

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule 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).

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 15, 2002. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2) of the Act.)

#### List of Subjects in Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, and Reporting and recordkeeping requirements.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: May 3, 2002.

**David A. Ullrich,**

*Acting Regional Administrator, Region 5.*

40 CFR part 70 is amended as follows:

#### PART 70—[AMENDED]

1. The authority citation for part 70 continues to read as follows:

**Authority:** 42 U.S.C. sections 7401 *et seq.*

2. Appendix A to part 70 is amended by adding paragraph (c) in the entry for Indiana to read as follows:

#### Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

\* \* \* \* \*

#### Indiana

(a) \* \* \*

(b) \* \* \*

(c) The Indiana Department of Environmental Management: program revisions submitted on February 7, 2002. These revisions are hereby granted final approval effective June 17, 2002.

\* \* \* \* \*

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**BILLING CODE 6560-50-P**

#### FEDERAL COMMUNICATIONS COMMISSION

#### 47 CFR Parts 1 and 90

[WT Docket No. 99-87; FCC 02-82]

#### Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Commission addresses petitions for reconsideration and related pleadings regarding certain decisions in this proceeding. It affirms its earlier decisions, and revises certain rules concerning its statutory auction authority and the licensing of private land mobile channels in the 800 MHz band for use in commercial systems. This action by the Commission implements the Communication Act of 1934 as amended by Congress.

**DATES:** Effective July 15, 2002.

**FOR FURTHER INFORMATION:** Karen Franklin of the Public Safety and Private Wireless Division at (202) 418-0680, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Federal Communications Commission's Memorandum Opinion and Order, FCC 02-82, adopted on March 14, 2002, and released on April 18, 2002. The full text of this Memorandum Opinion 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 20554. The complete text may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW., Room CY-B402, Washington, DC 20554. The full text may also be downloaded at: [www.fcc.gov](http://www.fcc.gov). Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418-7426 or TTY (202) 418-7365.

1. In the *Report and Order and Further Notice of Proposed Rule Making* ("R&O" and "FNPRM"), 66 FR 86,

January 2, 2001, in this proceeding, the Commission adopted rules and policies to implement Sections 309(j) and 337 of the Communications Act of 1934, as amended by the Balanced Budget Act of 1997. This *Memorandum Opinion and Order* ("MO&O") addresses petitions for reconsideration and related pleadings regarding certain of our decisions in the *R&O*.

2. The major decisions in this *MO&O* are as follows:

- The Commission affirms 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.

- Commission reiterates that the public safety radio services exemption in Section 309(j) applies to services, rather than specific users. Moreover, we affirm the dominant use test set forth in the *R&O* as the means to determine whether the particular service qualifies for the public safety radio services exemption. We also retain and clarify the definition for "private internal radio service" set forth in the *R&O*.

- The Commission retains the five-year holding period as a requirement for modification of an 800 MHz PLMRS authorization to permit commercial use.

- The Commission affirms the decision in the *R&O* that an applicant must demonstrate that there is no public safety spectrum available to satisfy the public safety service use before it can be granted a waiver pursuant to Section 337.

- The Commission reiterates whether a Section 337 application is in the public interest will be determined on a case-by-case examination of various factors, including the stage of the competitive bidding process with respect to the requested frequencies.

3. The *MO&O* also updates § 1.227 of the Commission's Rules, regarding mutually exclusive applications, to reflect that the Commission no longer utilizes random selection processes to resolve such conflicts, and has indicated that it will rely on existing regulatory tools to resolve rare instances of mutually exclusive applications in services that are not subject to competitive bidding. Finally, it revises § 90.621 permitting modification, assignment or transfer of private land mobile radio licenses for commercial use, to require such applications to be filed in accordance with the rules and procedures for commercial stations, and to clarify that a licensee that has modified its authorization for use in a

commercial operation, or a commercial operator that acquired PLMR channels via assignment or transfer, may at anytime submit a modification application to indicate that the subject frequencies will be used in a PLMR system, provided that the licensee meets the applicable eligibility requirements.

## I. Procedural Matters

### A. Final Regulatory Flexibility Act Analysis

4. As required by the Regulatory Flexibility Act (RFA), see 5 U.S.C. 604, the Commission has prepared a Supplemental Regulatory Flexibility Analysis of the possible impact of the rule changes contained in this *Memorandum Opinion and Order* on small entities. The Supplemental Regulatory Flexibility Analysis is set forth in paragraph six. The Commission's Consumer Information Bureau, Reference Information Center, will send a copy of this *Memorandum Opinion and Order*, including the Supplemental Final Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

### B. Paperwork Reduction Act of 1995 Analysis

5. This *Memorandum Opinion and Order* does not contain any new or modified information collection. Therefore, it is not subject to the requirements for a paperwork reduction analysis, and the Commission has not performed one.

### C. Further Information

6. For further information concerning this *Memorandum Opinion and Order*, contact Karen Franklin of the Public Safety and Private Wireless Division at (202) 418-0680, TTY (202) 418-7233, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554. Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities by contacting Jenifer Simpson at (202) 418-0008, TTY (202) 418-2555. This *Memorandum Opinion and Order* can be downloaded at <http://www.fcc.gov/Wireless/Orders/2001>.

