FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 20 and 22

[WT Docket No. 01–14; FCC 01–328]

2000 Biennial Regulatory Review—Spectrum Aggregation Limits for Commercial Mobile Radio Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document completes the Commission's reexamination of the need for the Commercial Mobile Radio Service (CMRS) spectrum aggregation limit, or ''spectrum cap,'' and cellular cross-interest rules as part of its 2000 biennial review of the Commission's regulations, pursuant to section 11 of the Communications Act of 1934, as amended (Communications Act). The intended effects of this action are to ''sunset'' the spectrum cap rule effective January 1, 2003; permit the Commission to consider, in conjunction with the United States Department of Justice (DOJ), substantive and processing guidelines for the Commission's case-by-case review of transactions that would raise concerns similar to those that the spectrum cap was designed to address; raise the spectrum cap to 55 MHz in all markets during the transition period; and eliminate the cellular cross-interest rule in Metropolitan Statistical Areas (MSAs), while retaining it in Rural Service Areas (RSAs).

DATES: Effective February 13, 2002.

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SUPPLEMENTARY INFORMATION: This *Report and Order* (''*R&O*'') in WT Docket No. 01–14, FCC 01–328, adopted November 8, 2001, and released December 18, 2001, is available for inspection and copying during normal business hours in the FCC Reference Information Center, 445 Twelfth Street, S.W., Room CY–A257, Washington, DC 20554. The complete text may be purchased from the Commission's duplicating contractor, Qualex International, 445 Twelfth Street, S.W., Room CY–B402, Washington, DC 20554, (202) 863–2893. The complete text is also available under the file name fcc01328.doc on the Commission's Internet site at *www.fcc.gov.*

Synopsis of Order

I. Background

A. CMRS Spectrum Cap

1. *CMRS Spectrum Aggregation Limit.* The CMRS spectrum cap provides that ''[n]o licensee in the broadband PCS, cellular, or SMR services (including all parties under common control) regulated as CMRS * * * shall have an attributable interest in a total of more than 45 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any geographic area, except that in Rural Service Areas (RSAs), * * * no licensee shall have an attributable interest in a total of more than 55 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any RSA.'' 47 CFR 20.6(a). Determining whether a ''significant overlap'' exists is necessary because of the use of different licensing and service areas for cellular, broadband Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) spectrum. When a PCS license and a cellular or SMR license are involved, a significant overlap exists when ten percent or more of the population of the designated PCS licensed service area is within the Cellular Geographic Service Area (CGSA) or SMR service area(s) in question.

2. *History of the CMRS Spectrum Cap.* The CMRS spectrum cap was established in 1994, in anticipation of PCS licensing, and in recognition that direct competition was likely to develop among cellular, broadband PCS, and SMR. Previously, the Commission had imposed service-specific limitations on the aggregation of broadband PCS spectrum and on cellular/PCS cross-ownership. In adopting the CMRS spectrum cap to complement these latter two rules, the Commission found that an overall cap applicable to cellular, broadband PCS, and SMR spectrum would add certainty to the marketplace without sacrificing the benefits of pro-competitive and efficiency-enhancing aggregation. The Commission explained that, if licensees were to aggregate sufficient amounts of CMRS spectrum, it would be possible for them, unilaterally or in combination, to exclude efficient competitors, to reduce the quantity or quality of services provided, or to increase prices to the detriment of consumers. The Commission determined that the imposition of a cap on the amount of covered spectrum that a single entity could control in any one geographic area would limit the ability of any entity to increase prices artificially. The Commission also found that a cap on broadband PCS, SMR, and cellular spectrum holdings would prevent licensees from artificially withholding capacity from the marketplace. The Commission concluded that a 45 MHz cap provided a ''minimally intrusive means'' for ensuring that the mobile communications marketplace remained competitive and preserved incentives for efficiency and innovation. *Third Report and Order* (59 FR 59945, November 21, 1994).

3. In 1996, in light of the U.S. Court of Appeals for the Sixth *Circuit's ruling in Cincinnati Bell Telephone Co.* v. *FCC* (69 F.3d 752 (6th Cir. 1995)) remanding the cellular/PCS cross-ownership restriction, the Commission eliminated the service-specific limitations on the aggregation of broadband PCS spectrum and on cellular/PCS cross-ownership, and decided to rely solely on the 45 MHz CMRS spectrum cap to ensure that multiple service providers would be able to obtain broadband PCS spectrum and thereby facilitate the development of competitive markets for wireless services. The Commission analyzed potential market concentration and again found that a 45 MHz spectrum cap was sufficient ''to avoid excessive concentration of licenses and promote and preserve competition'' while ''maintaining incentives for innovation and efficiency.''

4. In the *First Biennial Review Order* (''*First Biennial Review Order*'') (64 FR 54564, October 7, 1999), the Commission decided substantially to retain the CMRS spectrum cap, together with the cellular cross-interest rule, but ordered modifications to reflect circumstances in rural areas and to permit passive institutional investors to acquire greater non-attributable interests in CMRS carriers. The Commission concluded that the spectrum cap remained a simple and effective means of mitigating the competitive consequences of the spectrum-related barriers to entry in CMRS markets, and found that the 45 MHz limit struck the proper balance (in non-rural areas) between preserving opportunities for competitive entry and permitting carriers to achieve economies of scope and scale. The Commission did, however, raise the cap to 55 MHz in RSAs. This decision was based on findings that the potential consumer benefits in rural areas from competitive, facilities-based entry were likely to be limited by the economics of offering service to lower-density populations. The Commission also amended the spectrum cap rule to provide that equity interests of up to forty percent held by

passive institutional investors are not attributable. At the same time, the Commission adopted a waiver process to meet the spectrum requirements for third-generation (3G) and other advanced wireless services until additional spectrum for next generation applications could be allocated.

B. Cellular Cross-Interest Rule

5. *Cellular Cross-Interest Rule.* Section 22.942 of the Commission's rules limits the ability of parties to have interests in cellular carriers on different channel blocks in a single geographic area. 47 CFR 22.942. To the extent licensees on different channel blocks have any degree of overlap between their respective CGSAs, the rule prohibits any entity with an attributable interest in one licensee from having a direct or indirect ownership interest of more than five percent in the other licensee. An attributable interest is defined generally to include an ownership interest of twenty percent or more, as well as any controlling interest. However, an entity may have non-controlling and otherwise non-attributable direct or indirect ownership interests of less than twenty percent in licensees for different channel blocks in overlapping CGSAs. Divestiture of interests as a result of a transfer of control or assignment of authorization must occur prior to consummating the transfer or assignment.

6. *History of the Cellular Cross-Interest Rule.* The cellular cross-interest rule was adopted in 1991, when cellular licensees were the predominant providers of mobile voice services. In adopting this rule, the Commission stated that ''in a service area where only two cellular carriers are licensed per market, the licensee on one frequency block in a market should not own an interest in the other frequency block licensee in the same market.'' Thus, the Commission adopted restrictions on a party's ability to hold ownership interests in both cellular licensees in the same geographic area ''[i]n order to guarantee the competitive nature of the cellular industry and to foster the development of competing systems.'' In the *First Biennial Review Order,* the Commission determined that the cellular cross-interest rule was still required to protect against substantial anticompetitive threats from common ownership between the two cellular carriers in any given geographic area. The Commission found that cellular carriers served approximately eighty-six percent of nationwide mobile telephone subscribers at the end of 1998, and determined that the percentage was less than seventy in only a few major metropolitan markets. However, because competition from other services had increased on the whole since the rule's inception in 1991, the Commission relaxed the rule's attribution standards to the current limits described above.

