 12 FCC Rcd 10943, 10973-74 ¶ 61 (1997). See *Notice*, 14 FCC Rcd at 5224 ¶ 29.

<sup>205</sup> Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, PR Docket No. 92-257, 13 FCC Rcd 19853 (1988). See *Notice*, 14 FCC Rcd at 5224 ¶ 29.

<sup>206</sup> See, e.g., APCO Comments at 3-4; Motorola Comments at 5; Nextel Comments at 8-9.

<sup>207</sup> See *MAS Report and Order*, 15 FCC Rcd at 11,971 ¶ 37.

used by “utilities, railroads, metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments.”<sup>208</sup> The inclusion of private ambulances and volunteer fire departments is due to the fact that the services they perform supplement or, in some areas, replace traditional public safety functions ordinarily provided by local governments. Accordingly, we conclude that spectrum bands, the dominant use<sup>209</sup> of which are by entities that use their communications systems to perform such public safety services, should be exempt from auction.

76. However, the other entities identified in the Conference Report -- utilities, pipelines, metropolitan transit systems and railroads – do not have, as their primary missions, traditional public safety functions. Utilities and pipelines exist to bring, among other things, gas, water and electricity to consumers; transit systems and railroads exist to transport people and goods. In determining what common characteristics they do have, and thus what other entities Congress intended the exemption to encompass, we find helpful the Final Report of the Public Safety Wireless Advisory Committee (PSWAC), which the Commission, jointly with the National Telecommunications and Information Administration, chartered to provide advice and recommendations on the current and future requirements for public safety communications.<sup>210</sup> PSWAC recommended a definition of “Public Services” as services “that furnish, maintain, and protect the nation’s basic infrastructures which are required to promote the public’s safety and welfare.”<sup>211</sup> It stated, “Public service providers, such as transportation companies and utilities[,] rely extensively on radio communications in their day-to-day operations, which involve safeguarding safety and preventing accidents from occurring.”<sup>212</sup> The Commission relied on a similar concept when it established special frequency coordination requirements for spectrum formerly used exclusively by the power, petroleum, and railroad industries because, in these industries, radio is used as a critical tool for responding to emergencies that could impact hundreds or thousands of people. Although the primary functions of these organizations is not necessarily to provide safety services, the nature of their day-to-day operations provides little or no margin for error and in emergencies they can take on an almost quasi-public safety function. Any failure in their ability to communicate by radio could have severe consequences on the public welfare. For example, the failure or inability of trains to communicate with each other or a central dispatcher could result in unsafe conditions and an increased risk of derailment. Also, utility companies need to possess the ability to coordinate critical activities during or following storms or other natural disasters that disrupt the delivery of vital services to the public such as provision of electric, gas, and water supplies.<sup>213</sup>

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<sup>208</sup> Conference Report at 572.

<sup>209</sup> See *supra* ¶ 74.

<sup>210</sup> Public Safety Wireless Advisory Committee, *Final Report* at 7 (1996).

<sup>211</sup> *Id.* at 45.

<sup>212</sup> *Id.* at 33.

<sup>213</sup> *Refarming Second R&O*, 12 FCC Rcd at 14329-30 ¶ 41. Subsequently in this proceeding, the Commission amended the rules to require that frequencies formerly allocated to the power, petroleum, and railroad industries on either an exclusive or shared basis be coordinated only by the frequency coordinator of the relevant service, or, at the relevant frequency coordinator’s discretion, with its written concurrence. Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, *Second Memorandum Opinion and Order*, PR Docket No. 92-235, 14 FCC Rcd 8642, 8647-48 ¶ 9 (1999) (“*Refarming Second MO&O*”). The *Refarming Second MO&O* is currently on reconsideration, and has been (continued....)

77. Against this background, we observe that the entities identified in the Conference Report which do not use their communications principally for the protection of life, health or property -- utilities, railroads, metropolitan transit systems and pipelines -- have two characteristics in common. First, these entities have an infrastructure that they use primarily for the purpose of providing essential public services to the population at large. In this context, an infrastructure can be described as fixed physical facilities that extend beyond the licensee's place of business to areas where the public at large live and work and are therefore exposed to adverse results stemming from a breakdown in the licensee's infrastructure. The second common characteristic is that the reliability and availability of the communications systems for these entities is necessary for them, as part of their regular mission, to prevent or respond to a disaster or crisis affecting the public at large.<sup>214</sup> Specifically, the public depends on these services, which affect the daily lives of members of the public and interruption in the service may have dangerous consequences. Accordingly, we conclude that a radio service not allocated for traditional public safety uses will be deemed to protect the safety of life, health or property within the meaning of Section 309(j)(2)(A)(i) if the dominant use of the service is by entities that (1) have an infrastructure that they use primarily for the purpose of providing essential public services to the public at large; and (2) need, as part of their regular mission, reliable and available communications in order to prevent or respond to a disaster or crisis affecting the public at large.

78. For instance, an electric utility meets both prongs of the two-part standard. Power lines extend far beyond the utility's power plant and into areas where members of the public live and work. A breakdown in the electric utility's infrastructure or fixed physical facilities (*e.g.*, a live wire) creates a dangerous condition for members of the public. Additionally, a dependable communications system is necessary for an electric utility to respond to an interruption in service that may hinder the delivery of vital services (*e.g.*, without power, a home may lack heat in the winter or air conditioning in the summer). Similarly, a metropolitan transit system meets both parts of the standard. A metropolitan transit system has an infrastructure or fixed physical facilities (*e.g.*, railroad tracks) where a breakdown in the system (*e.g.*, derailment) creates a dangerous condition that would adversely affect the public at large. Moreover, a reliable communications system is essential for a metropolitan transit system to enable quick response to any disruption in service as an interruption can create a dangerous condition and would impede the delivery of vital transportation services to the public.

79. Some commenters argue that all private wireless communications, in some respect, protect the safety of life, health, and property of the public, and therefore all private wireless services should be auction-exempt.<sup>215</sup> They note that individuals in virtually every industry rely upon their private wireless radio systems to ensure the safety of their employees and enhance their productivity and operations and contribute to the continued growth and vibrancy of the economy.<sup>216</sup> As a general matter, we agree with

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stayed with respect to frequencies formerly allocated on a shared basis to these industries. Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, *Fourth Memorandum Opinion and Order*, 15 FCC Rcd 7051 (1999) ("*Refarming Fourth MO&O*").

<sup>214</sup> See, *e.g.*, ComEd Comments at 16-19; Entergy Comments at 14-16; Joint Commenters Comments at 7; API Reply Comments at 7.

<sup>215</sup> See Cinergy Comments at 18, 21; Entergy Comments at 17, 20; Joint Commenters Comments at 8-9, 14; SBT Comments at 3-4; USMSS Comments at 5-6.

<sup>216</sup> Indeed, virtually all of the commenters argue that the specific radio services they use, or that are used by the entities they represent, fall within the "public safety radio services" exemption because such radio uses in (continued....)

these characterizations. We conclude, however, that extending the exemption to all private wireless services would go beyond the legislative intent. As noted earlier, Section 309(j) formerly applied only to subscriber-based services, and thus exempted the private wireless services because these services were generally not subscriber-based. The Balanced Budget Act amended the statute to direct the Commission to use auctions to resolve mutually exclusive applications for all radio services, unless they fall within a specific exemption. To interpret the exemption for public safety radio services in Section 309(j)(2)(A) in a manner that effectively negates the changes to Section 309(j)(1) would not be reasonable.

80. It is apparent that Congress deemed utilities, railroads, metropolitan transit systems and pipelines to be entities that protect the safety of life, health, or property for purposes of public safety radio services. We agree with the commenters, however, that the list in the Conference Report was presented for illustrative purposes and not as an exhaustive listing.<sup>217</sup> Nonetheless, we believe that only spectrum used for the provision of services similar to those listed in the Conference Report should be included in the exemption, and that only similar entities can satisfy the aforementioned two-part standard.<sup>218</sup> For instance, telephone maintenance, although not specifically mentioned in the Conference Report, meets the two-part standard. In applying the standard, providers of such services have an infrastructure that serves the public where a breakdown in the system (*e.g.*, cut wire) impedes the ability to communicate by telephone, which is a vital service in today's society. In addition, a reliable communications system is necessary for telephone maintenance to enable quick response to an interruption in the delivery of telephone service in an emergency situation. On the other hand, for example, taxi cabs do not meet both prongs of the two-part standard and are therefore unlike those entities listed in the Conference Report. Although taxi cabs arguably provide essential services to the public, the providers of this service do not have an infrastructure or fixed physical facility where a breakdown in its system (*e.g.*, a disabled taxi cab) adversely affects the public at large.

81. While we will not at this time attempt to provide an extensive list of exempt public safety radio services, we do conclude that the Industrial/Land Transportation and Business Radio categories within the 800 MHz band<sup>219</sup> and 900 MHz band,<sup>220</sup> and the private land mobile radio frequencies in the 470-512 MHz

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some way enhance the safety of their employees or the public safety. *See, e.g.*, ARINC Comments at 9 (airlines and aviation support); AAR Reply Comments at 3 (railroads); CellNet Comments at 2-3 (gas, electric and water); ComEd Comments at 2-5 (electric utilities); Florida Fruit & Vegetable Association Reply Comments (RM-9405) at 2-3 (Florida agricultural producers); FIT Comments at 8 (forest products); Ford Reply Comments at 6-8 (automotive); HP Comments (RM-9405) at 1 (medical telemetry); LMCC Comments at 6-8 (land mobile); Motorola Comments at 3-10 (private land mobile); NRMCA Reply Comments (RM-9405) at 2 (concrete); NPGA Reply Comments (RM-9405) at 3 (propane); NUCA Reply Comments (RM-9405) at 2 (water and wastewater infrastructure).

