States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Authority

This notice is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended, 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: December 7, 2000.

Myron O. Knudson,

Acting Regional Administrator, Region 6.

[FR Doc. 00–33155 Filed 12–29–00; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL–6926–7]

Florida: Final Authorization of State Hazardous Waste Management Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Immediate final rule; extension of comment period and effective date.

SUMMARY: On September 18, 2000 (65 FR 56256), EPA published an action to grant Florida final authorization for several changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). One of the changes was the authorization of Florida for the February 16, 1993, Corrective Action Management Unit (CAMU) rule. With this action, EPA is extending the comment period and effective date for the authorization of Florida for the CAMU rule to provide additional information to the public.

DATES: This final authorization will become effective on March 5, 2001 unless EPA receives adverse written comment by February 1, 2001. If EPA receives such comment, it will publish a timely withdrawal of this immediate final rule in the **Federal Register** and inform the public that this authorization will not take effect.

ADDRESSES: Send written comments to Narindar Kumar, Chief, RCRA Programs Branch, Waste Management Division, U.S. Environmental Protection Agency, Atlanta Federal Center, 61 Forsyth Street, SW Atlanta, GA, 30303–8960; (404) 562–8440. We must receive your comments by February 1, 2001. You can view and copy Florida's application from 8 a.m. to 3:45 p.m. at the EPA Region 4 Library, The Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW, Atlanta, Georgia 30303–8960, Phone number (404) 562–8190, Kathy Piselli, Librarian.

FOR FURTHER INFORMATION CONTACT: Narindar Kumar, Chief, RCRA Programs Branch, Waste Management Division, U.S. Environmental Protection Agency, Atlanta Federal Center, 61 Forsyth Street, SW Atlanta, GA, 30303–8960; (404) 562–8440.

SUPPLEMENTARY INFORMATION: As a result of the September 18, 2000, Notice to grant final authorization to Florida (see 65 FR 56256) for the February 16, 1993, Corrective Action Management Unit (CAMU) rule, the State will be eligible for interim authorization-by-rule for the proposed amendments to the CAMU rule, published on August 22, 2000, at 65 FR 51080. Florida will also become eligible for conditional authorization if that alternative is chosen by EPA in the final CAMU amendments rule. This extension of the comment period and effective date only applies to the authorization of Florida for the CAMU rule, and not the other rules contained in the September 18, 2000, **Federal Register**.

Authority: This action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: December 1, 2000.

Michael V. Peyton,

Acting Regional Administrator, Region 4.

[FR Doc. 00–33425 Filed 12–29–00; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 90

[WT Docket No. 99–87; RM–9332; RM–9405; RM–9705; FCC 00–403]

Revised Competitive Bidding Authority

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document adopts rules and policies to implement changes to its statutory auction authority. This revision of the Commission's auction authority affects its determinations of which wireless telecommunications services licenses are potentially auctionable and its determinations of the appropriate licensing scheme for new and existing services.

DATES: Effective March 2, 2001, except § 90.621 which contains information collection requirement that has not been approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for this section.

FOR FURTHER INFORMATION CONTACT: Leora Hochstein or William Huber, Attorneys, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, at (202) 418–0660. For additional information concerning the information collection contained in this document, contact Judy Boley at 202–418–0214, or via the Internet at *jboley@fcc.gov*.

SUPPLEMENTARY INFORMATION: This a summary of a *Report and Order* in WT Docket No. 99–87, adopted on November 9, 2000, and released on November 20, 2000. The complete text of the *Report and Order* is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW, Washington, DC. It may also be purchased from the Commission's copy contractor, International Transcription Services, Inc. (ITS, Inc.), 445 12th Street, SW, Room CY–B400, Washington, DC 20554, (202) 314–3070. The *Report and Order* is also available on the Internet at the Commission's web site: *http://www.fcc.gov/wtb/documents.html*.