## II. Supplemental Final Regulatory Flexibility Analysis

7. As required by the Regulatory Flexibility Act (RFA), Initial Regulatory Flexibility Analyses (IRFA) were incorporated in the Notice of Proposed Rule Making (NPRM) and Report and Order and Further Notice of Proposed Rule Making (R&O and FNPRM) in WT Docket 99-87. The Commission sought

written public comment on the proposals in the Notice and R&O and FNPRM. This Supplemental Final Regulatory Flexibility Analysis (SFRFA) contained in this Memorandum Opinion and Order (MO&O) is limited to matters raised on reconsideration or clarification with regard to the R&O and FNPRM and addressed in this MO&O. This SFRFA conforms to the RFA.

## I. Reason for, and Objectives of, the Memorandum Opinion and Order

8. This proceeding was initiated to secure public comment on proposals 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"). 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.

## III. Summary of Significant Issues Raised by Public Comments in Response to the Previous Final Regulatory Flexibility Analysis

9. No reconsideration petitions/comments were filed in direct response to the previous Final Regulatory Flexibility Analysis (FRFA). However, the Commission has reviewed general comments that may impact small businesses. The *Report and Order* in this proceeding determined that the statutory changes in Section 309(j)(1) and exemptions in Section 309(j)(2) are considered in light of the Commission's 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). The Commission also concluded 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. The Commission concluded 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. In the *Report and Order*, the Commission determined 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. Further,

the Commission decided that subject to certain safeguards, 800 MHz Business and Industrial/Land Transportation licensees should be allowed to modify their licenses to permit commercial use, or to assign or transfer their licenses to Commercial Mobile Radio Service (CMRS) operators for commercial use. The *Report and Order* provided 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. Moreover, the Commission concluded that it would consider the state of the competitive bidding process when the Section 337 application is received as relevant to our determination of whether grant of the waiver request and the associated application(s) is in the public interest.

10. In this *Memorandum Opinion and Order*, we affirm the Commission's determinations. Moreover, we modify the Commission's Rules to require Section 337 applicants to enter the service code applicable to the type of service they intend to provide. We also note that despite the type of service code used, the Section 337 applicant will be required to meet the interference protection standards in our rules that are applicable to the subject spectrum in order to satisfy Section 337(c)(1)(B). Additionally, we modify our rules to require that applications filed to modify 800 MHz Private Land Mobile Radio (PLMR) channels for use in CMRS systems be processed in accordance with CMRS rules and procedures instead of PLMR rules and procedures. In that connection, we clarify that a licensee that has modified its authorization for use in a CMRS operation, or a CMRS operator that acquired PLMR channels via assignment or transfer, may at any time submit a modification application to indicate that the subject frequencies will be used in a PLMR system, provided that the licensee meets the applicable eligibility requirements.

## IV. Description and Estimate of the Number of Small Entities to Which the Rules Apply

11. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the

Small Business Act. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. Nationwide, as of 1992, there were approximately 275,801 small organizations.

12. The rule changes effectuated by this *Memorandum Opinion and Order* apply to licensees who provide public safety services pursuant to Section 337 of the Communications Act of 1934, as amended (the Act), and private land mobile radio licensees in the 800 MHz band that are regulated under Part 90 of the Commission's Rules.

#### *Estimates for PLMR Licensees*

13. Private land mobile radio systems serve an essential role in a vast range of industrial business, land transportation and public service activities. These radios are used by companies of all sizes that operate in all U.S. business categories. Because of the vast array of PLMR users, the Commission had not developed, nor would it be possible to develop, a definition of small entities specifically applicable to PLMR users. For the purpose of determining whether a licensee is a small business as defined by the Small Business Administration (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 1,087,276 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Further, because any entity engaged in a commercial activity is eligible to hold a PLMR license, these rules could potentially impact every small business in the U.S.

#### *Estimates for Public Safety Radio Services and Governmental Entities*

14. Public Safety radio services include police, fire, local governments, forestry conservation, highway maintenance, and emergency medical services. The SBA rules contain a definition for small radiotelephone (wireless) companies, which encompasses business entities engaged in radiotelephone communications employing no more than 1,500 persons. 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.

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

15. This *MO&O* makes two minor revisions to the compliance requirements in Parts 1 and 90 of the Commission's Rules to conform to the application and licensing procedures in the private land mobile and public safety radio services with the policies described in the *MO&O*. One of the amendments requires processing of modification applications submitted to convert the use of 800 MHz PLMR channels to use in a CMRS operation in accordance with our CMRS rules and procedures. The other amendment to our rules requires a Section 337 applicant to enter the service code applicable to the type of service the applicant intends to provide.

#### **VI. Steps Taken To Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered**

16. 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.