<sup>217</sup> *See, e.g.*, Joint Commenters Comments at 8. Indeed, the Conference Report states that the exemption "includes" the above listed-services, and does not state that the exemption is "limited to" those services. Conference Report at 572.

<sup>218</sup> *See supra* ¶ 77.

<sup>219</sup> The "800 MHz Band" is a reference to the frequencies in the 806-824 and 851-869 MHz bands. *See* 47 C.F.R. Part 90, Subpart S.

<sup>220</sup> The "900 MHz Band" is a reference to the frequencies in the 896-901 and 935-940 MHz bands. *See id.*



band, shall not be exempt from auction under the public safety radio service exemption. The dominant use of these frequencies is by persons primarily engaged in the operation of a commercial activity, to support day-to-day business operations (such as dispatching and diverting personnel or work vehicles, coordinating the activities of workers and machines on location, or remotely monitoring and controlling equipment). The dominant use is not by entities with an infrastructure that they use primarily for the purpose of providing essential public services to the public at large, and that need, as part of their regular mission, such spectrum to prevent or respond to a disaster or crisis affecting the public at large. Accordingly, we conclude that the 470-512,<sup>221</sup> 800, 900 MHz bands shall be subject to auction to the extent that mutually exclusive applications are filed. However, we emphasize that we will continue to utilize existing licensing approaches for these bands, which tend to avoid mutual exclusivity, thereby minimizing the possibility of competitive bidding.

82. *Noncommercial Proviso.* The public safety radio services exemption requires that the radio services not be made commercially available to the public.<sup>222</sup> We sought comment on how the term “not made commercially available to the public” should be defined.<sup>223</sup> The Commission has interpreted similar language in implementing the congressional definition of “commercial mobile service.” In that context, the Commission interpreted the term “for profit,”<sup>224</sup> which we believe is inherent to “commercial” use, as including any service that is provided with the intent of receiving monetary gain.<sup>225</sup> The Commission also found that a service is available “to the public” if it is offered to the public without restriction as to who can receive it.<sup>226</sup> Because the purpose of that proceeding was to determine the meaning of commercial mobile service, as defined in Section 332(d) of the Communications Act, the Commission was required to include in its definition those services “effectively available to a substantial portion of the public.”<sup>227</sup> The Commission concluded that if service is provided exclusively for internal use or is offered only to a significantly restricted class of eligible users, it is made available only to insubstantial portions of the public, and cited as an example of this, the Public Safety Radio Services.<sup>228</sup> We shall apply a definition of

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<sup>221</sup> We recognize that, unlike the 800 and 900 MHz Industrial/Land Transportation and Business Radio categories, the 470-512 MHz band is available to Public Safety users. See 47 C.F.R. § 90.311(a). We do not believe, however, that the level of use by such users is sufficient to require a different conclusion with respect to the applicability of the public safety radio service exemption to the 470-512 MHz band.

<sup>222</sup> 47 U.S.C. § 309(j)(2)(A)(ii).

<sup>223</sup> *Notice*, 14 FCC Rcd at 5230 ¶¶ 45-46, 5232-33 ¶ 51.

<sup>224</sup> See 47 U.S.C. § 332(d)(1).

<sup>225</sup> In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Second Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 1411, 1427 ¶ 43 (1994) (*CMRS Second R & O*).

<sup>226</sup> *Id.* at 1439 ¶ 65.

<sup>227</sup> See 47 U.S.C. § 332(d)(1)(B).

<sup>228</sup> *CMRS Second R & O*, 9 FCC Rcd at 1440 ¶ 67. See also *id.* at 1509-10 ¶¶ 265-268. While we have held that provision of service to eligibles in the Business Radio Service category is essentially service to the public, this is because the class of eligibles in this pool is extremely broad. Specifically, this pool encompasses users engaged in commercial activities and clergy activities, as well as, those that operate educational, philanthropic, or ecclesiastical institutions, hospitals, clinics and medical associations. 47 C.F.R. § 90.31.

“commercially available to the public” that is consistent with these definitions. Accordingly, for the purposes of the auction exemption under Section 309(j) of the Communications Act, we find that “not made commercially available to the public” means that the service is not provided with the intent of receiving compensation, and is not available to a substantial portion of the public.<sup>229</sup>

83. In the *Notice*, we also asked whether commercial service providers intending to provide telecommunications services to public safety entities should be able to apply for auction-exempt spectrum.<sup>230</sup> We agree with the commenters who argue that commercial service providers and public safety agencies have very different goals and incentives regarding spectrum use, and caution that if licenses for scarce public safety radio spectrum are assigned to commercial providers, public safety entities may find it virtually impossible to secure sufficient spectrum for their own internal needs. Also, if we expand eligibility to commercial providers declaring an intent to serve public safety entities, it would be difficult to ensure that the dominant use of this spectrum would be by entities that protect the safety of life, health, or property.<sup>231</sup> In addition, we conclude that permitting such use of public safety radio service spectrum would be contrary to Congress’s intent. We believe that Congress created the exemption to give entities that protect the safety of life, health, or property, at a minimum, an opportunity to secure access to spectrum without having to pay for it. Assigning public safety radio service spectrum to commercial providers could conflict with this intention by compelling public safety radio service eligibles to pay for access to auction-exempt spectrum.<sup>232</sup> We agree with Nextel that including commercial third-party providers within the exemption would enlarge it beyond all limits of reasonableness.<sup>233</sup> Thus, we believe that creating an opportunity for commercial operators to obtain public safety radio service spectrum would contravene congressional intent.

84. *Restrictions on Use.* Another important issue is the scope of permissible uses for public safety radio services spectrum, and more specifically, whether such licensees are required to use their auction-exempt frequencies exclusively for safety-related purposes.<sup>234</sup> Section 337(f)(1) of the Communications Act defines a “public safety service” for determining eligibility for licensing in the 24 MHz of spectrum reallocated for public safety services, as a service the “sole or principal purpose” of which is to protect the safety of life, health or property.<sup>235</sup> By contrast, the auction exemption under Section 309(j)(2) contains no

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<sup>229</sup> We also requested comment on whether services on which entities operate their systems under a nonprofit cost-sharing or cooperative agreement, or as a multiple licensed system, should be considered commercially available to the public. *Notice*, 14 FCC Rcd at 5230 ¶ 46. As we decided in the previous paragraph, once we have determined that a particular radio service is a public safety radio service, the spectrum will be auction-exempt even if some users operate their systems using such licensing arrangements.

<sup>230</sup> *Notice*, 14 FCC Rcd at 5228 ¶ 38.

<sup>231</sup> *See Notice*, 14 FCC Rcd at 5228 ¶ 38.

<sup>232</sup> We recognize that there may be situations where public safety radio service eligibles find it more cost effective to contract out their commercial needs to a commercial service provider, rather than construct their own systems. We believe that leaving this choice in the hands of the public safety radio service eligibles best comports with congressional intent.

<sup>233</sup> Nextel Reply Comments at 12-13.

<sup>234</sup> *See Notice*, 14 FCC Rcd at 5224-25 ¶ 30.

<sup>235</sup> 47 U.S.C. § 337(f)(1)(A).

such restriction. The majority of commenters oppose the imposition of a requirement that spectrum be *solely* or *principally* used for public safety communications.<sup>236</sup> They argue that it is difficult to draw the line where public safety ends and routine business begins because day-to-day business communications often have a safety-related purpose.

85. We conclude that because utilities, pipelines and railroads do not use their frequencies exclusively for safety-related purposes, Congress could not have intended that entities using exempt spectrum use that spectrum exclusively for such purposes. Furthermore, it would be overly burdensome to require licensees to differentiate between, and use different frequencies for, pure public safety communications and business communications, which may also serve a safety-related purpose. Accordingly, we agree that we should not, at this time, impose an additional restriction upon licensees in auction-exempt services to limit their use of their assigned frequencies to be exclusively for safety-related purposes. We do, however, expect that licensees making use of auction-exempt spectrum will be using that spectrum primarily to protect the safety of life, health or property. This is so because, given our principles for determining what frequencies are in public safety radio services, we anticipate that the spectrum will be used by entities with reasonably predictable (in frequency and types of occurrences, if not in exact timing) public safety-related needs. When such needs arise, licensees should dedicate their public safety radio service spectrum to addressing the situation. We also expect users of auction-exempt spectrum to make efficient use of that spectrum for safety-related purposes, and to use other available spectrum, or commercial providers, for more general business-related purposes that are not primarily safety-related.

86. *Eligibility Requirements.* In the *Notice*, we noted that applicants seeking spectrum for public safety radio services without bidding competitively are able to apply for such designated spectrum or, if they meet the requirements of Section 337(f), file a waiver request for unassigned spectrum pursuant to Section 337(c).<sup>237</sup> In this connection, we sought comment on whether entities eligible for licenses in the public safety radio services should also be eligible to bid competitively for spectrum that has been designated for private or commercial radio use.<sup>238</sup>

87. We do not believe that it was Congress's intent to forbid entities eligible to be licensed on public safety radio services from voluntarily participating in auctions for spectrum that is not exempted from our competitive bidding authority. Hence, we conclude that entities eligible for licenses in the public safety radio services are eligible to participate in auctions of other spectrum. We note that the licensing mechanisms adopted in this Report and Order would not enable entities eligible for public safety radio services to select auctionable spectrum and exercise an exemption privilege. Therefore, those entities eligible for licenses in the public safety radio services that desire to participate in the auction of other spectrum will be required to comply with the same regulations, including filing and payment requirements, to which every other bidder is subject. Accordingly, the Commission will not make any special provisions for entities eligible for the public safety radio services that choose to competitively bid for auctionable spectrum. Further, if a public safety radio service eligible voluntarily chooses to seek licenses in

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<sup>236</sup> See, e.g., AAA Reply Comments at 4; AAR Comments at 5-7; CellNet Comments at 11; CII Comments at 11-13; ComEd Comments at 9-12; Ford Reply Comments at 6-7; Joint Commenters Comments at 8; LMCC Comments at 6-7; PCIA Comments at 5-6; UTC Comments at 16-18. *But see* Nextel Comments at 8-9 (arguing that only bands which are used exclusively or almost exclusively for public safety should be auction-exempt). See also ARINC Comments at 2 and 7 (supporting a principal use standard).