Synopsis of the Report and Order

I. Introduction and Executive Summary

1. In the *Report and Order*, 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''), 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 this 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. *See* Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain 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*, (*NPRM*), 64 FR 23571 (May 3, 1999).

2. Specifically, the *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. 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 the *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, 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. *See* Service Rules for the 746–764 and 776–794 MHz Bands, and Revisions to 27 of the Commission's Rules, WT Docket No. 99–168, *Second Report and Order*, (''*700 MHz Second Report and Order*'') 65 FR 17594 (April 4, 2000). 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. *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, (November 20, 2000) (''*27 MHz Reallocation Order*''). 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 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. In general, we conclude that the existing rules should be retained. Specifically, we decline a request to establish geographic area licensing and competitive bidding rules in the 450–470 MHz band. We also decline the 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. In particular, we seek further comment on the effectiveness of the part 90 rules that have been adopted in the course of the Commission's *Reframing* proceeding, PR Docket No. 92–235, *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, (''*Reframing Report and Order and Further Notice*''), 60 FR 43720 (August 23, 1995) and 60 FR 37148 (July 19, 1995); *Memorandum Opinion and Order*, 62 FR 6027 (January 15, 1997); *Second Report and Order*, 62 FR 18834 (April 17, 1997); *Second Memorandum Opinion and Order*, 64 FR 36258 (July 6, 1999); *Third Memorandum Opinion and Order*, 64 FR 50257 (September 16, 1999); and *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 16,673 (2000) (collectively, the ''*Reframing Proceeding*'') 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'') 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. As we described in detail in the *NPRM*, the Commission in a series of rulemaking proceedings adopted rules and policies to implement section 309(j). *See* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93–253, *Second Report and Order*, (''*Competitive Bidding Second Report and Order*''), 59 FR 22980 (May 4, 1994); Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93–253, *Second Memorandum Opinion and Order*, (''*Competitive Bidding Second M O & O*''), 59 FR 44272 (August 26, 1994).

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. The Commission has determined that applications are ''mutually exclusive'' if the grant of one application would effectively preclude the grant of one or more of the other applications. 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. In addition, section 309(j)(2) set forth conditions beyond mutual exclusivity that had to be satisfied in order for spectrum to be auctionable. 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. 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)].'' 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. As we explained in the *NPRM*, the services deemed nonauctionable under the 1993 Budget Act were non-subscriber based, private and noncommercial offerings operating on a variety of frequency bands.

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) of this title.

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). 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.

14. 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 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).

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. *See* 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*, (''*Commercial Broadcast Competitive Bidding First Report & Order*''), 63 FR 48615 (September 11, 1998). 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''). 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, for the purpose of determining eligibility for licensing in the 24 MHz of spectrum reallocated for public safety services.

5. 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.'' *See Competitive Bidding Second Report and Order*. 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. In the *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). 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 The *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.

C. Framework for Determining Whether Licenses Are Subject to Auction

18. In the *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). We also recognize the potential for band manager licensing of 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.

i. Obligation to Avoid Mutual Exclusivity

19. *Background*. In the *NPRM*, 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. 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. 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. 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). 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.

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. 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. Under these commenters' proposed interpretation, the 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. 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.

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. 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). 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*, 64 FR 45891 (August 23, 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*, 64 FR 33762 (June 24, 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*, 62 FR 41190 (July 31, 1997); 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*, 62 FR 41225 (July 31, 1997). We conclude that the amendment of section 309(j)(1) by 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. 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, 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.'' 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. However, Congress also expressed concern that the Commission not interpret its expanded auction authority in a way that would reduce its section 309(j)(6)(E) obligations. 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, 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.

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. 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. *See* Amendment of the Commission's Rules Regarding Multiple Address Systems, WT Docket No. 97–81, Report and Order, (''*MAS Report and Order*''), 65 FR 17445 (April 3, 2000). 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. 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. If the Commission finds such schemes to be in the public interest, the court states, it may 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.' '' 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. 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.