C. Notice of Proposed Rulemaking

7. In the *Notice of Proposed Rulemaking* (''*NPRM*'') (66 FR 9798, February 12, 2001) (*corrected* at 66 FR 10567, February 15, 2001) in this proceeding, the Commission initiated a reexamination of the need for CMRS spectrum aggregation limits as part of its 2000 biennial regulatory review of the Commission's telecommunications regulations. Section 11 of the Communications Act requires the Commission, every two years, to review all regulations that apply to ''the operations or activities of any provider of telecommunications service'' and to ''determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.'' The *NPRM* initiated the Commission's second comprehensive review of the CMRS spectrum cap and cellular cross-interest rules, the two regulations that currently limit the aggregation of broadband CMRS spectrum.

8. The *NPRM* requested public comment, including the submission of specific market data and studies, to assist the Commission's determination of whether the CMRS spectrum aggregation rules are no longer necessary in the public interest and, if they are necessary, whether the Commission's existing spectrum limits should be modified. First, comment was requested on whether spectrum aggregation limits, including the cellular cross-interest rule, continue to enhance meaningful competition in today's CMRS marketplace. In this regard, comment was sought on the development of meaningful economic competition, as well as the potential competitive consequences of consolidation that may occur without spectrum aggregation limits. Next, comment was requested on spectrum management and other regulatory considerations, particularly in the context of spectrum suitable for broadband CMRS. Under this inquiry, the Commission sought to examine any costs that the spectrum aggregation limits may impose on the development of advanced wireless services, the possible benefits of prophylactic standards, and whether these standards promote efficiency. In addition, comment was sought on how recent international developments should affect the Commission's public interest determination.

9. The Commission also sought comment on the implications for its processes of DOJ's antitrust law enforcement responsibilities. The Commission asked whether it should defer to DOJ in CMRS license transfers, and, if so, what form such deference should take. Specifically, the Commission asked whether all transfers resulting in consolidation of spectrum below a certain threshold should be exempt from competitive analysis under section 310(d) of the Communications Act. The Commission acknowledged that antitrust laws may place adequate focus on mergers that threaten to curtail actual competition. Therefore, the Commission asked whether it may, and should, refrain from independent review of the competitive effects of a transaction that is subject to some specified level of DOJ review, and if so, what that level should be.

10. The *NPRM* also requested comment on whether specific attributes of the CMRS spectrum cap and cellular cross-interest rules should be modified, if those rules are generally retained, to allow some of the benefits that may arise from additional cross-ownership interests. To the extent that certain revisions would reduce any costs of the rules or promote public interest objectives, the Commission sought comment on how to implement them without significantly increasing barriers to entry for new competitors or reducing benefits to wireless consumers.

II. Discussion

A. Standard for Decision

1. Section 11 of the Communications Act

11. The Telecommunications Act of 1996 (1996 Act) (Public Law No. 104–104, 110 Stat. 56 (1996)) significantly amended the Communications Act to permit and encourage competition in various communications markets. Congress anticipated that the development of competition would lead market forces to reduce the need for regulation. Section 11 of the Communications Act, which was added by the 1996 Act, provides that every two years the Commission shall review all regulations that apply to ''the operations or activities of any provider of telecommunications service'' and ''determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.'' Section 11 further provides that in carrying out this review, the Commission ''shall repeal or

modify any regulation it determines to be no longer necessary in the public interest.''

12. Consistent with section 11, the Commission stated in the *NPRM* that its fundamental inquiry is whether, as a result of meaningful economic competition among providers of telecommunications services, spectrum aggregation limits are no longer necessary in the public interest. The Commission sought comment on what constitutes ''meaningful economic competition'' under section 11, and to what degree the relevant competitive conditions have changed since the Commission's last biennial review of these rules. If meaningful economic competition were found to exist, the Commission asked whether this would mean that spectrum aggregation limits have served their purpose and are no longer in the public interest, or whether public interest considerations nevertheless would warrant continued use of spectrum aggregation limits.

13. Commenters differ on how section 11 should be applied and whether there might be public interest reasons to retain spectrum aggregation limits if meaningful economic competition exists. The Commission, however, concludes that it need not, for purposes of this proceeding, go beyond the plain meaning of the text of section 11 of the Communications Act. The language places an obligation on the Commission to ''determine'' if the regulation in question ''is no longer necessary in the public interest as the result of meaningful economic competition.'' Section 11 requires the Commission to determine ''whether any of these regulations are no longer in the public interest because competition between providers renders the regulation no longer meaningful.'' The Communications Act then explicitly provides that ''the Commission *shall* repeal or modify'' any regulation that it determines is no longer necessary in the public interest as the result of meaningful economic competition. The statutory language does not impose any particular burdens on the opponents or proponents of a particular rule, but rather places the burden on the Commission to make the requisite determinations. In exercising its obligation under section 11, the language suggests that the Commission must examine why the rule was ''necessary'' in the first place and whether it is necessary any longer. Thus, in making the determination whether a rule remains ''necessary'' in the public interest once meaningful economic competition exists, the Commission must consider whether the concerns that led to the rule or the rule's original purposes may be achieved without the rule or with a modified rule.

14. The primary public interest purpose underlying the original adoption of the spectrum aggregation limits was to promote pro-competitive ends in CMRS markets. In initially setting the spectrum cap in 1994, the Commission's goal was to ''discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency.'' The Commission found that its ''goal of preventing anticompetitive outcomes'' could be accomplished by creating a cap on broadband PCS, cellular, and SMR licensees, which would ''prevent licensees from artificially withholding capacity from the market.'' Consistent with this goal, the Commission stated that the spectrum cap sought ''to promote diversity and competition in mobile services, by recognizing the possibility that mobile service licensees might exert undue market power or inhibit market entry by other service providers if permitted to aggregate large amounts of spectrum'' Furthermore, the absence of a spectrum cap could undermine other statutory goals related to the promotion of competition, ''such as the avoidance of excessive concentration of licenses and the dissemination of licenses among a wide variety of applicants.'' In addition, the Commission found that the cap not only promoted competition, but also benefited the public interest by allowing review of CMRS acquisitions in an administratively simple manner and lending certainty to the marketplace. In 1996 and 1999, the Commission reaffirmed the primary public interest purpose of promoting pro-competition ends in the CMRS markets. In 1996, the Commission also found that the spectrum cap, in addition to other tools at its disposal, furthered the goals of section 309(j) of the Communications Act. *CMRS Spectrum Cap Report and Order* (61 FR 33859, July 1, 1996) (*corrected* at 61 FR 51233, October 1, 1996). (The Commission notes that there are other tools to achieve goals other than competition, including case-by-case review, as well as prescribing license area designations and bandwidth assignments, and using bidding credits to create opportunities for new entrants.) In adopting the cellular cross-interest rule, the Commission acted ''[i]n order to guarantee the competitive nature of the cellular industry and to foster the development of competing systems.''

2. Meaningful Economic Competition

15. In the case of the spectrum cap and cellular cross-interest rules, the Commission's inquiry focuses on the state of competition in the consumer markets for CMRS. At the same time, the Commission recognizes that spectrum is an input in CMRS markets. Indeed, this recognition prompted adoption of the spectrum cap as a means of ensuring CMRS competition in the first place. Although participants in the mobile telephony and CMRS spectrum markets are largely the same entities under current conditions, this could change if leasing arrangements become more common. *Secondary Markets Policy Statement* (65 FR 80367, December 21, 2000). Again, the Commission emphasizes that the markets with which it is principally concerned are the output markets for services, and that conditions in the input markets provide only a partial proxy measure of competition in the output markets. Nonetheless, in the context of the output market, the state of control over the spectrum input is a relevant factor.