<sup>237</sup> *Notice*, 14 FCC Rcd at 5246 ¶ 85.

<sup>238</sup> *Id.*

auctionable spectrum, the spectrum will not thereby become auction-exempt.

## 2. Resolution of Mutually Exclusive Applications for Services Exempt from Competitive Bidding

88. Background. In the *Notice*, we requested comment on how to resolve mutual exclusivity between applications for spectrum exempt from competitive bidding.<sup>239</sup> We noted that the Balanced Budget Act terminated the Commission's authority to use lotteries to choose among mutually exclusive applications and concluded that we are precluded from using random selection procedures to resolve mutually exclusive applications for auction-exempt public safety radio services.<sup>240</sup> Thus, we specifically sought comment on whether engineering solutions, negotiation, threshold qualifications, service regulations, or other means, such as comparative hearings and first-come, first-served licensing, should be used to resolve mutual exclusivity in cases where frequency coordination is unsuccessful in avoiding mutual exclusivity.<sup>241</sup>

89. Discussion. Commenters overwhelmingly express support for the Commission's continued use of frequency coordination as a mechanism to limit instances of mutually exclusive applications.<sup>242</sup> Although frequency coordination greatly reduces instances of mutual exclusivity, we acknowledge the possibility that it may not resolve all conflicts. Commenters offered various proposals to address situations where frequency coordination is not adequate. For instance, several commenters suggest that mutually exclusive applications may be resolved through first-come, first-served procedures.<sup>243</sup> We agree with these commenters that first-come, first-served procedures may resolve some cases of mutually exclusive applications. However, such procedures may not be as useful if applications are received on the same day from different coordinators, or if the Commission opens a filing window. During a filing window, each application is given a filing status equal to any other application filed during the window. Hence, frequency coordination, coupled with first-come, first-served licensing procedures may not prevent every case of mutual exclusivity.

90. Other commenters suggest alternative approaches, such as private negotiations, shared use procedures and engineering solutions.<sup>244</sup> Specifically, CII Joint Commenters and United Telecom Council present a detailed procedure involving private negotiations to encourage the resolution of mutually exclusive applications without the Commission's involvement.<sup>245</sup> In this suggested procedure, applicants who file mutually exclusive applications must, within a specified time period, such as sixty to ninety days,

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<sup>239</sup> *Notice*, 14 FCC Rcd at 5233 ¶ 52.

<sup>240</sup> *Id.* at 5233 ¶ 53.

<sup>241</sup> *Id.*

<sup>242</sup> *See, e.g.*, AAR Comments at 8; Blooston Comments at 10; Boeing Comments at 5; NAM/ MRFAC, Inc. Reply Comments at 7; Motorola Comments at 3; Radscan Reply Comments at 6; RRS Comments at 4; Rocky Mountain Reply Comments at 6; SCANA Comments at 8.

<sup>243</sup> *See, e.g.*, Joint Commenters Comments at 7; Joint Commenters Reply Comments at 4; Intek Comments at 6; LMCC Comments at 3-4.

<sup>244</sup> *See, e.g.*, Boeing Comments at 5; CII Comments at 23-24; UTC Comments at 19.

<sup>245</sup> CII Comments at 23-24; UTC Comments at 19.

resolve the conflict through private negotiation.<sup>246</sup> According to the commenters, the parties could devise engineering solutions and/or coordination procedures that would enable spectrum sharing.<sup>247</sup> Additionally, if the parties are unsuccessful at reaching an agreement by the end of the negotiation period, the applicants could be provided with the option of expedited alternative dispute resolution procedures, such as binding arbitration or mediation.<sup>248</sup> In the event that these procedures prove unsuccessful, the commenters indicate that the Commission should dismiss the applications and deem the requested frequencies unavailable for licensing by any party for a period of at least ninety days, as an incentive for the parties to reach an agreement.<sup>249</sup>

91. We are aware that there may be instances where frequency coordination and/or first-come, first-served licensing will be inadequate and the Commission will receive mutually exclusive applications for licenses in the public safety radio services. However, we believe that such instances will be rare and conclude that the Commission should continue to rely on the regulatory tools already available to it to resolve mutually exclusive applications that may not be resolved by competitive bidding. In addition to commenters' suggestion that we provide a time period during which mutually exclusive applicants may negotiate a mutually agreeable solution, the Commission can also work with the relevant frequency coordinators to find alternative spectrum, develop engineering solutions, dismiss the applications with or without prejudice, or refer the matter to a comparative hearing. These tools have been sufficient heretofore to resolve mutually exclusive applications for non-auctionable spectrum, and, particularly given the expectation that such situations will continue to be rare, there does not appear to be sufficient grounds to implement a new procedural framework.

#### **D. Proposals Regarding Private Land Mobile Radio Services**

92. A number of issues have been raised regarding our auction authority in the context of licensing in the private radio services. First, we consider whether geographic licensing and competitive bidding should be employed on the PLMR frequencies below 470 MHz that are currently licensed under a scheme developed in our "refarming" docket. Next, we consider a proposal advanced by a coalition of private radio users to create a third radio pool to accommodate the needs of "critical infrastructure industries." We also rule on a proposal advanced by the American Mobile Telecommunications Association, Inc. ("AMTA") to restructure the licensing framework for the 450-470 MHz band. This Report and Order also analyzes a proposal to permit the incorporation of PLMR spectrum in the 800 MHz band into commercial mobile radio services ("CMRS") systems. Finally, we address the issue of whether the Part 90 multiple licensing rules should be changed in light of our revised auction authority.

##### **1. Licensing of "Refarming" Bands**

93. Background. In the *Notice*, we sought comment on whether the public interest would best be served by retaining our current licensing scheme, rather than adopting geographic licensing and competitive bidding, for the PLMR frequencies below 470 MHz.<sup>250</sup> We noted that the current licensing scheme for

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<sup>246</sup> CII Comments at 23-24; UTC Comments at 19.

<sup>247</sup> CII Comments at 23-24; UTC Comments at 19.

<sup>248</sup> CII Comments at 23-24; UTC Comments at 19.

<sup>249</sup> CII Comments at 23-24; UTC Comments at 19.

<sup>250</sup> *Notice*, 14 FCC Rcd at 5241 ¶ 68.

these frequencies came out of the lengthy “Refarming” proceeding,<sup>251</sup> in which the Commission, *inter alia*, consolidated the twenty PLMR services into two broad frequency pools,<sup>252</sup> and implemented procedures that will result in the transition to more spectrally efficient, narrowband technologies by requiring that future equipment meet increasingly efficient standards.<sup>253</sup>

94. Discussion. The commenters were nearly uniform in their opposition to the introduction of geographic area licensing in the Refarming bands.<sup>254</sup> The National Association of Manufacturers (“NAM”) and MFRAC, Inc., for example, note that the Commission and the private radio community have spent the better part of the past eight years formulating and refining the policies for Refarming.<sup>255</sup> They caution that with the process nearly complete, users and equipment vendors would be subject to great uncertainty and displacement, should the current licensing scheme be changed, as the private land mobile community has relied on the Commission’s Refarming decisions to date in forming investment plans.<sup>256</sup> We agree. Moreover, we believe that there simply has not been enough time since the adoption of the Refarming provisions to reap the full benefit of the revised procedures.

95. Moreover, we note that the refarmed bands below 470 MHz are currently licensed on a shared, rather than exclusive, basis.<sup>257</sup> Many licensees operate on the same channels in most geographic areas. These channels are heavily congested in most major urban areas, so the number of incumbents, particularly in the areas where geographic overlay licenses would be most desirable, would create nearly impossible due diligence requirements and would make the spectrum, at best, only marginally useful to a geographic area licensee. We believe that this militates against geographic overlay licensing of this spectrum.

96. Thus, we conclude that the public interest would best be served by retaining our current licensing scheme. Accordingly, we shall not, at this time, reexamine the licensing scheme for the PLMR frequencies below 470 MHz. We emphasize, however, that this decision applies only to the existing allocation and not to any spectrum that might subsequently be allocated for PLMR services.<sup>258</sup> In addition,

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<sup>251</sup> See, e.g., *Refarming Second R&O*, 12 FCC Rcd 14307; Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, PR Docket No. 92-235, *Memorandum Opinion and Order*, 11 FCC Rcd 17676 (1996); Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, PR Docket No. 92-235, *Report and Order and Further Notice of Proposed Rule Making*, 10 FCC Rcd 10076 (1995) (“*Refarming Report and Order and Further Notice*”).

<sup>252</sup> See *Refarming Second R&O*, 12 FCC Rcd at 14315 ¶ 15.

<sup>253</sup> *Refarming Report and Order and Further Notice*, 10 FCC Rcd at 10098 ¶ 36.

<sup>254</sup> See, e.g., AEP Comments at 4; API Comments at 12; AAR Comments at 7; Blooston Comments at 10; Cal State Reply Comments at 5; LMCC Comments at 4-6; Motorola Comments at 8. *But see* AMTA Comments at 2;

<sup>255</sup> NAM/MFRAC Reply Comments at 15.

<sup>256</sup> *Id.*; accord, e.g., PCIA Comments at 4.

<sup>257</sup> See 47 C.F.R. § 90.173(a).