27. We reject this interpretation of the statute. Prohibiting the Commission from considering 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. 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. *See Second Report and Order*, and 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*, (''*39 GHz Report and Order*''), 63 FR 6079 (February 2, 1998) and 63 FR 3075 (January 21, 1998). At the same time, 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.

ii. License Scope

28. *Background*. In the *NPRM*, 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). 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. 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. 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. 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. The Commission further sought comment on the likely effects of geographic area licensing on incumbent systems and potential new entrants for private radio services.

29. *Discussion*. The Commission has previously concluded with respect to many commercial services that geographic area licensing is a highly efficient licensing scheme. *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*, 62 FR 11616 and 62 FR 11638 (March 12, 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. *See 39 GHz Report and Order. See also 800 MHz Second Report and Order*, 62 FR 41190 (July 31, 1997). 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. As discussed earlier, 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. 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*. 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. 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. 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).

iii. Band Manager Licenses

31. *Background*. In the *NPRM*, we sought comment on whether to establish a new class of licensee called a ''band manager'' in the private radio services. We described band managers in the *NPRM* as a class of Commission licensee that engages in the business of making its spectrum available for use by others through private, written contracts. 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. We inquired whether the concept of a band manager fits within the Commission's overall spectrum management responsibilities and obligations under the Communications Act. We also asked a number of questions about whether and when a band manager licensing approach may be more effective relative to alternative methods of licensing private internal communications services. 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.

32. *Discussion*. As discussed in the following paragraphs, we believe that band manager licensing is a viable mechanism that should be considered for licensing in spectrum allocated for the private services. 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*, 65 FR 69451 and 65 FR 69612 (November 17, 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. The *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 the *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.

33. Since the *NPRM* was adopted, we have implemented a form of band manager licensing for the first time in the *700 MHz Second Report and Order*. 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. We 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. 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. 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.

34. 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. 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. However, we reject the view that band managers are inappropriate for private services generally.

35. 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. 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. 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, with only a fraction of these benefits accruing to the party undertaking the effort.'' 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.

36. 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. 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.

37. 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. 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. 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.

38. Some commenters argue that band manager licensing is an improper delegation of the Commission's spectrum management and licensing authority under the Communications Act. We previously concluded in the 700 MHz guard band proceeding that band manager licensing is fully consistent with our statutory spectrum management obligations. 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. 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. 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.

39. We also reject the view that band manager licensing is inherently inconsistent with the requirements of section 310(d) of the Communications Act. Section 310(d) prohibits the transfer of a radio license or any rights thereunder without Commission approval. Generally speaking, one of the 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. 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,* 48 FR 17081 (April 21, 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,* 59 FR 18493 (April 19, 1994); 47 CFR 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. 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. 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. 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. 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.

40. 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 site-by-site licensing approach in existing private radio services, as many commenters advocate. 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. We will continue to evaluate this issue on an ongoing basis. As many of the commenters who oppose band manager licensing acknowledge, demand for private radio spectrum is increasing and available spectrum is scarce. 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. 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.

41. 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. 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.

42. 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, loss of spectrum efficiency, and inadequacy of user access and service. 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. *See Spectrum Policy Statement.*

43. 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 and warehouse spectrum. We are confident that band managers will have incentives to open the use of the spectrum for all eligible users. Nonetheless, we will consider whether it is appropriate for band managers in other bands to be subject to the same types of rules as 700 MHz Guard Band Managers regarding fair and nondiscriminatory access to the band manager's spectrum, and limits on the type of restrictions that band managers may impose on their customers' use of the spectrum. If circumstances warrant, moreover, the Commission might consider imposing reasonable access standards or other requirements to forestall anticompetitive behavior.

44. 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.

45. 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. 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. *See, e.g.,* 47 CFR 90.35(a) (eligibility for part 90 licenses on Industrial/Business Pool frequencies).

46. We believe that the framework outlined 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 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.