16. In evaluating CMRS markets, the Commission considers both actual and potential competition. In general, potential competition can be as important as actual competition in promoting desirable outcomes. In the case of CMRS, however, it appears that actual competition among those firms already providing service has been the most significant factor in the gains that have been achieved in recent years. There remains relatively little potential for additional entry into urban markets in the near term, because most licenses for currently allocated spectrum have been constructed and put into service. In rural markets, a significant number of licenses have not yet been put into service, but demographic and geographic conditions generally appear to render additional large-scale entry economically difficult to support. As additional CMRS-suitable spectrum becomes available, the overall effect on the CMRS marketplace of potential competition could change.

3. Necessity for Rules in the Public Interest

17. In determining whether its spectrum aggregation limits remain necessary in the public interest, the Commission considers the original purposes for which the rules were promulgated. The purpose underlying the spectrum aggregation limits was to promote competition in CMRS markets. An important consideration in determining the necessity for regulation is the availability of other, less

burdensome tools to achieve these ends. In the case of the CMRS spectrum aggregation limits, these tools include case-by-case review of transactions by the Commission and DOJ, as well as the Commission's ability to shape the initial distribution of licenses through the service rules adopted with respect to specific auctions. In addition, the Commission is also obligated, pursuant to section 332(c)(1)(C) of the Communications Act, to continue to review (as it has done six times already) the state of competition among CMRS providers. Specifically, this provision states:

> The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. 47 U.S.C. 332(c)(1)(C).

The Commission's most recent report, issued this year, has guided its decision in this proceeding, and future reports will continue to provide a useful tool for overseeing the changes, if any, in competitive market conditions. *Sixth Annual CMRS Competition Report* (''*Sixth Annual CMRS Competition Report*'') (16 FCC Rcd 13350 (2001)). Moreover, the Commission also has at its disposal various enforcement tools to ensure that CMRS carriers, which are common carriers under section 332(c) and key provisions of Title II of the Communications Act, 47 U.S.C. 332(c), 201, 202, 208, do not engage in conduct that is anti-competitive or otherwise harm consumers due to excess concentration of spectrum.

B. Analysis of Competition in the Mobile Telephony Markets

18. The Commission begins its analysis by considering the state of economic competition. Various indicators confirm the presence of meaningful economic competition in markets for CMRS. As the Commission described in the *Sixth Annual CMRS Competition Report,* and as commenters generally agree, mobile telephony markets have experienced and continue to experience strong growth, increased competition, and active innovation. (Although the Commission noted that it could not warranty the accuracy or completeness of the individual data in the *Sixth Annual CMRS Competition Report,* all of which were taken from publicly available sources, the Commission finds that, cumulatively, these data are more than adequate to inform its evaluation of meaningful economic competition.) The Commission also finds it important that competition in these markets has progressed dramatically, not only since 1994, but since its last biennial review.

19. *Number of Competitors and Concentration.* One basic indicator of meaningful economic competition is that most Americans have a choice of obtaining CMRS from several different providers of service. As of the end of 2000, about ninety-one percent of U.S. residents lived in a county that was served, at least in part, by three or more different mobile telephony providers, and seventy-five percent of the U.S. population lived in a county where five or more providers offered service. (Because the Commission's analysis was limited to publicly available sources of information, this coverage percentage is based on the number of operators serving any portion of a particular county. Consequently, some counties included in this analysis may have only a small amount of coverage from a particular provider.) Furthermore, over 133 million people lived in counties with six or more mobile telephony providers, an increase of thirty-five percent over the previous year, and thirty-four million people lived in counties served by seven or more providers, a one-year increase of 170 percent. By contrast, when the spectrum cap was first promulgated in 1994, in all but the few markets where Nextel had then launched service, consumer choice was limited to two cellular providers.

20. Measures of market concentration in the record show a substantial continuing decline in concentration in most local CMRS markets. The Commission finds that considerable entry has occurred and that meaningful competition is present, particularly given the presence of such earmarks of competition as falling prices, increasing output, and improving service quality and options. Specifically, concentration in CMRS markets, as measured by subscriber share, is falling. Calculations submitted by economist John Hayes in both this record and the previous biennial review proceeding show that Herfindahl-Hirschman Indices (HHIs) in the twenty-five largest markets, calculated based on estimated subscribed customers, have fallen by an average of fifteen to twenty-five percent over the last two years. This downward trend in concentration may be attributed in part to the continued construction of new entrants' networks, which has made these mobile telephony providers more viable competitors.

21. On the other hand, other measures of market concentration reveal moderate to high concentration levels. Using CMRS spectrum share as the capacity measure, the Commission has calculated HHIs of 1,270 to 1,801 for the fifty most populous MSAs, and 1,246 to 2,405 for a sampling of eighty counties in RSAs. These figures are generally consistent with the capacity'based HHI calculations submitted by various commenters. The Commission emphasizes, however, that caution is appropriate in employing such measures, whether they reveal a positive or negative indication of concentration. Although more concentrated markets can be less competitive and more vulnerable to anticompetitive activity than less concentrated markets, moderate to high concentration is not necessarily a threat to competition. For example, the Commission has previously found that ''an HHI analysis alone is not determinative and does not substitute for its more detailed examination of competitive considerations.'' In the case of CMRS markets, for example, limits to economies of scale, technological compatibility issues, difficulties in finding a willing seller at a reasonable price, and capital market constraints limit consolidation. Moreover, antitrust review by the DOJ and section 310(d) review by the Commission continue to serve as protection against levels of consolidation that would impair competition. Furthermore, HHI measures function as indicators of the likely competitive situation—guidelines to which other information is added, as under the DOJ/Federal Trade Commission (FTC) approach—rather than as the single factor upon which to make competitive judgments, including the judgment of whether to retain the spectrum cap rule. As the *DOJ/FTC Merger Guidelines* state, ''[b]ecause the specific standards set forth in the guidelines must be applied to a broad range of possible factual circumstances, mechanical application of those standards may provide misleading answers to the economic questions raised under antitrust laws.''

22. Based on the record before the Commission and publicly available evidence, however, there appears to be a disparity in the amount of actual competition existing in MSAs versus RSAs. In MSAs, eighty-six percent of counties have four or more facilities-based CMRS providers serving some portion of the county, while in RSAs, twenty-four percent of counties have four or more facilities-based CMRS

providers. Further, in over half of RSA counties, two or fewer licensed mobile telephony carriers are currently providing service. Because these numbers include carriers that may be offering service in only a small portion of a county, they may overstate the amount of actual facilities-based competition, especially in RSAs. Moreover, the Commission's licensing records show that gaps in the footprints of the nationwide carriers tend to be greater in RSAs than in MSAs. Of the fifty most populous MSAs, forty have five licensed nationwide carriers, not counting Nextel, and the other ten have four. In a sampling of fifty average population RSA counties, by contrast, sixteen have five nationwide carriers, sixteen have four, and eighteen have fewer than four. In a sampling of thirty less populated RSA counties, eight have five nationwide carriers, nine have four, and thirteen have fewer than four. Therefore, consumers in rural areas appear to have fewer choices in terms of providers, pricing plans, and service offerings than consumers in MSAs. Commenters generally agree that rural markets have significantly less competition than metropolitan areas in large part due to population density and economics.