<sup>258</sup> See, e.g., Principals for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, *Policy Statement*, 14 FCC Rcd 19868, 19878-79 ¶ 24 (1999).

we would not be precluded from revisiting the licensing scheme for the Refarming bands at some later date and adopting a new approach, such as the use of band managers.<sup>259</sup>

## 2. UTC Proposal To Establish a New Public Safety Radio Pool in the Private Mobile Bands Below 470 MHz

97. Background. In the *Notice*, we requested comment<sup>260</sup> on a rulemaking petition submitted by UTC, The Telecommunications Association (“UTC”),<sup>261</sup> the American Petroleum Institute (“API”), and the Association of American Railroads (“AAR”) (jointly referred to as the “Critical Infrastructure Industries” or “CII”).<sup>262</sup> UTC represents electric, gas, water, and steam utilities, and natural gas pipelines.<sup>263</sup> API represents companies in all phases of the petroleum and natural gas industries.<sup>264</sup> AAR represents railroads operating in the United States, Canada, and Mexico.<sup>265</sup> The petition proposes to create a third radio pool, in addition to the Public Safety and Industrial/Business (I/B) Radio Pools already used for private radio frequencies below 470 MHz. We also sought comment on whether this approach would be feasible for other frequency bands.<sup>266</sup> For the reasons set forth below, we find that a third pool is not called for at this time, and we deny the petition for rule making.

98. Discussion. The petition urges the Commission to create a Public Service Radio Pool in the PLMR bands below 800 MHz open to entities that do not qualify for Public Safety Radio Pool spectrum, but are eligible to use the public safety radio service spectrum exempted from the Commission’s auction authority under the Balanced Budget Act.<sup>267</sup> The CII propose to form the proposed Public Service Pool from all of the channels formerly allocated exclusively to the Power, Petroleum and Railroad Radio Services before those services (and others) were consolidated into the I/B Pool in the *Refarming Second Report and Order*.<sup>268</sup> The CII also propose moving a portion of the channels formerly shared by these services with one or more of the other services now in the I/B Pool.<sup>269</sup> The CII further state that the Public

<sup>259</sup> See, e.g., Service Rules for the 746-764 and 776-794 MHz Bands and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, 15 FCC Rcd 5299, 5311-14 ¶¶ 26-32 (2000).

<sup>260</sup> See *Notice*, 14 FCC Rcd at 5229 ¶ 41.

<sup>261</sup> UTC is now known as the United Telecom Council.

<sup>262</sup> UTC, The Telecommunications Association, American Petroleum Institute, and Association of American Railroads Petition for Rulemaking (RM-9405) (filed August 14, 1998) (UTC Petition).

<sup>263</sup> *Id.* at 2.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 3.

<sup>266</sup> See *Notice*, 14 FCC Rcd at 5229 ¶ 41.

<sup>267</sup> UTC Petition at 19.

<sup>268</sup> See *Refarming Second R&O*, 12 FCC Rcd at 14315-16 ¶ 15.

<sup>269</sup> UTC Petition at 21. The CII specifically propose that 61% of the shared low band frequencies, 8% of the shared frequencies in the 70 MHz band, 52% of the shared frequencies in the VHF high band, and 61% of the shared UHF frequencies should be allocated to the proposed new pool, in addition to all of the channels exclusively used by the CII.

Service Pool should also include frequencies formerly allocated to services used by any other industries that we conclude are eligible for auction-exempt public safety radio service spectrum. The CII recommend that the Commission should examine claims of eligibility for any new Public Service Pool closely.<sup>270</sup>

99. The CII argue that a pool to accommodate the needs of critical infrastructure industries is needed to protect the availability of spectrum for qualified entities, because of the public safety components of their requirements.<sup>271</sup> While critical infrastructure industries have legitimate spectrum needs, we do not believe these needs warrant removing frequencies from the I/B Pool. The I/B Pool was created to address the scarcity of PLMR spectrum, by consolidating spectrum to make fallow frequencies available to parties in need.<sup>272</sup> We are not persuaded that creating a third pool would not exacerbate the shortage of PLMR spectrum, overall, for the entire set of eligibles for the I/B Pool.

100. The CII also argue that a third pool is needed because the power, petroleum and railroad industries' radio operations need greater protection from interference caused by other users than the Commission has provided.<sup>273</sup> The CII note that the *Refarming Second Report and Order* requires entities that apply for frequencies formerly allocated solely to the Power, Petroleum, and Railroad Radio Services to obtain coordination from the frequency coordinator for the respective service.<sup>274</sup> They argue, however, that greater protection is needed in light of increasing instances of interference by new systems being licensed near utility and pipeline operations.<sup>275</sup> Critics of the petition argue that there is insufficient evidence of widespread interference problems to justify the creation of a third pool, and that isolated incidences of interference do not create a justification.<sup>276</sup> We agree that the number of instances of actual electrical interference do not appear so large as to justify the inefficiencies that could arise from creating a third pool.

101. Furthermore, several commenters contend that the exclusive coordination prerogative granted to the CII creates a *de facto* separate pool for these entities, and that therefore a separate pool for

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<sup>270</sup>*Id.* at 19-20. A number of commenters urge that if we were to create a separate pool, they should also be included within that pool. *See, e.g.*, ARINC Comments at 9 (airlines and aviation support); FFVA Reply Comments (RM-9405) at 2-3 (Florida agricultural producers); FIT Comments at 8 (forest products); HP Comments (RM-9405) at 1 (medical telemetry); NRMCA Reply Comments (RM-9405) at 2 (concrete); NPGA Reply Comments (RM-9405) at 3 (propane); NUCA Reply Comments (RM-9405) at 2 (water and wastewater infrastructure).

<sup>271</sup>UTC Petition at 7-8.

<sup>272</sup>*See Refarming Second R&O*, 12 FCC Rcd at 14315-16 ¶ 15.

<sup>273</sup>UTC Petition at 8.

<sup>274</sup>*See Refarming Second R&O*, 12 FCC Rcd at 14330 ¶ 42.

<sup>275</sup>UTC Petition at 9. *See also* API Reply Comments (RM-9405) at 3-5; AWWA Comments (RM-9405) at 1; AWWA Comments at 5-6; National Fuel Gas Company Comments (RM-9405) at 2; NRECA Comments (RM-9405) at 2-3; NU Comments (RM-9405) at 3; UTC Comments (RM-9405) at 7-9.

<sup>276</sup>*See, e.g.* PCIA Reply Comments (RM-9405) at 3; Petroleum Communications, Inc. Comments (RM-9405) at 2.



the CII is not necessary.<sup>277</sup> We also note that the question of whether that exclusive coordination prerogative should be expanded to include frequencies formerly allocated to the Power, Petroleum, and Railroad Radio Services on a shared basis is pending in the *Refarming* proceeding.<sup>278</sup> We believe that the issue of how to protect these services from interference is more appropriately addressed there.

102. Finally, the CII contend that because Congress specifically intended to include within the exemption to competitive bidding the private internal radio services used by utilities, pipelines and railroads, the creation of a Public Service Radio Pool for the CII would effectuate Congressional intent by protecting those services from encroachment by non-essential services.<sup>279</sup> The purpose of the exemption from our competitive bidding authority for public safety radio services is to relieve entities that protect the safety of life, health, and property from having to purchase spectrum at auction.<sup>280</sup> There is no basis upon which to infer other or additional congressional intent with respect to this provision. Finally, the CII's argument that we should create a third pool in order to avoid complications due to the potential introduction of auctions in the I/B Pool is not persuasive.<sup>281</sup> Because PLMR frequencies below 470 MHz currently are licensed in a manner that tends to avoid mutually exclusive applications, such complications generally do not arise.<sup>282</sup>

103. Accordingly, for all the reasons stated above, we deny the petition. We note, however, that our decision not to create a third pool below 470 MHz does not preclude us from using other mechanisms (e.g., Bands Managers or a change of licensing schemes) in these or other bands, in order to appropriately respond to the concerns set forth by the CII.

### **3. AMTA Proposal To Restructure Licensing Framework for PLMR Services in the 450-470 MHz Band**

104. *Background.* On July 30, 1999, after we released the *Notice*, AMTA, a trade association representing the specialized wireless communications industry, filed a petition for rule making proposing to fundamentally restructure the licensing framework for PLMR frequencies in the 450-470 MHz band.<sup>283</sup>

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<sup>277</sup> *Refarming Fourth MO&O*, 15 FCC Rcd 7051. See, e.g., Joint Commenters Comments at 12; NAM /MRFAC Reply Comments at 3.

<sup>278</sup> See *Refarming Fourth MO&O*, 15 FCC Rcd at 7056 ¶ 14. (staying *Refarming Second MO&O*, 14 FCC Rcd at 8647-48 ¶ 9 (1999) (expanding the rule to formerly shared frequencies), pending resolution of petitions for reconsideration).

<sup>279</sup> UTC Petition at 7.

<sup>280</sup> See Conference Report at 572.

<sup>281</sup> UTC Petition at 17-18.

<sup>282</sup> *Notice*, 14 FCC Rcd at 5217 ¶ 14.

<sup>283</sup> AMTA Petition for Rulemaking (RM-9705) at 11 (filed July 30, 1999) (AMTA Petition II). AMTA filed a previous petition for rule making on June 19, 1998, proposing that certain Part 90 licensees be required to employ new spectrum-efficient technologies. AMTA Petition for Rulemaking (RM-9332) (filed June 19, 1999) (AMTA Petition I). Because the issues raised in that petition are relevant to the instant proceeding, we included it in the *Notice*. See *Notice*, 14 FCC Rcd at 5242 ¶ 71. We discuss AMTA Petition I *infra* in the *Further Notice of Proposed Rule Making*.