D. Auction Design for Private Radio Spectrum Deemed Subject to Auction

47. 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.

i. Competitive Bidding Methodology and Design

48. *Background.* We have concluded 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. 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. In the *NPRM,* we stated that § 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. We also pointed out that under section 309(j) the Commission has authority to design and test other auction methodologies. 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. 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. In addition, we asked whether certain procedures such as bidding credits and spectrum caps would be appropriate in the private radio services.

49. *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 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. *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 (''Part 1 Third Report and Order),* 63 FR 2315 (January 15, 1998) and 63 FR 770 (January 7, 1998) (modified by *Erratum,* DA 98–419 (rel. Mar. 2, 1998)) (adopting small business bidding credits). *See also* 47 CFR 1.2110 (definition of small business designated entities for purposes of FCC's competitive bidding processes). We further believe that scheduling auctions for licenses in the private services at regular intervals would be particularly beneficial to the private wireless industry because private internal radio service licensees may not be able to wait a significant amount of time to obtain authorizations for the frequencies they need to conduct their businesses. In addition, 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.

ii. Eligibility Requirements

50. *Background.* The *NPRM* solicited comment on a broad range of questions relating to eligibility for participation in spectrum auctions for private radio services. 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.

51. *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.

52. 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. 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).

iii. Processing of New Applications

53. *Background.* In the *NPRM,* 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. 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.

54. *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, 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.

55. 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. *See* 47 CFR 0.131; 0.331. While we defer to 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.

E. Exemption from Competitive Bidding for Public Safety Radio Services

56. The following discussion focuses on the scope of section 309(j)(2)(A)'s exemption for ''public safety radio services,'' and mechanisms that may be used in the event we receive mutually exclusive applications for public safety radio services.

i. Scope of Public Safety Radio Services Exemption

57. *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 *NPRM,* this exemption from the Commission's auction authority is of particular importance to determining the auctionability of wireless spectrum. In the *NPRM,* we sought comment on the various elements of the statutory exemption.

58. *Discussion.* As discussed in greater detail in the following paragraphs, 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.

59. 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, because the dominant use of these bands is not ''public safety'' use as defined by section 309(j)(2)(A). *See* 47 CFR 90.311(a)(1) (permitting a wide variety of users in the 470–512 MHz band, including Business Radio Service eligibles). 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.

60. 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.'' 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. 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. 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.

61. *Private Internal Radio Services.* The statutory public safety exemption includes ''private internal radio services'' used for public safety purposes. In the *NPRM,* 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). The commenters broadly support adopting the part 90 definition for 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.

62. 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. 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. 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.

63. *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.'' In the *NPRM,* 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. 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. *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,* 63 FR 58645 and 63 FR 58685 (November 2, 1998). 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. Commenters addressing this issue agree that the Commission should presume eligibility for state and local government entities. Consequently, we 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.

64. *Non-government Entities.* In the *NPRM,* 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. Most commenters addressing this issue oppose the imposition of eligibility restrictions, such as

governmental approval requirements. 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. 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.

65. 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.'' 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.'' 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.

66. *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.

67. 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. 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.

68. 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 *NPRM,* we tentatively concluded that Congress intended to include those users of spectrum currently allocated for traditional public safety uses. Specifically, we proposed to designate the following spectrum as exempt from assignment by competitive bidding procedures:

a. Private Land Mobile Radio Services currently assigned to the Public Safety Radio Pool. This pool is comprised of those services formerly housed in the Public Safety Radio Services and the Special Emergency Radio Services. *See* 47 CFR 90.16. The Public Safety Radio Services included the Local Government, Police, Fire, Highway Maintenance, Forestry-Conservation, and Emergency Medical Radio Services. *See* 47 CFR part 90, subpart B, Note, former § 90.15 (1997). *See* 47 CFR 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 CFR part 90, subpart C, Note, former § 90.33 (1997).

b. Public safety spectrum in the 700 MHz band.

c. The ten 220 MHz band non-nationwide channel pairs allocated for the exclusive use of Public Safety eligibles.

d. The two contiguous channel pairs in each of the thirty-three inland VHF Public Coast areas set aside for public safety users. *See,* Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order,* PR Docket No. 92–257, 63 FR 40059 (July 27, 1998).