23. *Benefits to Consumers of Competition.* As the CMRS marketplace has developed, consumers in both MSAs and RSAs have realized the benefits of competition in the form of increased output, lower prices, and increased diversity of service offerings. For example, from 1993 to 2000, the number of subscribers using mobile phones jumped 584 percent, the amount of revenue the sector generated climbed 384 percent, and the number of people employed in the industry grew 364 percent. In addition, as the Commission described in the *Sixth Annual CMRS Competition Report,* and as commenters generally agree, prices in mobile telephony markets are falling at an accelerating rate. During 2000, the cellular telephone component of the Consumer Price Index (CPI) produced by the United States Department of Labor decreased by 12.3 percent, while the overall CPI increased by 3.4 percent. In comparison, the cellular telephone component of the CPI from December 1997 to January 1999 decreased by 9.1 percent (8.4 percent annualized), while the overall CPI increased by 1.9 percent. Several studies indicate that the entrance of new competitors into mobile telephony markets continues to reduce prices. Furthermore, mobile telephony service providers are offering new and innovative pricing plans. Most of the major carriers offer nationwide flat-rate, digital pricing plans, and several large carriers now offer regional flat-rate, digital pricing plans as well. Further, several carriers provide international roaming services to their customers. Mobile telephony providers are also offering technologically innovative services including Short Message Service (SMS), e-mail, and web-based applications. In addition, ''churn * * * and continued expansion of mobile networks into new and existing markets demonstrate a high level of competition for mobile telephony customers.''

24. To a certain degree, mobile telephony services have begun to compete with wireline services. For some, wireless service is no longer a complement to wireline service but has become the preferred method of communication. According to a recent survey by the Yankee Group, about three percent of mobile telephony subscribers rely on their wireless phone as their only phone. In another survey conducted in January 2000, twelve percent of respondents said they purchased a mobile phone instead of installing an additional wireline phone. In a survey performed for the Consumer Electronics Association, three in ten mobile phone users, and forty-five percent of mobile phone users aged eighteen to thirty-four years old, stated they would rather give up their home telephone than their mobile phone. In some areas, mobile phone use has begun to erode wireline revenue due to ''technology substitution,'' that is, the substitution of new technologies for existing ones. BellSouth, for example, stated in February 2001 that it was exiting the payphone business in part due to business lost to mobile phones.

25. A few mobile carriers have begun offering service plans designed to compete directly with wireline local telephone service. For example, Leap, through its Cricket subsidiary, now offers its Comfortable Wireless mobile telephone service in over a dozen markets. Leap's service allows subscribers to make unlimited local calls and receive calls from anywhere in the world for a flat rate of approximately $30 per month. In November 2000, Leap also claimed that sixty percent of its customers use their wireless phones as their primary phone. US Cellular, ALLTEL, and Rural Cellular Corporation similarly offer flat-rate or nearly flat-rate service plans in select markets. Several CMRS providers have received Eligible Telecommunications Carrier status, enabling them to receive universal service funding in certain states, and some carriers are using cellular or broadband PCS spectrum to offer fixed wireless services.

26. Consumers have also derived benefits in recent years from combinations as some operators have expanded their licensed service areas through acquisitions and swaps to create nationwide service providers. There are currently six nationwide mobile telephony operators: AT&T, Cingular, Nextel, Sprint, Verizon, and VoiceStream. The Commission has concluded previously that mobile telephony service providers with nationwide service areas can achieve certain economies of scale and increased efficiencies compared to operators with smaller service areas.

27. *Barriers to Entry.* One potential threat to the continued existence of meaningful economic competition in CMRS markets is the barrier to entry posed by the limited availability of spectrum. Ease of entry is an important factor when determining if firms in a given product and geographic market will be able to exercise market power. ''[E]ntry is * * * easy if entry would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern.'' In particular, we note that antitrust authorities ''will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact.'' Unfettered market competition forces prices to the level of production costs. Markets function optimally only if one or more firms are able to enter a market or expand current production swiftly and effectively in response to the elevation of prices (or degradation of service) by one or more firms attempting to exercise market power. Therefore, in evaluating the state of the market the Commission considers whether barriers to entry exist and, if so, how pronounced these barriers to entry are, with the ultimate goal of determining whether potential entry would be timely, likely, and sufficient to discipline the market.

28. The requirement to obtain access to spectrum constitutes a barrier to facilities-based entry into the CMRS marketplace because the supply of suitable spectrum is limited. Facilities-based mobile telephony service cannot be offered without access to suitable spectrum, and a government license is required to use spectrum to provide CMRS. Some commenters argue that, because CMRS spectrum allocations have been made, this barrier to entry has been reduced. Other commenters, however, argue that it is typically difficult to acquire the spectrum necessary to enter a CMRS market. One

commenter, in particular, emphasizes that the finite amount of spectrum suitable for CMRS is an ''insurmountable barrier to entry.'' The Commission finds that the limited amount of spectrum suitable for CMRS available today creates a significant barrier to entry, at least in MSAs. Most of the spectrum currently subject to the cap either has been assigned or is being considered for assignment to the high bidder at auction. In most cases, the high bidder is either an existing market participant or its affiliate. Although some of this spectrum is currently unused or underused, the total pool of such spectrum is finite, and the amount that is not controlled by a provider that has launched service, particularly in MSAs, is small.

29. Some commenters argue that availability of spectrum is not a significant barrier to entry because other spectrum, not covered by the cap, is a viable substitute for the provision of mobile telephony services. Specifically, commenters identify spectrum allocated for Mobile Satellite Service (MSS), big Low Earth Orbit (LEO) satellite service, Multipoint Multichannel Distribution Service and Instructional Television Fixed Service (MDS/ITFS), Wireless Communications Service (WCS), and CMRS other than cellular, broadband PCS, and SMR, as well as spectrum that has been (or is soon likely to be) reallocated from television Channels 52–59 and 60–69. Much of this spectrum, however, either is not currently allocated for mobile terrestrial use, is subject to technical and use restrictions that prevent offering of full mobile telephony services, or has insufficient capacity to support significant mobile telephony competition. The Commission believes the spectrum bands that are most likely to support additional competition to the services offered over cellular, broadband PCS, and SMR spectrum in the reasonably near future are the 1.7 and 2.1 GHz bands that are being considered for mobile allocation in the Commission's so-called 3G proceeding, and the bands reallocated from television Channels 60–69. However, this spectrum is still at least several months away from being assigned, and after assignment it will take time for incumbent users to be relocated and following that for licensees to build out their networks. Thus, although the Commission expects that 3G and Channels 60–69 spectrum will offer some potential for near-term entry over the next few years, the availability of spectrum suitable for CMRS remains a barrier to entry in the near term.

30. Nonetheless, there are factors that moderate concern regarding the spectrum access barrier to entry. In particular, the need for direct access to spectrum is not absolute because carriers can compete in the provision of CMRS without direct access to spectrum through resale, or a mobile virtual network operator (MVNO) arrangement. However, it is not clear that these options have more than a limited role today. The transition period the Commission adopts today also helps to minimize the problem of spectrum access because, while future allocations do not respond to the needs of the marketplace today, the Commission expects that additional spectrum will be available at the end of the transition period, or shortly thereafter.