Currently, this band is licensed by 6.25 kilohertz frequency pairs assigned on a site-by-site basis. The frequencies are licensed on a shared basis, and frequency coordination is required.<sup>284</sup> The frequencies are divided between the Public Safety Radio Pool (8 MHz) and the Industrial/Business (I/B) Radio Pool (12 MHz).<sup>285</sup>

105. AMTA proposes that we divide the 450-470 MHz band I/B Radio Pool so that 2 megahertz would be available for site-based licensing on a shared basis, and 10 megahertz would be licensed by geographic area in .5 megahertz paired blocks (creating twenty licenses per market).<sup>286</sup> Five of the twenty licenses would be set aside for private, internal systems, leaving the remaining fifteen available for either internal or commercial systems.<sup>287</sup> In addition, any incumbent that is not a winning bidder for its frequency and area would be required either to move to the shared channels or elect to receive service from a commercial geographic licensee.<sup>288</sup> The petition was placed on public notice on August 24, 1999.<sup>289</sup> We believe that it is appropriate to consider these proposals as part of the instant proceeding.

106. *Discussion.* Although we believe that geographic licensing is generally a highly efficient means of assigning spectrum, in this instance we agree with the commenters that do not believe such an approach is warranted in the 450-470 MHz band.<sup>290</sup> First, as we stated above in our discussion of the Refarming bands (which include the 450-470 MHz band), the benefits of geographic overlay licensing of this spectrum may be limited because these channels are heavily congested in most urban areas.<sup>291</sup> In addition, we note that many commenters were concerned by the AMTA proposal's effect on incumbent operations.<sup>292</sup> Motorola, for example, believes the relocation choices offered to incumbents in many cases will not provide a legitimate option.<sup>293</sup> Similarly, the Industry Coalition states that even if relocation were possible, the logistics would be staggering, causing devastating disruptions in service and severe levels of

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<sup>284</sup> See 47 C.F.R. §§ 90.173(a), 90.175.

<sup>285</sup> See 47 C.F.R. §§ 90.20(c)(3), 90.35(b)(3).

<sup>286</sup> AMTA Petition II at 13.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 16. An incumbent electing to obtain such service would receive replacement equipment paid for by the commercial geographic licensee. *Id.*

<sup>289</sup> Public Notice, Report No. 2356 (rel. Aug. 24, 1999).

<sup>290</sup> See, e.g., Blooston Comments (RM-9705) at 4; AAR Opposition (RM-9705) at 4 (implementation of the AMTA proposal will neglect railroad critical safety functions); APCO Comments (RM-9705) at 2; ARINC Comments (RM-9705) at 3; Mobex Opposition (RM-9705) at 4-5; Industry Coalition Joint Opposition (RM-9705) at 6 (the adoption of AMTA's proposals would merely suppress marketplace choice for no purpose other than to create new business opportunities for AMTA's members).

<sup>291</sup> See *supra* ¶ 95.

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

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

interference as a result of compressing tens of thousands of private wireless communications facilities within a limited amount of spectrum.<sup>294</sup>

107. In light of these concerns, we conclude that it is not advisable to revisit the licensing scheme for the 450-470 MHz band at this time. Moreover, we believe that not enough time has elapsed in order to reap the benefits of the licensing reforms that were adopted as part of the Refarming proceeding.<sup>295</sup>

We therefore deny AMTA's petition. This decision does not, however, preclude us from deciding in the future that some alternative approach is warranted.

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

108. Background. In the *Notice*, we noted that some spectrum currently allocated for private internal use is also used to provide subscriber-based services, pursuant to intercategory sharing or rule waiver.<sup>296</sup> We referred to a request by Nextel Communications, Inc. (Nextel) for waivers to permit it to acquire by assignment Part 90 PLMR services frequencies, and utilize those frequencies for CMRS operation in its 800 MHz SMR systems.<sup>297</sup> Subsequently, the Wireless Telecommunications Bureau (Bureau) granted Nextel's request in part and denied in part.<sup>298</sup> Specifically, the Bureau granted those waivers and assignments where Nextel would use the spectrum for relocation of incumbent licensees on the upper 200 channels of the 800 MHz band.<sup>299</sup> The Bureau also permitted Nextel to use PLMR frequencies in its SMR network, but only on the condition that at least seventy-five percent of the channels involved in the waiver requests would be used to relocate upper 200 channel incumbents.<sup>300</sup> The Bureau declined to address broader issues raised by Nextel's request to acquire channels without relocating an upper 200 incumbent, and determined that incorporation into the instant proceeding would be the more appropriate avenue to resolve such a proposal.<sup>301</sup> Consequently, the Bureau released a *Public Notice* incorporating the record of the Nextel matter into the instant proceeding and seeking comment on whether the Commission's licensing rules for PLMR channels in the 800 MHz band should be amended to allow their use in CMRS systems.<sup>302</sup>

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<sup>294</sup> Industry Coalition Joint Opposition (RM-9705) at 5.

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

<sup>296</sup> See *Notice*, 14 FCC Rcd at 5241 ¶ 69.

<sup>297</sup> See *id.* at 5241 n.201.

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

<sup>299</sup> See *id.* at 11689 ¶ 26.

<sup>300</sup> See *id.* at 11691 ¶ 30.

<sup>301</sup> See *id.* at 11691-92 ¶¶ 31-32.

<sup>302</sup> See Wireless Telecommunications Bureau Incorporates Nextel Communications, Inc. Waiver Record into WT Docket No. 99-87, *Public Notice*, 14 FCC Rcd 11795 (WTB 1999). In response to this public notice comments and reply comments were filed by the following: AAA, AMTA, API, APCO, Blooston I, Boeing, (continued....)

109. Discussion. We first address whether our Rules should be amended to allow PLMR licensees to assign or transfer spectrum to CMRS licensees for use in CMRS operations. Commenters were split on this issue. Commenters supporting such a change argue that licensees should be permitted to enter into voluntary assignment agreements that alter the use of the spectrum<sup>303</sup> because such voluntary transactions, wherein the licensee is willing to forego use of the spectrum for the consideration offered by the other party, result in the most economically efficient use of the spectrum.<sup>304</sup> That is, they contend that if a PLMR licensee finds advantageous the terms of commercial service, including the assignment of its frequency(ies) to the CMRS operator, then we should allow such transactions because the CMRS operator values the frequency(ies) more highly than the PLMR licensee.<sup>305</sup> We note that the 800 MHz band is particularly suited to such flexibility because 800 MHz PLMR and CMRS channels are interleaved, rather than grouped into separate subbands.<sup>306</sup> In addition, a review of our licensing database indicates a greater presence in the 800 MHz Business and I/LT channels of licenses on which CMRS operations are permitted, through rule waivers or inter-category sharing, than in other PLMR bands. We therefore find that permitting such transactions would create additional flexibility for both PLMR licensees seeking to fill their communications needs and for CMRS licensees seeking additional spectrum.

110. Consequently, we will amend our Rules to allow 800 MHz Business and I/LT licensees to assign or transfer their spectrum to CMRS licensees for use in CMRS operations.<sup>307</sup> Moreover, unlike the Bureau's decision in the *Nextel Order*, we will not require that any portion of the channels transferred or

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Chadmoore, ComEd, FM Communications, Inc. (FM) Ex Parte Letter, FIT, Joint Commenters, MRFAC, NAM/MRFAC, Nextel, NTCC, PCIA, Rocky Mountain, SBT, and Ameren.

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

<sup>304</sup> See, e.g., Nextel Comments at 15; Chadmoore Comments at 4.

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

<sup>306</sup> See 47 C.F.R. § 90.617.

<sup>307</sup> This decision resolves the related issue raised elsewhere by the Southern Company. See Letter from Christine M. Gill, McDermott, Will & Emery to David Furth, Senior Legal Advisor, Wireless Telecommunications Bureau (dated May 18, 2000). Southern seeks a determination that the Commission's Rules permit a CMRS licensee that obtained 800 MHz PLMR spectrum via intercategory sharing to transfer that spectrum to another CMRS licensee for use in its CMRS system. Pursuant to our decision above, we will permit CMRS use of assigned 800 MHz PLMR channels, whether the transferor/assignor is a PLMR or CMRS licensee. We emphasize that CMRS use will be limited to the 800 MHz PLMR channels because most of the other PLMR spectrum is shared spectrum. In this context, freer channel transferability in this band is warranted. In addition, the *Refarming* proceeding significantly affected a substantial portion of the PLMR spectrum below 512 MHz. As a result, we are reluctant to introduce additional policy changes with respect to the PLMR spectrum until more time has passed and we have the opportunity to fully analyze the benefits of the licensing reforms that were adopted as part of the *Refarming* proceeding. Similarly, we are not applying the decision above to PLMR spectrum at 900 MHz, but we seek comment in the Further Notice of Proposed Rule Making on whether we should do so. The approach we adopt today is new, and we believe that we should examine its results with respect to the availability of spectrum for future PLMR needs before we consider extending this approach to other bands.

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

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

112. We disagree with those commenters opposed to permitting the incorporation of PLMR spectrum into CMRS systems, who argue that it will reduce the available supply of PLMR spectrum.<sup>310</sup> They note that the Commission's purpose in eliminating intercategory sharing of non-SMR spectrum by SMR applicants<sup>311</sup> was to stop encroachment on PLMR frequencies by commercial SMR licensees and eligibles,<sup>312</sup> and argue that allowing CMRS use of 800 MHz PLMR spectrum would further exacerbate the current shortage of private spectrum.<sup>313</sup> We do not find these concerns persuasive. These objections seem to envision a scenario in which current PLMR licensees voluntarily surrender their rights to frequencies they are not using or are using inefficiently and these frequencies are then returned to the PLMR pool so as to be available for licensing to other private users. It has been our experience, however, that licensees do not in any large measure turn back to the Commission PLMR frequencies they no longer need or are using inefficiently; rather, they continue to hold the spectrum. Consequently, we believe that allowing licensees

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<sup>308</sup> See *Nextel Order*, 14 FCC Rcd at 11691 ¶ 30.