We now conclude that the portions of spectrum listed 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 fall within the exemption.

69. 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 used by ''utilities, railroads, metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments.'' 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 of which are by entities that use their communications systems to perform such public safety services, should be exempt from auction.

70. 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. 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.'' 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.'' 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. 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, PR Docket No. 92–235, *Second Memorandum Opinion and Order, (''Refarming Second MO&O'')* 64 FR 36258 (July 6, 1999). The *Refarming Second MO&O* is currently on reconsideration, and has been 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,* 64 FR 50466 (September 17, 1999), (''*Refarming Fourth MO&O*'').

71. 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. 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.

72. 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.

73. 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. 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. As a general matter, we agree with 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.

74. 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. 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. 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.

75. 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 and 900 MHz band, and the private land mobile radio frequencies in the 470–512 MHz 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, 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.

76. *Noncommercial Proviso.* The public safety radio services exemption requires that the radio services not be made commercially available to the public. We sought comment on how the term ''not made commercially available to the public'' should be defined. 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,'' which we believe is inherent to ''commercial'' use, as including any service that is provided with the intent of receiving monetary gain. In the Matter of Implementation of sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93–252, *Second Report and Order, (CMRS Second R &O)* 59 FR 18493 (April 19, 1994). 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. 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.'' 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. *See CMRS Second R&O.* 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. *See* 47 CFR 90.31. We shall apply a definition of ''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.

77. In the *NPRM,* 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. 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. 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. We agree with commenters that including commercial third-party providers within the exemption would enlarge it beyond all limits of reasonableness. Thus, we believe that creating an opportunity for commercial operators to obtain public safety radio service spectrum would contravene congressional intent.

78. *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. 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. By contrast, the auction exemption under section 309(j)(2) contains no such restriction.

79. 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. 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.

80. *Eligibility Requirements.* In the *NPRM,* 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). 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.

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

ii. Resolution of Mutually Exclusive Applications for Services Exempt From Competitive Bidding

82. *Background.* In the *NPRM,* we requested comment on how to resolve mutual exclusivity between applications for spectrum exempt from competitive bidding. 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. 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.

83. *Discussion.* 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.

F. Proposals Regarding Private Land Mobile Radio Services

84. 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. The *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.

i. Licensing of ''Refarming'' Bands

85. *Background.* In the *NPRM,* 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. We noted that the current licensing scheme for these frequencies came out of the lengthy ''Refarming'' proceeding, in which the Commission, *inter alia,* consolidated the twenty PLMR services into two broad frequency pools, and implemented procedures that will result in the transition to more spectrally efficient, narrowband technologies by requiring that future equipment meet increasingly efficient standards.

86. *Discussion.* The commenters were nearly uniform in their opposition to the introduction of geographic area licensing in the Refarming bands. 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. We note that the refarmed bands below 470 MHz are currently licensed on a shared, rather than exclusive, basis. *See* 47 CFR 90.173(a). 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.

87. 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. In addition, 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.

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

88. *Background.* In the *NPRM,* we requested comment on a rulemaking petition submitted by UTC, The Telecommunications Association (''UTC''), the American Petroleum Institute (''API''), and the Association of American Railroads (''AAR'') (jointly referred to as the ''Critical Infrastructure Industries'' or ''CII''). UTC represents electric, gas, water, and steam utilities, and natural gas pipelines. API represents companies in all phases of the petroleum and natural gas industries. AAR represents railroads operating in the United States, Canada, and Mexico. 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. For the reasons set forth in the following paragraphs, we find that a third pool is not called for at this time, and we deny the petition for rule making.

89. *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. 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*. 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. The CII further state that the Public 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.