31. Although access to spectrum does not appear to be a substantial barrier to entry in RSAs, as in these areas there is typically a significant amount of unused spectrum, the other costs of serving high-cost and low-density areas may make it unlikely that competition in RSAs will increase to a level rivaling that of MSAs. Specifically, the cost of building out a network with pervasive coverage is likely to be higher in rural than in urban areas (especially for digital networks on 1.9 GHz PCS spectrum with lower power handsets), and revenue potential is lower. Thus, the potential revenue from initiating or expanding service in an RSA may not be sufficient to cover the costs of building out the network, including any opportunity costs associated with directing resources to rural buildout instead of enhancing the carrier's network in urban areas. In addition, it would likely be time-consuming for a new entrant to access sufficient capital, build out its network to a sufficient degree to effectively market its services, and attract a sufficient subscriber base to discipline the market. Although the Commission does not have sufficient record evidence to evaluate the likely development of the market in RSAs, the underlying economics appear to make it unlikely that competition in RSAs will evolve in the near term to rival that in MSAs.

32. *Other Issues.* Various commenters discuss the potential for CMRS providers to foreclose entry by anticompetitive warehousing of spectrum. Some commenters argue that it is unlikely that carriers have an incentive to warehouse spectrum because the cost of acquiring spectrum and meeting the Commission's buildout requirements is high. Other commenters, however, argue that CMRS providers have an incentive to warehouse spectrum either by purchasing more spectrum than can be used or by investing in inefficient technologies. Even if a carrier did not deliberately set out to foreclose competition, one commenter contends that the profits from doing so may be an attractive side effect of spectrum aggregation. The Commission does not have evidence that firms are currently holding excess spectrum in order to deter entry or that the benefits of excluding competitors would exceed the cost of acquiring spectrum and the free-rider problem of several incumbents benefiting from one incumbent's expenditure. However, it is at least a threshold possibility that because the supply of suitable spectrum is limited, firms in CMRS markets might choose to overinvest in spectrum in order to deter entry, depending on the costs of doing so.

33. One commenter also suggests that collusion among CMRS providers may warrant ongoing consideration. It notes that pricing plans for CMRS offerings are similar among the national carriers, and price comparisons of these plans can easily be performed, facilitating price coordination. Further, the commenter argues that experience in the marketplace shows carriers behaving in a largely oligopolistic fashion by offering largely identical products at prices far above their marginal costs. However, another commenter argues that anticompetitive collusion is unlikely in CMRS markets because these markets have well-capitalized actual and potential competitors, and demand is increasing. Further, according to this commenter, it is relatively easy for existing competitors to add capacity in response to any price increase, and therefore firms cannot profitably reduce output and sustain a high price for a significant period of time. Other commenters argue that the large number of competitors and the complexities of the various pricing plans make coordination unlikely. Although the record does not indicate that tacit collusion is occurring or is likely to occur, CMRS markets do meet many of the criteria that make tacit collusion sustainable. Moreover, tacit collusion becomes more likely as the number of competitors is reduced.

34. *Conclusion.* In light of all the factors discussed above, the Commission finds that there is meaningful economic competition in CMRS mobile telephony generally. Evidence in MSAs regarding the current state of these markets clearly shows that the presence of multiple competitors is effectively restraining prices, promoting innovation and diversity, and increasing output. Based on the information

available, competition in RSAs appears to be less robust than in MSAs. Finally, to the extent that competitive concerns are raised in a particular proposed assignment or transfer of control application, as discussed below, the Commission believes they can be addressed through means other than the spectrum cap.

C. Repeal and Interim Modification of the Spectrum Cap

35. Currently, the Commission evaluates the competitive effects of the acquisition of CMRS spectrum primarily through the general application of numerical thresholds such as the spectrum cap. The Commission could, however, fulfill its duties under section 310(d) and other statutory provisions through case-by-case review of individual transactions. In light of its finding of meaningful economic competition above, the Commission concludes that long-term retention of the spectrum cap rule is no longer necessary in the public interest, and it therefore moves to repeal that rule. At the same time, it concludes that it is necessary in the public interest to retain the rule for a limited transition period to allow the market to adjust and enable the Commission to consider guidelines for case-by-case review of CMRS spectrum aggregation transactions. Finally, during the transition period, the Commission modifies the rule by increasing the spectrum cap to 55 MHz in all areas.

1. Move From Prophylactic Rule to Case-by-Case Review

36. *Background*. With respect to the appropriate regulatory tool for reviewing potential effects on competition in CMRS markets, proponents of the current spectrum cap generally favor a bright-line approach, arguing that a bright line promotes regulatory certainty and significantly reduces the processing time of transfer and assignment applications. One proponent argues that determining how to apply the rule in a particular case is easier than gathering the information that transacting parties may be required to submit under a case-by-case approach, such as potentially sensitive customer and market share information. Generally, opponents of the current spectrum cap argue that case-by-case review is preferable to a prophylactic approach because the case-by-case approach is more flexible and reduces the possibility of blocking transactions that are actually in the public interest or, alternatively, permitting transactions that are not in the public interest.

37. *Discussion*. The Commission concludes that it is appropriate to move in the very near future from reliance on a prophylactic rule of general application to pure case-by-case review. In assessing the choice of an appropriate tool, the Commission recognizes that different costs and benefits can be associated with bright-line rules and case-by-case review with respect to degree of flexibility, predictability of outcome, likelihood of rejecting beneficial (or approving harmful) transactions, ability to account for the particular attributes of a transaction or market, speed of decision-making, and resource demands on the Commission and carriers.

38. On balance, and in light of the growth of both competition and consumer demand in CMRS markets, the Commission concludes that case-by-case review, accompanied by enforcement of sanctions in cases of misconduct, is now preferable to the spectrum cap rule because it gives the Commission flexibility to reach the appropriate decision in each case, on the basis of the particular circumstances of that case. The development of competition among CMRS carriers since the 1999 biennial review is an important factor underlying this conclusion. The Commission is persuaded that competition is now robust enough in CMRS markets that it is no longer appropriate to impose overbroad, *a priori* limits on spectrum aggregation that may prevent transactions that are in the public interest. As discussed below, the Commission commits itself to increasing Commission resources available to review spectrum aggregation transactions and to considering appropriate guidelines for review of future transactions, in order to continue to provide parties with a reasonable degree of certainty and transparency as well as to minimize the administrative costs of case-by-case review.

39. The Commission does not agree with commenters who suggest that the spectrum cap rule should be retained to promote technologically efficient use of spectrum. As discussed above, the Commission's purpose in adopting the spectrum cap was to promote competition in CMRS markets. The Commission is not persuaded that it is in the public interest to interfere with the competitive market's creation of incentives regarding choice of technology. Similarly, the Commission does not agree with commenters who argue that the spectrum cap rule should be retained to further opportunities for resale or roaming arrangements. The Commission's case-by-case review will allow it the flexibility to consider any such concerns raised with respect to specific applications.

40. The Commission also is not persuaded by arguments that the spectrum cap rule should be retained to preserve opportunities for entrepreneurs and providers of niche services. As other commenters point out, the spectrum cap rule does nothing in and of itself to create opportunities for entrepreneurs, and may actually harm small businesses by limiting their access to existing carriers as sources of capital and management expertise. Furthermore, to the extent the spectrum cap does create some potential opportunities for entrepreneurs, the Commission finds this benefit is insufficient to outweigh the benefits of moving away from a bright-line rule approach, particularly in light of the other tools it has to help preserve opportunities for small businesses—its ability to carry out case-by-case review of transactions and its ability to shape the initial distribution of licenses through the service rules adopted with respect to specific auctions. Moreover, the Commission intends to take into account the special needs of small businesses as it considers processing guidelines, and the Commission believes that individualized review will benefit small businesses as well as large.