<sup>309</sup> See Chadmoore Reply Comments at 2-3; Nextel Comments at 7.

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

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

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

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

to modify their licenses for CMRS use or assign or transfer these frequencies to CMRS entities will not materially affect the supply of available spectrum for licensing from the PLMR pool.

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

114. While we will allow incumbent PLMR licensees to transfer or modify their licenses for CMRS use, we do not want to facilitate trafficking of PLMR spectrum (*e.g.*, PLMR eligibles acquiring new licenses from the existing pool of unassigned frequencies for the purpose of selling them to CMRS providers).<sup>315</sup> Several methods are employed to avoid trafficking, including holding periods, random audits, moratoria on acquiring new frequencies and reporting requirements.<sup>316</sup> In that connection, PCIA,<sup>317</sup> supported by several other commenters,<sup>318</sup> suggests that we discourage trafficking by adopting a rule providing that a licensee that transfers or assigns 800 MHz PLMR spectrum to a CMRS licensee may not apply for new spectrum for six months after the Commission consents to the transfer or assignment. We do not believe that this proposal is sufficient to reduce potential trafficking of PLMR services licenses. Instead, we will preclude a licensee that modifies its license or transfers or assigns its license to a CMRS operator, or an affiliate of the modifying or assigning licensee, from applying for 800 MHz PLMR spectrum in the same area<sup>319</sup> for one year.<sup>320</sup>

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<sup>314</sup> See Nextel Comments at 14-15; Nextel Reply Comments at 2, 22-23.

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

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

<sup>317</sup> See PCIA Comments at 20-23.

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

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

<sup>320</sup> We note that a one-year moratorium has been imposed upon General Category licensees that make partial assignment of a station's frequencies to stem trafficking in licenses. See 47 C.F.R. § 90.609(c); see also (continued....)

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

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

117. We are confident that the rules adopted herein, coupled with existing requirements in our rules,<sup>324</sup> provide the necessary safeguards against trafficking in PLMR licenses for the purpose of assigning the license to a CMRS operator or using the spectrum to provide a CMRS service. We note that neither the one-year moratorium nor the five-year holding requirement is applicable to PLMR-to-PLMR assignments and/or transfers.

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

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Amendment of Part 90, Subparts M and S, of the Commission's Rules, PR Docket No. 86-404, 3 FCC Rcd 1838, 1847 ¶ 79 (1988)

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

<sup>322</sup> See 47 C.F.R. § 1.2111(b)(1).

<sup>323</sup> See 47 C.F.R. § 90.629.

<sup>324</sup> Section 90.155 requires the licensee to have its station placed in operation within twelve months from the date of grant to avoid automatic cancellation. 47 C.F.R. § 90.155. Moreover, Section 90.609 requires complete construction of the radio facility prior to any transfer or assignment. 47 C.F.R. § 90.609. Additionally, Section 90.157 provides that a license will cancel automatically if there is discontinuance of station operation for twelve months or more. 47 C.F.R. § 90.157.

interference<sup>325</sup> to such public safety licensees.<sup>326</sup> We believe that these actions together will reduce the risk of increased interference in this band.

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

## 5. Revision of Part 90 Multiple Licensing Rules

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

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

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

<sup>326</sup> See Letter from Robert M. Gurss, counsel for APCO, to Magalie Roman Salas, Secretary, FCC (dated Nov. 6, 2000).

<sup>327</sup> See *Nextel Order*, 14 FCC Rcd 11678.

<sup>328</sup> *Notice*, 14 FCC Rcd at 5232 ¶ 50.

<sup>329</sup> See 47 C.F.R. § 90.185.

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

<sup>331</sup> *Id.* at 1392 ¶ 5.

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



in the land mobile services since the 1960s.<sup>333</sup>

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

123. In 1992, in connection with the Refarming proceeding, the Commission proposed eliminating multiple licensing because (1) from a user's standpoint, such facilities were indistinguishable from SMR facilities; and (2) the users' needs could adequately be met by SMR and private carrier licensees, which were more widely available than they were ten years earlier.<sup>336</sup> When the Commission implemented the 1993 Budget Act, however, it concluded that Congress recognized the benefits of allowing private radio users to enter into legitimate cost-sharing arrangements, and did not intend such arrangements to be classified as for-profit CMRS.<sup>337</sup> This conclusion was based upon the definition of "mobile service" adopted in the 1993 Budget Act.<sup>338</sup> The Commission determined that the legislative intent was to provide for shared use<sup>339</sup> and multiple licensed "private" communications systems exempt from the competitive bidding process.<sup>340</sup> Despite concern that these systems are often indistinguishable from commercial systems, the Commission deemed it appropriate at that time to retain multiple licensing as a non-auction, private radio licensing alternative.<sup>341</sup> The Commission stated, however, that it would closely monitor the use of multiple licensing in order to ensure that unlicensed station managers did not attempt to provide for-

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<sup>333</sup> *Id.* at 1392 ¶ 6.

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

<sup>335</sup> *Id.*

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

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

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

<sup>339</sup> *See* 47 C.F.R. § 90.185. Multiple licensing (licensed under code FB4) must be distinguished from shared use. Section 90.179 of the Commission's Rules discusses shared use of radio stations. Shared use of facilities, licensed under code FB7, occurs when persons not licensed for the station control the station for their own use pursuant to the licensee's authorization. Shared use may be either on a non-profit, cost-shared basis or on a for-profit private carrier basis depending on the spectrum being used. Thus, shared use involves one licensee who shares its systems with other non-licensees who could get their own license but choose not to.

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

<sup>341</sup> *Id.*

profit service in competition with CMRS licensees.<sup>342</sup>

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

125. MRFAC, on the other hand, states that the relevant rules for multiple licensing are widely ignored, little enforced, and an invitation to abuse.<sup>345</sup> Some recent decisions support the view that not every multiple licensing application represents a legitimate private radio cost-sharing proposal. For example, in *East River Electric Power Cooperative*,<sup>346</sup> East River, which previously had applied unsuccessfully for SMR frequencies, sought a waiver of the multiple licensing rules to permit use of its excess capacity by entities not otherwise eligible to use those frequencies.<sup>347</sup> Opponents of the proposal argued that East River simply intended to provide a for-profit commercial communications service to other parties.<sup>348</sup> The Wireless Telecommunications Bureau (Bureau) agreed, and found that East River’s proposal was not a legitimate multiple licensing arrangement under Section 90.185 of the Commission’s Rules.<sup>349</sup> While East River’s use of its system for internal communications remained PMRS, the proposed sale of excess capacity to third parties did not. More recently, in *Viking Dispatch Services, Inc.*, we rejected a purported sharing proposal on the grounds that it really was a for-profit CMRS.<sup>350</sup> Viking proposed to operate forty-two sites for PMRS two-way mobile dispatch systems as a third-party provider on a not-for-profit, cost-shared basis.<sup>351</sup> We concluded that Viking’s proposal was not PMRS because it intended only to provide service to others.<sup>352</sup> We also concluded that it was not a true not-for-profit arrangement, because the system manager and equipment vendor was an affiliate of Viking.<sup>353</sup> Therefore, Viking’s request was denied.

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<sup>342</sup> *Id.* at 1430-31 ¶ 49.

<sup>343</sup> *See* AMTA Comments at 7.

<sup>344</sup> *Id.*

<sup>345</sup> MRFAC Comments at 8 n.2.

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

<sup>347</sup> *Id.* at 5873-74 ¶¶ 5-6.

<sup>348</sup> *Id.* at 5876 ¶ 9.

<sup>349</sup> *Id.* at 5876-78 ¶¶ 10-11

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

<sup>351</sup> *Id.* at 18815 ¶ 2.

<sup>352</sup> *Id.* at 18817-18 ¶ 7.

<sup>353</sup> *Id.* at 18818-19 ¶ 8.

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

#### **E. Section 337 Licensing for Public Safety Services**

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

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

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

- (c) Licensing of Unused Frequencies for Public Safety Services.--
  - (1) Use of unused channels for public safety services.--Upon application by an entity seeking to provide public safety services, the Commission shall waive any requirement of this Act or its regulations implementing this Act (other than its regulations regarding harmful interference) to the extent necessary to permit the use of unassigned frequencies for the provision of public safety services by such entity. An application shall be granted under this subsection if the Commission finds that--
    - (A) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use;
    - (B) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission’s regulations;
    - (C) the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made;
    - (D) the unassigned frequency was allocated for its present use not less than 2 years prior to the date on which the application is granted; and
    - (E) granting such application is consistent with the public interest.<sup>356</sup>

<sup>354</sup> See *Spectrum Policy Statement*, 14 FCC Rcd 19868 (1999).

<sup>355</sup> 47 U.S.C. § 337(f).

<sup>356</sup> 47 U.S.C. § 337(c)(1).

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

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

131. *Discussion.* Some commenters suggest that an applicant need not satisfy all five statutory criteria to satisfy the requirements of Section 337(c), if it makes a particularly strong showing for the factors it does meet.<sup>361</sup> We disagree. We do not find any statutory basis or legislative history supporting such a conclusion. Indeed, the legislative history clearly states, “Before granting applications under this subsection, the Commission must make five specific findings.”<sup>362</sup> All five statutory criteria must be satisfied to receive authorization based on a Section 337 request.<sup>363</sup>

132. In addition, we believe that further exposition regarding two of the criteria is warranted. With regard to the statutory requirement that “no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use,”<sup>364</sup> several Section 337 applicants apparently have interpreted this provision as only requiring a showing that no public safety frequencies are

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<sup>357</sup> *Notice*, 14 FCC Rcd at 5234 ¶ 56.