90. 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. 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. 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.

91. 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. 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. 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.

92. 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 the CII is not necessary. 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. We believe that the issue of how to protect these services from interference is more appropriately addressed there.

93. 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. 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. 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. 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.

94. Accordingly, for all the reasons stated, 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.

iii. AMTA Proposal To Restructure Licensing Framework for PLMR Services in the 450–470 MHz Band

95. *Background.* On July 30, 1999, after we released the *NPRM,* 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. 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. *See* 47 CFR 90.173(a), 90.175. The frequencies are divided between the Public Safety Radio Pool (8 MHz) and the Industrial/Business (I/B) Radio Pool (12 MHz). *See* 47 CFR 90.20(c)(3), 90.35(b)(3).

96. 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). Five of the twenty licenses would be set aside for private, internal systems, leaving the remaining fifteen available for either internal or commercial systems. 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. The petition was placed on Public Notice on August 24, 1999. We believe that it is appropriate to consider these proposals as part of the instant proceeding.

97. *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. First, as we stated 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. In addition, we note that many commenters were concerned by the AMTA proposal's effect on incumbent operations. 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. We therefore deny AMTA's petition. This decision does not, however, preclude us from deciding in the future that some alternative approach is warranted.

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

98. *Background.* In the *NPRM,* 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. 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. Subsequently, the Wireless Telecommunications Bureau (Bureau) granted Nextel's request in part and denied in part. 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. 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. 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. 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.

99. *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 because such voluntary transactions, wherein the licensee is willing to forgo use of the spectrum for the consideration offered by the other party, result in the most economically efficient use of the spectrum. 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. 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. *See* 47 CFR 90.617. 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.

100. 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. Moreover, unlike the Bureau's decision in the *Nextel Order*, we will not require that any portion of the channels transferred or assigned to CMRS licensees be used to relocate upper 200 channel incumbents. We are not persuaded that we should require the relocation of upper 200 channel incumbents as a condition of approving the transaction. That the spectrum at issue would be used predominantly for relocation purposes was important to the Bureau's public interest analysis of Nextel's waiver request. 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.

101. 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.

102. 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. They note that the Commission's purpose in eliminating intercategory sharing of non-SMR spectrum by SMR applicants was to stop encroachment on PLMR frequencies by commercial SMR licensees and eligibles, and argue that allowing CMRS use of 800 MHz PLMR spectrum would further exacerbate the current shortage of private spectrum. *See* Amendment of Part 90 of the Communications Act Regulatory Treatment of Mobile Services, PR Docket 93–144, *First Report and Order, Eighth Report and Order and Second Further Notice of Proposed Rulemaking*, 61 FR 6138 and 61 FR 6212 (February 16, 1996); *See* 47 CFR 90.621(e). In 1997, the Commission affirmed its decision to eliminate intercategory sharing by SMR eligibles. *See Memorandum Opinion and Order on Reconsideration*. We do not find these concerns persuasive. These objections seem to envision a scenario in which current PLMR licensees voluntarily surrender their rights to frequencies they are not using or are using inefficiently and these frequencies are then returned to the PLMR pool so as to be available for licensing to other private users. It has been our experience, however, that licensees do not in any large measure turn back to the Commission PLMR frequencies they no longer need or are using inefficiently; rather, they continue to hold the spectrum. Consequently, we believe that allowing licensees to modify their licenses for CMRS use or assign or transfer these frequencies to CMRS entities will not materially affect the supply of available spectrum for licensing from the PLMR pool.

103. However, we deny Nextel's proposal to eliminate the distinction between CMRS spectrum and non-Public Safety PLMR spectrum with respect to initial licensing. We believe that the existing PLMR pool of

unassigned frequencies should remain available on an initial basis to PLMR eligibles only, to construct new systems or expand existing systems. Therefore, we maintain the eligibility criteria for all new applications.

104. 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). We will thus 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 for one year. 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 CFR 90.609(c).