41. Finally, the Commission notes the arguments of several parties that, if it eliminates or increases the spectrum cap, it should take certain other actions to ensure competition in all segments of the CMRS marketplace. The merits of these proposals are beyond the scope of this proceeding, irrespective of the Commission's decisions today with regard to the spectrum cap; however, the Commission notes that a flexible case-by-case approach will allow it to consider specific circumstances and impacts of individual applications.

2. Case-by-Case Review

42. The public policy objectives that the Commission first articulated in 1994 with respect to review of CMRS spectrum acquisitions remain applicable today. The spectrum cap rule was originally designed to ''discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency.'' The Commission has also stated that the spectrum cap promotes competition in CMRS markets, allows efficient administration of CMRS spectrum acquisitions, and provides regulatory certainty to the marketplace. Although the Commission decides today that the spectrum cap rule is no longer necessary in the public interest, it must still

achieve the objectives that the spectrum cap was intended to promote. The Commission believes that these objectives can now be better achieved in the context of secondary market transactions through case-by-case review, properly performed. Furthermore, to the extent that the initial distribution of spectrum through auction is an issue in the future, that is also amenable to case-by-case review, in the sense that the Commission can shape the initial distribution through the service rules adopted with respect to specific auctions.

43. With or without the spectrum cap rule, the Commission has an obligation to ensure that acquisitions of CMRS spectrum do not have anticompetitive effects that render them contrary to the public interest. Specifically, section 310(d) of the Communications Act requires the Commission not to approve any transfer, assignment, or disposal of a license, or attendant rights unless it finds that the public interest, convenience, and necessity will be served thereby. Moreover, although strong competitive forces are evident in today's CMRS industry, the Commission recognizes the possibility that significant additional consolidation of control over spectrum could have serious anticompetitive effects. Thus, the Commission intends to perform case-by-case review of CMRS spectrum aggregation transactions in order to fulfill its statutory mandates to promote competition, ensure diversity of license holdings, and manage the spectrum in the public interest. 47 U.S.C. 301, 303, 309(j), 310(d). The Commission determines that, in order to ensure that this review is performed in a manner that serves the public interest, it is necessary to retain the spectrum cap rule until January 1, 2003, to enable the Commission and the market to prepare for case-by-case review, including the Commission's consideration of processing and/or substantive guidelines for this process.

44. *Performing Case-by-Case Review.* Although, the Commission determines that long-term retention of the spectrum cap rule is no longer necessary to serve the procompetitive purposes for which it was adopted, it recognizes that application of this prophylactic rule has conferred certain advantages. In particular, the spectrum cap rule has provided parties with guidance regarding what transactions the Commission would likely consider to be in the public interest, enabled parties to structure their transactions to fall within the rule, and provided processing guidance for Commission staff. From August 2000 to August 2001, the Wireless Telecommunications Bureau disposed of assignments and transfers of control involving approximately 1,305 licenses (other than pro forma applications) currently covered by the CMRS spectrum cap. The overwhelming majority of these transfers and assignments were processed within ninety days.

45. If it were to repeal the spectrum cap immediately, without anything further, the Commission would have neither objective guidelines nor a body of precedent to guide the review process. Therefore, the Commission would run the risks both that its review would fail to produce accurate and consistent results, and that, without benefit of either objective standards or directly applicable precedent, applications would not be decided on a timely basis. To perform meaningful and timely review of spectrum aggregation transactions without the spectrum cap, the Commission may need to develop effective guidelines for this process, as well as ensure that sufficient resources are devoted to the task. One commenter emphasized the importance of regulatory certainty and speed of review to enable them to plan efficiently, invest with confidence, and reassure providers of capital. A transition period is necessary so that the Commission can continue to meet these needs.

46. As it develops the contours of its case-by-case regime during the transition period, the Commission will consider what form of guidelines might best balance the virtues of certainty and flexibility in this review process. For example, procedural guidelines could specify timing benchmarks and the types of information that applicants will be expected to provide. It may also be useful to applicants and Commission staff to identify substantive factors and benchmarks that would make the Commission more or less likely to take a closer look at a proposed transaction. For example, some of these factors could track those in the *DOJ/FTC Merger Guidelines*, such as measures of concentration in a market. One commenter argues that, to the extent the Commission develops internal processing guidelines for evaluating wireless transactions, ''it should look to the same criteria used by [DOJ] in its antitrust analysis—the Merger Guidelines, and rely on the kind of information and methodologies utilized by DOJ in conducting its competition analyses.'' The Commission also will consider the most appropriate process for developing potential guidelines, including whether notice and comment procedures are necessary or helpful. The Commission emphasizes, however, that it does not intend to adopt guidelines to reinstate a bright-line rule.

47. *Relationship of Commission's and DOJ's Processes.* With respect to competitive issues, applicants may currently be required to satisfy both the Commission's review process and that of DOJ. (DOJ investigates proposed mergers and acquisitions to determine whether they may substantially affect competition under sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. 1–2) and section 7 of the Clayton Act (15 U.S.C. 18)). In the *NPRM*, the Commission asked whether, and under what circumstances, in its review of transfer/assignment applications it should defer to DOJ's review of competitive issues in a transaction. A number of parties, generally those that favor retaining the spectrum cap, argue that the Commission cannot leave all competitive review of CMRS markets to DOJ. One commenter argues that the Commission bears a special responsibility under the Communications Act for CMRS markets, different from the antitrust authority of DOJ under the antitrust statutes. Unlike DOJ or FTC, the commenter asserts, the Commission is under explicit statutory mandates to promote economic opportunity; avoid excessive concentration of licenses and disseminate licenses among a wide variety of applicants; foster rapid deployment of new technologies, products, and services that benefit the public; and promote the efficient use of the spectrum. Further, the commenter argues that the Communications Act obligates the Commission to promote competition, while DOJ is authorized only to stop proposed transactions that would substantially lessen competition. Therefore, the commenter argues, the Commission has an independent role in competitive review and is not duplicating the work of the antitrust agencies by performing competitive analysis.

48. Another commenter argues that the Commission has authority to prevent certain anticompetitive acquisitions that DOJ does not, such as the acquisition of licenses at auction, license swaps, and spectrum leases. Further, the commenter argues that the Commission has an independent responsibility to review competitive effects of transactions because DOJ's review standard does not encompass overall public interest considerations. Another commenter argues that the Commission should continue to analyze the competitive effects of license transfers and assignments because many transactions fall below the reporting

threshold of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR) (15 U.S.C. 18(a)) and, in light of the recent increase in these thresholds, fewer transactions are now reportable than before. Pursuant to 15 U.S.C. 18(a), premerger notification is required if a transaction meets either of two thresholds: (1) one of the parties to the transaction has annual sales or assets of more than $100 million and the other party $10 million, and as a result of the acquisition, the acquiring person will hold voting securities or assets worth in the aggregate more than $50 million; or (2) the total value of the transaction exceeds $200 million. Further, the commenter argues that DOJ has limited resources, resulting in review of only a subset of the transactions reported under HSR and virtually none of the transactions that need not be reported.

49. Some parties that favor eliminating the spectrum cap argue that the Commission's competitive analysis duplicates review by DOJ and, therefore, is unnecessary and creates delay and uncertainty. These parties generally believe that the Commission should review transfers and assignments only pursuant to specific obligations imposed by the Communications Act, e.g., the public interest standard of section 310(d) and for compliance with Commission rules, and that competitive review of CMRS transactions should be performed exclusively by the antitrust agencies. Another commenter argues that DOJ is better equipped than the Commission to investigate competitive harm, but that section 310(d) of the Communications Act provides the means for the Commission also to investigate competitive issues as a supplement to DOJ's responsibilities.