17. The Part 1 rule adopted in this *MO&O* clarifies our policies with respect to the processing of applications for licenses in the public safety radio services under Section 337 of the Act. The revision to Part 1 of the Commission's Rules provides guidance toward accurate completion of FCC

Form 601. This form requires the applicant to provide a service code. Although we did consider allowing a Section 337 applicant to enter a service code commensurate with the frequency allocation, other applicants, frequency coordinators or other licensees would not know the type of service provided on the subject frequency. Moreover, we observe that selection of a service code is not a unique requirement for small business, Section 337 applicants; nor does selection of one service code instead of another service code impose an additional economic burden.

18. The Part 90 regulation amended by this *MO&O* designates the rules governing CMRS operations as the rules by which applications submitted to convert the use of PLMR channels to use in CMRS operations will be processed rather than the rules governing Industrial/Land Transportation and Business channels. While a small business, 800 MHz PLMR licensee who chooses to convert use of its frequencies and operate a CMRS system may have to familiarize itself with the CMRS rules, it is incumbent upon this agency, *inter alia*, to make such regulations as it may deem necessary to prevent interference between stations. For instance, use of PLMR channels in CMRS operations must comply with the interference and technical requirements that govern CMRS operations to ensure harmful interference to existing licensees is avoided. Similarly, use of PLMR channels in CMRS operations must comply with the power limitations and other operational requirements imposed upon other CMRS operators to protect licensees from harmful interference.

*Report to Congress:* The Commission will send a copy of this *Memorandum Opinion and Order*, including this Supplemental 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 *Memorandum Opinion and Order*, including Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Memorandum Opinion and Order* and Supplemental FRFA (or summaries thereof) will also be published in the **Federal Register**. *See* 5 U.S.C. 604(b).

#### **VII. Ordering Clauses**

19. 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, that the *Memorandum Opinion and Order* is hereby ADOPTED.

20. Parts 1 and 90 of the Commission's Rules ARE AMENDED as set forth in Rule Changes, and that these Rules shall be effective July 15, 2002.

21. The Petitions for Reconsideration submitted by the following parties are DENIED: AllCom, LLC; American Automobile Association; Association of Public-Safety Communications Officials-International; Central Station Alarm Association; Cinergy Corporation; Commonwealth Edison Company; Consolidated Edison Company of New York; Entergy Corporation; Kansas City Power & Light Company; Omaha Public Power District; SCANA; Union Electric Company and Central Illinois Public Service Company and Ameren Energy Generating Company; United Telecom Council; and Xcel Energy, Inc.

22. The Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order*, including the Supplemental Regulatory Flexibility Analysis and Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the U.S. Small Business Administration.

23. The Motion to Accept Supplemental Comments submitted by Industrial Telecommunications Association, Inc. is GRANTED.

**List of Subjects**

*47 CFR Part 1*

Administrative practice and procedure, Radio.

*47 CFR Part 90*

Communications equipment, Radio, Reporting, Recordkeeping requirements. Federal Communications Commission.

**Marlene H. Dortch,**  
*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**

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).

1. Section 1.227 is amended by revising paragraphs (b)(3)(ii) and (b)(4) to read as follows:

**§ 1.227 Consolidations.**

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(ii) *Domestic public fixed and public mobile.* See Rule § 21.31 of this chapter for the requirements as to mutually exclusive applications. See also Rule § 21.23 of this chapter for the requirements as to amendments of applications.

\* \* \* \* \*

(4) This paragraph applies when mutually exclusive applications subject to section 309(b) of the Communications Act and not subject to competitive bidding procedures pursuant to § 1.2102 of this chapter are filed in the Private Radio Services, or when there are more such applications for initial licenses than can be accommodated on available frequencies. Except for applications filed under part 101, subparts H and O, Private Operational Fixed Microwave Service, and applications for high seas public coast stations (see §§ 80.122(b)(1) (first sentence), 80.357, 80.361, 80.363(a)(2), 80.371(a), (b), and (d), and 80.374 of this chapter), mutual exclusivity will occur if the later application or applications are received by the Commission's offices in Gettysburg, PA (or Pittsburgh, PA for applications requiring the fees set forth at part 1, subpart G of the rules) in a condition acceptable for filing within 30 days after the release date of public notice listing the first prior filed application (with which subsequent applications are in conflict) as having been accepted for filing or within such other period as specified by the Commission. For applications in the Private Operational Fixed Microwave Service, mutual exclusivity will occur if two or more acceptable applications that are in conflict are filed on the same day. Applications for high seas public coast stations will be processed on a first come, first served basis, with the first acceptable application cutting off the filing rights of subsequent, conflicting applications. Applications for high seas public coast stations received on the same day will be treated as simultaneously filed and, if granting more than one would result in harmful interference, must be resolved through settlement or technical amendment.

\* \* \* \* \*

2. Section 1.913 is amended by revising 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), except that applicants must select the service code reflective of the type of service the applicant intends to provide.

**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 90.621 is amended by revising paragraph (e)(2) introductory text and adding paragraph (e)(3) to read as follows:

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

\* \* \* \* \*

(e) \* \* \*

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

\* \* \* \* \*

(3) Licensees granted authorizations pursuant to paragraph (e)(2) of this section may at any time request modification of the license to authorize use of the channels consistent with the rules governing the category to which they are allocated, provided that the licensee meets the applicable eligibility requirements.

\* \* \* \* \*

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