105. 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. *See Competitive Bidding Fifth Report and Order* (explaining that a holding period would be imposed to avoid sham arrangements with broadband PCS licenses). 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. *See* 47 CFR 1.2111(b)(1). 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. *See* 47 CFR 90.629. 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.

106. 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 the *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 the *Report and Order*, no speculative incentive to acquire Business and I/LT frequencies can be inferred.

107. We are confident that the rules adopted herein, coupled with existing requirements in our rules, 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. 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. *See* 47 CFR 90.155. Moreover, § 90.609 requires complete construction of the radio facility prior to any transfer or assignment. *See* 47 CFR 90.609. Additionally, § 90.157 provides that a license will cancel automatically if there is discontinuance of station operation for twelve months or more. *See* 47 CFR 90.157. We note that neither the one-year moratorium nor the five-year holding requirement is applicable to PLMR-to-PLMR assignments and/or transfers.

108. 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 interference to such public safety licensees. *See also* 47 CFR 90.173(b), 90.403(e) (requiring licensees to undertake precautions to avoid harmful interference). We believe that these actions together will reduce the risk of increased interference in this band.

109. 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. 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.

v. Revision of Part 90 Multiple Licensing Rules

110. *Background.* In the *NPRM*, 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. 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. *See* 47 CFR 90.185.

111. 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. 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. The Commission does not usually regulate this third party's activity and the third party is not licensed by the Commission. Multiple licensing has been a widespread practice in the land mobile services since the 1960s.

112. *Discussion.* We agree 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. A commenter 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.

113. In addition, given the light response to our request for comment on whether to modify the multiple licensing rules, we will not eliminate 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. Thus, we will continue to closely monitor multiple-licensed systems and judge their validity on a case-by-case basis.

G. Section 337 Licensing for Public Safety Services

114. *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.''

115. 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.

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

117. In the *NPRM*, 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. Since enactment of the statute, we have issued several decisions on section 337 applications.

118. *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. 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.'' All five statutory criteria must be satisfied to receive authorization based on a section 337 request.

119. 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,'' several section 337 applicants apparently have interpreted this provision as only requiring a showing that no public safety frequencies are currently available in the same band as the frequencies being requested. 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.

120. With regard to the statutory requirement that ''granting such application is consistent with the public interest,'' 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. 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).

121. 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. 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. 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.

122. 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. 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). 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.

123. Finally, we take this opportunity to 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, and applicants will need to register their Taxpayer Identification Number or Employer Identification Number. Additionally, antennas that require registration must be registered prior to filing the request.

H. Final Regulatory Flexibility Analysis

124. As required by the Regulatory Flexibility Act (''RFA''), an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the *NPRM* in WT Docket 99–87. *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*, 64 FR 28130 (May 25, 1999). The Commission sought written public comment on the issues and proposals in the *NPRM*, including comment on the IRFA. The comments received are discussed. This Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA. *See* 5 U.S.C. 604.

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

125. The *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 the *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 the *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. *See* 47 U.S.C. 309(j)(3)(B); *see also* 47 U.S.C. 257.

126. 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.

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

127. 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. *See* 5 U.S.C. 603(b)(3). Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. *See* 5 U.S.C. 601(6). The RFA generally defines the term ''small business'' as having the same meaning as the term ''small business concern'' under the Small Business Act. *Compare* 5 U.S.C. 601(3) (RFA) *with* 15 U.S.C. 632 (SBA). 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. *See* Small Business Act, 5 U.S.C. 632 (1996). A small organization is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). Nationwide, as of 1992, there were approximately 275,801 small organizations.