50. *Discussion.* The Commission finds that, under the statutory regime set out by Congress, the Commission has an obligation, distinct from that of DOJ, to consider as part of the Commission's public interest review the anticompetitive effects of acquisitions of CMRS spectrum, including those that occur in the secondary market. The U.S. Court of Appeals for the District of Columbia Circuit has found that the Commission must consider antitrust and competition effects in making its public interest determinations under the Communications Act. *United States* v. *FCC* (652 F.2d 72 (D.C. Cir. 1980)).

51. Further, the Commission's independent statutory obligations in this area are sufficiently different from those of DOJ that it would be difficult for the Commission to fulfill them were it to defer generally to competitive assessments made by DOJ. For example, the Commission's unique spectrum management responsibilities, including those under 47 U.S.C. 151, 301, 303, and 309(j), are affected by the level of competition that exists in CMRS markets. In addition, while the Commission has never chosen to exercise it, the Commission has independent authority under sections 7 and 11 of Clayton Act (15 U.S.C. 18, 21(a)) to disapprove the acquisition of common carriers engaged in wire or radio communications or radio transmissions of energy in any line of commerce in any section of the country where the effects of such an acquisition may substantially lessen competition, or tend to create a monopoly.

52. There are also significant differences between the two agencies' procedural responsibilities. Unlike DOJ, the Commission has an independent statutory obligation to make a public interest determination that is judicially reviewable, on the record, pursuant to the APA, with regard to all applications for transfer or assignment of licenses. By contrast, DOJ does not review all CMRS-related transactions, is permitted to exercise prosecutorial discretion in choosing which cases to pursue, and is not required to state the reasons that underlie its decision to abandon individual cases. Were the Commission to defer all competitive review to DOJ, it would sometimes be compelled to defer to DOJ's silence on particular matters, providing no basis for judicial review.

53. It may, however, be appropriate for the Commission to rely, at least in part, on DOJ's analysis in certain cases where DOJ has fully examined the competitive effects of a particular acquisition and determined its effect on the relevant market(s)—for example, cases where DOJ and the transacting parties have entered into a Consent Decree. The Commission intends during its transition period to case-by-case review to explore appropriate circumstances in which it might either rely on DOJ's conclusions or engage in greater coordination with DOJ with respect to these issues so as to minimize duplication of effort between the agencies, process applications as efficiently as possible, and minimize the burden on applicants for Commission approval of transfers and assignments.

54. *Transition Period.* The Commission concludes that a transition period, pursuant to which a modified spectrum cap will remain in effect until January 1, 2003, is in the public interest so that applicants and the Commission can prepare for case-by-case review of all transactions. In addition to giving the Commission the opportunity to consider guidelines, a transition period will also help carriers prepare for the additional burdens that case-by-case review could impose on their resources. In particular, the Commission believes this preparation may be especially important for small businesses. While the Commission believes that opportunities for small businesses can be fully protected through a case-by-case approach, the Commission recognizes that advancing one's positions in a case-by-case regime could require the preparation of more detailed applications, which could require resources that small businesses may not be immediately prepared to commit. In addition, regulatory certainty and speed of processing are likely to be particularly important to small businesses, which typically are less able to withstand extended or costly administrative processes. This demand for resources would be especially great if the Commission were to change immediately to a case-by-case process without first considering effective standards and procedures. The Commission intends to take the special needs of small businesses into account in considering its guidelines for the review of CMRS spectrum acquisitions.

55. At the same time, the Commission finds that in the interim, continued application of the spectrum cap, modified as discussed below, will not result in significant distortions in the market or delay in the introduction of beneficial services. In fact, in only relatively few instances is any party at the spectrum cap. (In the fifty most populous MSAs, Commission records indicate that in only four instances is a carrier currently at the spectrum cap, and in a survey of eighty sample RSAs the Commission found only seven instances of a party reaching the cap.) The Commission believes increasing the spectrum cap to 55 MHz will provide a meaningful margin to relieve capacity constraints that some carriers may face now or are likely to encounter within the next fourteen months. Thus, the Commission will generally presume that transactions complying with the 55 MHz spectrum cap will not cause undue risk of market concentration. At the same time, while it anticipates that most transactions that are within the cap will not raise competitive concerns, the Commission retains the discretion to review the competitive effects of transactions that are within the spectrum cap if an interested party provides specific evidence that such a transaction will create an undue risk of market concentration, or if the Commission staff independently finds

such evidence. In any instance in which permitting a carrier to exceed 55 MHz would be in the public interest due to capacity constraints or otherwise, the waiver process remains available.

56. The Commission concludes that sunsetting the cap on January 1, 2003, will provide a sufficient period of time for the Commission and industry to prepare for reliance solely on case-by-case review of CMRS spectrum aggregation transactions. Moreover, two blocks of spectrum that will be usable for CMRS are likely to be allocated and assigned within this approximate timeframe or soon thereafter. First, the Commission currently has pending a proceeding in which it has proposed to allocate additional spectrum for the provision of 3G and other advanced services. *3G Notice of Proposed Rulemaking* (66 FR 7483, January 23, 2001), *3G Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* (''*M&O*'') (66 FR 47591, September 13, 2001) and (''*FNPRM*'') (66 FR 47618, September 13, 2001), *3G First Report and Order and Memorandum Opinion and Order* (''*First R&O*'') (66 FR 53960, October 25, 2001) and (''*MO&O*'') (66 FR 53973, October 25, 2001). Second, 30 MHz of spectrum being vacated by television Channels 60–69 is scheduled to be auctioned beginning June 19, 2002. Accordingly, the spectrum cap rule will cease to be effective on January 1, 2003. The Commission believes that setting a date certain for repeal of this rule provides stability to the market, and that this period gives all parties sufficient time to prepare for the change.

3. Modification to the Spectrum Cap During the Transition Period

57. Having determined that the CMRS spectrum cap should be eliminated, but that a transition period is necessary before it switches to a pure case-by-case approach to analyzing CMRS assignments and transfers of control, the Commission next considers whether to make changes to the existing rule during the transition period. The Commission concludes that an increase in the spectrum cap to 55 MHz in MSAs is appropriate at this time. This modification will provide carriers in MSAs some additional freedom to acquire spectrum during the transition at relatively minimal competitive risk. The Commission also concludes that because the spectrum cap in RSAs is already at 55 MHz, no modification in RSAs is appropriate during the sunset period.

a. MSAs: 58. The current CMRS spectrum cap restricts parties to attributable interests in 45 MHz of covered spectrum in MSAs. In the *NPRM*, the Commission requested comment on whether this threshold should be modified. The Commission first addresses the efficiency effects of the rule and then addresses the competitive effects.

59. *Efficiency Effects of the Spectrum Cap.* Advocates of raising the spectrum cap generally make two types of efficiency arguments. The first is a long-run argument that the 45 MHz ceiling prevents service providers from achieving minimum efficient scale, *i.e.,* that level of output at which long-run average costs reach a minimum. This means that non-trivial economies of scale are going unrealized. The second argument is that in the short run under the current ceilings, the quantity of service demanded exceeds, or will soon exceed, the quantity that firms can supply efficiently. That is, demand for service is, or will be, such that firms will be forced either not to offer certain services at all, or to distort their input choices in order to satisfy demand. This input distortion, for example, might consist of over-investing in cell-splitting and smart antennas because additional spectrum input cannot be acquired.