<sup>358</sup> *Id.* at 5233 ¶ 54.

<sup>359</sup> *Notice*, 14 FCC Rcd at 5234 ¶ 57.

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

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

<sup>362</sup> Conference Report at 579.

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

<sup>364</sup> 47 U.S.C. § 337(c)(1)(A).

currently available in the same band as the frequencies being requested.<sup>365</sup> We disagree with this interpretation. We believe that the statutory language is clear in that it expressly requires that no other spectrum allocated to public safety services be available without any qualification. Thus, we believe that the statute requires that there be no unassigned public safety spectrum, or not enough for the proposed public safety use, in any band in the geographic area in which the Section 337 applicant seeks to provide public safety services.<sup>366</sup>

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

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

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

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

<sup>367</sup> 47 U.S.C. § 337(c)(1)(E).

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

<sup>369</sup> See *South Bay*, 13 FCC Rcd at 23796 ¶ 33.

<sup>370</sup> See *Sacramento*, 15 FCC Rcd 12600, 12607 ¶ 19.

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

136. Finally, we take this opportunity streamline our processing of Section 337 requests by amending our rules to require that Section 337 requests be filed in the same manner and on the same form(s) as ordinary applications requesting the subject spectrum. Specifically, Section 337 waiver requests and applications for commercial spectrum must be filed through the Universal Licensing System using Form 601 Main Form and Schedules B and J,<sup>373</sup> and applicants will need to register their Taxpayer Identification Number or Employer Identification Number.<sup>374</sup> Additionally, antennas that require registration must be registered prior to filing the request.<sup>375</sup>

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<sup>371</sup> See 47 U.S.C. § 151.

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

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

<sup>374</sup> *Id.* at 21087-91 ¶¶ 132-142.

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

#### IV. FURTHER NOTICE OF PROPOSED RULE MAKING

##### A. AMTA Proposal to Require New Spectrum Efficient Technologies

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

138. AMTA contends that such requirements are needed because, under the current rules, it is financially imprudent for a licensee to invest in new, more efficient technology, since doing so results in additional costs without additional benefits.<sup>381</sup> The current rules, which were adopted in the Refarming proceeding, provide that, in order to effect a transition to a narrowband channel plan, we will type certify only increasingly efficient equipment.<sup>382</sup> Specifically, since February 14, 1997, we have certified equipment for 25 kilohertz channels only if it is also capable of operating on 12.5 kilohertz and/or narrower channels.<sup>383</sup> After January 1, 2005, only new equipment that operates on 6.25 kilohertz channel bandwidths will be certified.<sup>384</sup> New equipment that operates on 25 and/or 12.5 kilohertz channels will be certified only if it is also capable of operating on 6.25 kilohertz or narrower channels.<sup>385</sup> The rules do not

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

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

<sup>378</sup> AMTA Petition I at 6.

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

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

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

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

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

<sup>384</sup> 47 C.F.R. § 90.203(j)(4).

<sup>385</sup> *Id.*

require users to replace existing systems.<sup>386</sup>

139. AMTA's petition was placed on public notice on July 31, 1998.<sup>387</sup> Because the issues raised in that petition are relevant to the instant proceeding, the petition was included in the *Notice*.<sup>388</sup>

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

141. AMTA and other commenters argue that a new approach is needed, because the migration to narrowband technology is not occurring as rapidly as the Commission intended.<sup>392</sup> Other commenters believe that the Refarming rules should be retained at least for the time being, because not enough time has elapsed in order to reap the benefits of the well-considered compromises the Commission adopted in that proceeding.<sup>393</sup> After considering the record and comments in this proceeding, we are inclined to agree with AMTA that the current pace of migration to more spectrally efficient technology is not rapid enough. We seek comment on this tentative conclusion, as well as whether enough time has elapsed to allow us to evaluate the effectiveness of our current rules.

142. Commenters believing that the rules need to be revised should also discuss what action the Commission should take. We tentatively conclude that that we should encourage the migration to narrowband technology by prohibiting the manufacture or importation of equipment that does not meet

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

<sup>387</sup> Public Notice, Report No. 2288 (rel. July 31, 1998).

<sup>388</sup> *See Notice*, 14 FCC Rcd at 5242 ¶ 71.

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

<sup>390</sup> *Id.* at 10097-98 ¶¶ 34-36.

<sup>391</sup> *Id.* at 10099 ¶ 37.

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

<sup>393</sup> *See* Chadmoore Reply Comments (RM-9332) at 3; CICS Comments (RM-9332) at 2; SCANA Opposition (RM-9332) at 5; USMSS Comments (RM-9332) at 2; *see also, e.g.*, MRFAC Partial Opposition at 5 (the unresolved Refarming issues should be resolved before any new rules are adopted); PCIA Comments at 5-6 (Commission should wait to impose any type of mandatory conversion until the Refarming rules are in place and have had time to take effect).



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

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

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

144. We now seek comment on whether this flexibility in use of PLMR channels should be extended to the 900 MHz band. We believe that such an action would promote the statutory objective of regulatory symmetry among CMRS providers.<sup>397</sup> We intend, if we introduce such flexibility for licensees in the 900 MHz band, to impose an appropriate holding period requirement on all licenses the application for which is filed on or after the date we adopt this item. We would take such an action in order to ensure that our request for comment on this issue does not motivate prospective licensees to apply for vacant

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<sup>394</sup> We note that the Commission took such an approach with respect to fixed microwave equipment. *See* Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *Second Report and Order*, ET Docket No. 92-9, 8 FCC Rcd 6495, 6514 ¶ 53 (1993). The deadline would not apply to equipment manufactured for export. *See id.* at 6514 n.26. *See also* Amendment of Part 90 of the Commission's Rules to Restrict the Use of Radio Transmitters with External Frequency Controls, PR Docket No. 86-37, 2 FCC Rcd 7221 (1987). *See generally* 47 C.F.R. § 302(b) ("No person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.").

<sup>395</sup> *See* AEP Comments (RM-9332) at 4; APSC Comments (RM-9332) at 5; BGE Comments (RM-9332) at 3; CSW Comments (RM-9332) at 2.

<sup>396</sup> *See supra* at ¶¶ 110, 111.

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

PLMR spectrum with the sole intent of using it for CMRS operations. Given the unique characteristics of the 800 MHz PLMR bands, however,<sup>398</sup> we also seek comment as to whether there are any reasons we should continue to treat the 800 MHz and 900 MHz bands differently.

## V. PROCEDURAL MATTERS

### A. Ex Parte Presentations

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

### B. Regulatory Flexibility Act Analyses

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

### C. Final Paperwork Reduction Act of 1995 Analysis

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

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

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<sup>398</sup> See *supra* at ¶ 109.

<sup>399</sup> See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

<sup>400</sup> See 5 U.S.C. § 604.

<sup>401</sup> See 5 U.S.C. § 603.

#### **D. Filing Procedures**

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

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

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

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

#### **E. Further Information**

153. For further information concerning this Report and Order and Further Notice of Proposed Rule Making, contact Gary D. Michaels or Leora Hochstein of the Auctions and Industry Analysis Division at (202) 418-0660 (voice), (202) 418-7233 (TTY), or Shellie Blakeney of the Public Safety and Private Wireless Division at (202) 418-0680 (voice), (202) 418-7233 (TTY), Wireless Telecommunications Bureau, Washington, DC 20554.

### **VI. ORDERING CLAUSES**

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

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

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

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

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

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

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

**APPENDIX A: COMMENTS AND REPLY COMMENTS FILED IN WT DOCKET 99-87****Comments<sup>1</sup>**

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

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<sup>1</sup> This list includes comments and reply comments submitted in response to RM-9405.

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

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

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

### Reply Comments

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



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

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

#### **Ex Parte Submissions**

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

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

#### **Extension of Time to File Reply Comments Submissions**

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

#### **Petition for Rulemaking RM-9332**

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

#### **Support to Petition for Rulemaking RM-9332**

1. American Petroleum Institute (API)

#### **Opposition to Petition for Rulemaking RM-9332**

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

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

**Comments Filed in Response to RM-9705**

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

## Representing:

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

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

**Reply Comments Filed in Response to RM-9705**

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

**APPENDIX B: FINAL RULES**

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

**§1.913 Application forms; electronic filing and manual filing**

\*\*\*\*\*

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

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

**§ 90.179 Shared use of stations.**

\* \* \* \* \*

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

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

**§ 90.621 Selection and assignment of frequencies.**

\* \* \* \* \*

(e) \* \* \*

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

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

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

(iii) Requests submitted pursuant to paragraph (e)(2) of this section must include a certification

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

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

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**APPENDIX C: FINAL REGULATORY FLEXIBILITY ANALYSIS**

1. As required by the Regulatory Flexibility Act (“RFA”),<sup>1</sup> an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the *Notice of Proposed Rule Making* in WT Docket 99-87.<sup>2</sup> The Commission sought written public comment on the issues and proposals in the *Notice*, including comment on the IRFA. The comments received are discussed below. This Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.<sup>3</sup>

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

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

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

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

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

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

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

<sup>3</sup>See 5 U.S.C. § 604.

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

<sup>5</sup> See Comment of the Office of Advocacy, U.S. Small Business Administration on the Notice of Proposed Rulemaking and the Initial Regulatory Flexibility Analysis of the Notice of Proposed Rulemaking, CC Docket 99-87 (sic) (filed Aug. 2, 1999) (“SBA Comments”); Initial Regulatory Flexibility Analysis Comments of (continued....)



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

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

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

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

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Blooston, Mordkofsky, Jackson & Dickens, WT Docket 99-87, RM-9332 (filed Aug. 2, 1999) (“Blooston IRFA Comments”).