128. The rule changes effectuated by the *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.

129. *Public Safety radio services and Governmental entities.* Public Safety radio services include police, fire, local governments, forestry conservation, highway maintenance, and emergency medical services. With the exception of the special emergency service, these services are governed by subpart B of part 90 of the Commission's rules. *See*

47 CFR 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. *See* 47 CFR 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. *See* 47 CFR 90.33 through 90.55. The SBA rules contain a definition for small radiotelephone (wireless) companies, which encompasses business entities engaged in radiotelephone communications employing no more that 1,500 persons. *See* 13 CFR 121.201 (SIC Code 4812). 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. ''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.'' As of 1992, there were approximately 85,006 such jurisdictions in the United States. This number includes 38,978 counties, cities and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000. 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.

130. *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.

131. *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. *See* 13 CFR 121.201 (SIC Code 4812). Included in this definition are business entities engaged in radiotelephone communications employing no more that 1,500 persons. 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.

132. *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. *See* 13 CFR 121.201, Standard Industrial Code (SIC) 3663. 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.

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

133. The *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. The *Report and Order* also imposes new compliance requirements for part 90 PLMR licensees seeking to modify their licenses to for use in CMRS systems.

134. 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 lisense 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.

135. 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.

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

136. 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. *See* 5 U.S.C. 603(c).

137. The part 1 rule adopted in the *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.

138. The part 90 regulations amended by this 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 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.

139. *Report to Congress:* The Commission will send a copy of the *Report and Order,* including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. *See* 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the *Report and Order,* including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the **Federal Register**. *See* 5 U.S.C. 604(b).

140. 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, Public Law 105–33, Title III, 111 Stat. 251 (1997), and §§ 1.421 and 1.425 of the Commission's Rules, 47 CFR 1.421 and 1.425, it is ordered that the *Report and Order* is hereby adopted.

141. 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 § 1.425 of the Commission's Rules, 47 CFR 1.425, the Petition for Rulemaking filed by the American Mobile Telecommunications Association, Inc. on July 30, 1999 (RM–9705) is denied.

142. 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.

143. It is further ordered that parts 1 and 90 of the Commission's Rules are amended as set forth, and that these rules shall be effective March 5, 2001, except § 90.621 which contains information collection requirement that has not been approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for this section.

144. It is further ordered that the Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of the *Report and Order,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the U.S. Small Business Administration.

List of Subjects in 47 CFR Parts 1 and 90

Radio, Reporting and recordkeeping requirements.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications

Commission amends 47 CFR parts 1 and 90 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

2. Section 1.913 is amended by adding paragraph (g) to read as follows:

§ 1.913 Application forms; electronic 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).

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

3. The authority citation for part 90 continues to read as follows:

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

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

§ 90.179 Shared use of radio 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).

5. 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 chapter, 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 chapter, 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 chapter.

(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), 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) of this section, 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), 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 section, 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.

* * * * *

[FR Doc. 01–40 Filed 12–29–00; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[I.D. 121200G]

Atlantic Highly Migratory Species (HMS) Fisheries; Pelagic Shark Species

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

ACTION: Commercial fishing quota notification.

SUMMARY: NMFS notifies eligible participants of commercial quotas for pelagic shark species for the 2001 fishing year. These quotas are consistent with the regulations issued in May 1999 to implement the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks.

DATES: The fishery opening for pelagic sharks is January 1, 2001.

FOR FURTHER INFORMATION CONTACT: Margo Schulze-Haugen or Karyl Brewster-Geisz, 301-713-2347; fax 301-713-1917.

SUPPLEMENTARY INFORMATION: The Atlantic shark fishery is managed under the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (HMS FMP), and its implementing regulations are found at 50 CFR part 635 issued under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

On June 30, 1999, in the course of a lawsuit brought by commercial shark fishermen and dealers, NMFS was enjoined from enforcing the 1999 regulations, 64 FR 29090 (May 28, 1999), regarding Atlantic shark commercial catch quotas and fish-counting methods (including the counting of dead discards and state commercial landings after Federal closures) that are different from the quotas and fish-counting methods prescribed by the 1997 Atlantic shark regulations, 62 FR 16648 (April 7, 1997). On November 22, 2000, NMFS and the Plaintiffs signed a settlement agreement.