<sup>6</sup> See SBA comments at 1, 2-3.

<sup>7</sup> See *id.* at 1, 4-6.

<sup>8</sup> See Blooston IRFA Comments at 1.

<sup>9</sup> *Notice* at ¶ 76.

<sup>10</sup> See, e.g., Cinergy Comments at ii; API Comments at 22; PCIA Comments at 21-22; Motorola Comments at 9.

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

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

8. SBA and Blooston also suggest that auctions are inherently unfair to small businesses. In drawing that conclusion, SBA fails to mention that the Commission, in consultation with SBA, has developed designated entity preferences, such as bidding credits, to facilitate participation by small businesses in spectrum auctions,<sup>18</sup> and routinely makes bidding credits available to encourage the award of licenses to small businesses.<sup>19</sup> Contrary to SBA's assertions,<sup>20</sup> we believe that band manager licensing is

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

<sup>12</sup> See *id.*, 14 FCC Rcd. at 5246 ¶ 83-84.

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*, 14 FCC Rcd. at 5261 ¶ 23 (IRFA).

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

<sup>16</sup> See 5 U.S.C. § 603(c).

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

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

<sup>19</sup> See, e.g., Amendment of Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for (continued....)

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

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

10. We disagree with the premise of Blooston's argument that auctions will lead to a concentration of licenses in the hands of a few licensees.<sup>26</sup> Rather, where licensees are afforded the flexibility to maximize use of the spectrum during their license tenure, as under a band manager licensing scheme, those licensees will have an economic incentive not to discriminate or warehouse, and will instead maximize use of the spectrum. The Report and Order observes that the Commission will consider whether it is appropriate for band managers in other bands to be subject to the same types of rules as 700 MHz Guard

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

<sup>20</sup> See SBA Comments at 4.

<sup>21</sup> See Blooston IRFA Comments at 4.

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

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

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

<sup>26</sup> See Blooston IRFA Comments at 5.

Band Managers regarding fair and nondiscriminatory access to the band manager's spectrum, and limits on the type of restrictions that band managers may impose on their customers' use of the spectrum.<sup>27</sup> If circumstances warrant, moreover, the Commission might consider imposing reasonable access standards or other requirements to forestall anticompetitive behavior.<sup>28</sup>

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

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

12. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>30</sup> Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions.<sup>31</sup> The RFA generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act.<sup>32</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>33</sup> A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."<sup>34</sup> Nationwide, as of 1992, there were approximately 275,801 small organizations.<sup>35</sup>

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

14. *Public Safety radio services and Governmental entities.* Public Safety radio services include

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<sup>27</sup> See *supra* ¶ 47.

<sup>28</sup> See *id.*

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

<sup>30</sup> See 5 U.S.C. § 603(b)(3).

<sup>31</sup> See 5 U.S.C. § 601(6).

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

<sup>33</sup> Small Business Act, 5 U.S.C. § 632 (1996).

<sup>34</sup> 5 U.S.C. § 601(4).

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

police, fire, local governments, forestry conservation, highway maintenance, and emergency medical services.<sup>36</sup> The SBA rules contain a definition for small radiotelephone (wireless) companies, which encompasses business entities engaged in radiotelephone communications employing no more than 1,500 persons.<sup>37</sup> There are a total of approximately 127,540 licensees within these services. Governmental entities as well as private businesses comprise the licensees for these services. The RFA also includes small governmental entities as a part of the regulatory flexibility analysis.<sup>38</sup> "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."<sup>39</sup> As of 1992, there were approximately 85,006 such jurisdictions in the United States.<sup>40</sup> This number includes 38,978 counties, cities and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.<sup>41</sup> The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, the Commission estimates that 81,600 (91 percent) are small entities.

15. *Specialized Mobile Radio ("SMR")*. The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to two tiers of firms: (1) "small entities," those with revenues of no more than \$15 million in each of the three previous calendar years; and (2) "very small entities," those with revenues of no more than \$3 million in each of the three previous calendar years. The regulations defining "small entity" and "very small entity" in the context of 800 MHz SMR (upper 10 MHz and lower 230 channels) and 900 MHz SMR have been approved by the SBA. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended

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

<sup>37</sup> See 13 C.F.R. § 121.201 (SIC Code 4812).

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

<sup>39</sup> 5 U.S.C. § 601(5).

<sup>40</sup> U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

<sup>41</sup> *Id.*

implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. We assume, for our purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz (upper 10 MHz) and 900 MHz SMR bands. There were 60 winning bidders that qualified as small and very small entities in the 900 MHz auction. Of the 1,020 licenses won in the 900 MHz auction, 263 licenses were won by bidders qualifying as small and very small entities. In the 800 MHz SMR auction, 38 of the 524 licenses awarded were won by small and very small entities.

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

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

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

18. This Report and Order establishes a framework for making certain determinations for future licensing of the private wireless services and the scope of the Balanced Budget Act's exemption from competitive bidding for licenses and permits issued for public safety radio services. This Report and Order also imposes new compliance requirements for Part 90 PLMR licensees seeking to modify their licenses to for use in CMRS systems.

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<sup>42</sup> See 13 C.F.R. § 121.201 (SIC Code 4812).

<sup>43</sup> *Id.*

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

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

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

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

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

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

21. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>47</sup>

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

23. The Part 90 regulations amended by this Report and Order permit the conversion of 800 MHz non-Public Safety PLMRS licensees be permitted to convert their spectrum to CMRS use under certain circumstances, and clarify that spectrum in the 800 MHz non-Public Safety PLMRS may not be shared under our Part 90 multiple licensing rule. We denied a proposal to eliminate the distinction between CMRS spectrum and non-Public Safety PLMR spectrum with respect to initial licensing. We believe that the existing PLMR pool of unassigned frequencies should remain available on an initial basis to PLMR

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<sup>47</sup> See 5 U.S.C. § 603(c).

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

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

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<sup>48</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>49</sup> See 5 U.S.C. §604(b).



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

1. As required by the Regulatory Flexibility Act (“RFA”),<sup>1</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis (“IRFA”) of the possible significant economic impact on small entities by the policies and rules proposed in this Further Notice of Proposed Rule Making (“Further Notice”). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on this Further Notice provided above in paras. 149-152, *supra*. The Commission will send a copy of the Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).<sup>2</sup> In addition, the Further Notice and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

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

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

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

**B. Legal Basis:**

4. Authority for issuance of this Further Notice is contained in Sections 4(i), 303(r), and 332(a)(2) of the Communications Act of 1934, as amended.<sup>4</sup>

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

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

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

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

5. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>5</sup> Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions.<sup>6</sup> The RFA generally defines the term “small business” as having the same meaning as the term “small business concern” under the Small Business Act.<sup>7</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>8</sup> A small organization is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>9</sup> Nationwide, as of 1992, there were approximately 275,801 small organizations.<sup>10</sup>

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

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

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<sup>5</sup> See 5 U.S.C. § 603(b)(3).

<sup>6</sup> See 5 U.S.C. § 601(6).

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

<sup>8</sup> Small Business Act, 5 U.S.C. § 632 (1996).

<sup>9</sup> 5 U.S.C. § 601(4).

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

<sup>11</sup> With the exception of the special emergency service, these services are governed by Subpart B of Part 90 of the Commission's rules. 47 C.F.R. §§ 90.15 through 90.27. The police service includes 26,608 licensees that serve state, county and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes 22,677 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service that is presently comprised of 40,512 licensees that are state, county or municipal entities that use the radio for official purposes not covered by other public safety services. There are 7,325 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The 9,480 state and local governments are licensed to highway maintenance service provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The 1,460 licensees in the Emergency Medical Radio Service (EMRS) use the 39 channels allocated to this service for emergency medical service communications related to the actual delivery of emergency medical treatment. 47 C.F.R. §§ 90.15 through 90.27. The 19,478 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities and emergency repair of public communication facilities. 47 C.F.R. §§ 90.33 through 90.55.

encompasses business entities engaged in radiotelephone communications employing no more than 1,500 persons.<sup>12</sup> There are a total of approximately 127,540 licensees within these services. Governmental entities as well as private businesses comprise the licensees for these services. The RFA also includes small governmental entities as a part of the regulatory flexibility analysis.<sup>13</sup> “Small governmental jurisdiction” generally means “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.”<sup>14</sup> As of 1992, there were approximately 85,006 such jurisdictions in the United States.<sup>15</sup> This number includes 38,978 counties, cities and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.<sup>16</sup> The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, the Commission estimates that 81,600 (91 percent) are small entities.

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

9. *Estimates for PLMR Licensees.* Private land mobile radio systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the Commission has not developed a definition of small entities specifically applicable to PLMR users, nor has the SBA developed any such definition. The SBA rules do, however, contain a definition for small radiotelephone (wireless) companies.<sup>17</sup> Included in this definition are business entities engaged in radiotelephone communications employing no more than 1,500 persons.<sup>18</sup> Entities engaged in telegraph and

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<sup>12</sup> See 13 C.F.R. § 121.201 (SIC Code 4812).

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

<sup>14</sup> 5 U.S.C. § 601(5).

<sup>15</sup> U.S. Dept. of Commerce, Bureau of the Census, “1992 Census of Governments.”

<sup>16</sup> *Id.*

<sup>17</sup> See 13 C.F.R. § 121.201 (SIC Code 4812).

<sup>18</sup> *Id.*

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

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

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

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

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

12. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account 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.<sup>23</sup>

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<sup>19</sup> *Id.* (SIC Code 4822).

<sup>20</sup> *See* Federal Communications Commission, 60th Annual Report, Fiscal Year 1994 at 120-121.

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

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

<sup>23</sup> *See* 5 U.S.C. §603(c).

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

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

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

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

16. None.

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<sup>24</sup> *See supra* ¶¶ 113-16.