60. The Commission agrees that both the short-run and long-run efficiency problems, to the extent they are present, would constitute harms imposed by the current rule, and easing them would be a benefit of raising the CMRS cap. Based on the specific information and data in the record, however, the Commission finds that most providers are not constrained today by the current cap in most markets, and that it is unlikely that total demand for voice and data services will grow so rapidly over the next year or two that capacity constraints will become a serious, across-the-board problem during that time. The Commission also believes that less than 45 MHz is required to achieve minimum efficient scale in the provision of service today.

61. The Commission does agree, however, that it may be the case that some carriers are capacity-constrained in certain urban markets with high population density. And the Commission agrees that it is possible—if not likely—that demand for voice and data services will grow so rapidly over the next fourteen months that the current 45 MHz cap would cause significant efficiency costs. Such costs, of course, while initially imposed on the operators, would eventually be passed on at least in part to consumers of mobile telephony services in the form of higher prices, poorer service, or lack of innovation. An increase in the cap to 55 MHz, where it is now for rural areas, can help to prevent such potential efficiency losses.

62. *Competitive Effects of Relaxing the Spectrum Cap.* There are several reasons that an increase in the cap in MSAs to 55 MHz does not pose undue risk of anticompetitive consequences during the transition period, but that any greater increase would run an unacceptable risk of significantly reducing competition. First, a 10 MHz increase in the cap means that, as with the 45 MHz cap, there must in principle be at least four competitors in each geographic market. While the current cap permits four competitors with equal (45 MHz) spectrum holdings, the 55 MHz cap will permit three firms holding 55 MHz and a fourth holding 15 MHz. Although a firm with 15 MHz may be capacity-constrained in some geographic areas, it will often be able to help discipline its larger competitors. Second, the Commission notes that raising the cap to 55 MHz increases the maximum possible input-based HHI by only 350 points, from 2,500 to 2,850. While not insignificant, this increase appears unlikely to foster unilateral pricing power in the current marketplace. Third, mobile telephony operators typically experience high fixed costs and low marginal costs of production. Low marginal costs mean that producers can potentially achieve high profits by reducing their prices, and therefore can render tacit agreements to charge high prices difficult to sustain.

63. The Commission also notes that, as is the case today, it reserves the right to subject transactions involving significant geographic overlap but resulting in consolidation below the new ceiling to further scrutiny. There may be circumstances under which a transfer or assignment could raise competitive concerns notwithstanding compliance with the spectrum cap, for example, elimination of significant actual competition. The Commission will generally presume that transactions complying with the 55 MHz cap do not cause undue risk of market concentration unless specific evidence to the contrary is presented by either interested parties or through review by Commission staff.

64. Furthermore, any concern about the possible competitive impact of moderately increased concentration is also materially reduced by the possibility of additional allocations of spectrum over the next two years that will greatly increase the amount of spectrum available for CMRS applications. In particular, the Commission's Advanced Wireless Services proceeding is considering

options for substantial new allocations of spectrum for terrestrial, fixed, and mobile services. These options include the 1710–1755 MHz band, which has already been transferred from federal government use, and the 2110–2150, 2160–2165 MHz Emerging Technologies band. Licensing of these bands is likely within the next two years. Clearance of incumbent users in each case is unlikely to be difficult, since they are primarily fixed operators and thus multiple options for relocation are available. Although provision of service on these bands is not imminent, the Commission believes this quantity of spectrum and the relative certainty that it will become available shortly after the end of the transition period should meaningfully discourage anticompetitive behavior during the period.

65. *Balancing of Efficiency and Competitive Effects of the Spectrum Cap.* On balance, the Commission finds that it should increase the CMRS spectrum cap to 55 MHz in MSAs. The potential harm from increasing the cap to 55 MHz appears to be outweighed by the corresponding potential benefits, which include facilitating improved operations, network design, and innovation. The Commission believes any increase of less than 10 MHz might not provide significant relief to firms that may be capacity-constrained, because there may be indivisibilities in the secondary market for spectrum that make acquisition in increments smaller than 10 MHz unlikely. (For example, carriers at 40 MHz may in effect be constrained by the 45 MHz cap because they can acquire, at most, 5 MHz of additional spectrum and such a small block of spectrum may not be available.) Regarding the effect of mergers or acquisitions up to the new cap, the Commission notes that many of these may not be acquisitions of ongoing businesses, but rather of bare licenses or licenses with only certain physical assets. In the 50 largest MSAs, for example, there is an average of roughly 40 MHz of unlaunched spectrum licenses. In the ten largest MSAs, there is an average of roughly 30 MHz. Consolidation of this unused spectrum into an existing business would not reduce actual competition, although it might have an effect on potential competition.

66. If a firm is capacity-constrained even at the 55 MHz limit, it may submit a waiver request. We find that waivers provide a reasonable solution for carriers that may need spectrum above the relaxed spectrum aggregation limit during the period until the rule sunsets. Therefore, to the extent that a carrier can demonstrate that in a particular geographic area the spectrum cap is currently having a significant adverse effect on its ability to provide CMRS, the Commission will consider granting a waiver of the cap for that geographic area. We urge carriers requesting waivers to clearly identify what additional services they would provide if the spectrum cap rule were waived, and why such services cannot be provided without exceeding the cap. In evaluating a waiver request, the Commission will also take into account any potential adverse effects of granting the waiver, such as diminution of competition, as well as the potential benefits from the provision of additional services.

*b. RSAs:*67. CMRS markets in rural areas are significantly different from the markets in urban areas. In particular, RSAs typically have many fewer competitors offering two-way mobile service, and many fewer nationwide service providers, than do MSAs. Indeed, in seventy-six percent of RSA counties, no more than one broadband PCS provider is competing with the cellular incumbents in any part of the county. In the *First Biennial Review Order*, the Commission increased the spectrum cap to 55 MHz in RSAs on the ground that allowing rural cellular and broadband PCS carriers to form partnerships in certain overlapping areas would allow these carriers to achieve economies of scope that might facilitate deployment, while entailing little opportunity cost because the economics of serving rural areas made it unlikely that a large number of independent competitors would emerge in any event. In the *NPRM*, the Commission asked whether, in light of the continued lagging development of competition in rural areas, it should consider further changes to the spectrum aggregation limits in these markets. In particular, the Commission asked commenters to describe any benefits to rural customers that had accrued from the previous increase in the spectrum cap in terms of lower prices, availability of digital services, or otherwise.

68. Some commenters argue that the spectrum cap inhibits competition in rural areas due to the high cost of providing service across large geographic areas, and that the most cost-effective means of bringing broadband PCS and SMR services to rural subscribers is to provide existing rural cellular providers the ability to acquire additional spectrum to offer such services. Another commenter, on the other hand, argues that removal of the spectrum cap in rural markets is likely to reduce competition and increase costs of mobile wireless service in those areas, given the smaller number of competitors in rural areas. Others argue that spectrum in rural areas is currently going unused, and that if the spectrum cap and cellular cross-interest rules are eliminated, the Commission should take other actions to ensure that small rural companies have the ability to obtain spectrum and that consumers in rural areas have access to advanced services.

69. Based on the record before it, the Commission concludes that, given the market conditions prevailing in rural areas during the transition period, 55 MHz remains the appropriate level for the spectrum cap in these areas until the cap is eliminated in favor of case-by-case review. Given the smaller population and demand for service in RSAs, it is highly unlikely that the current spectrum cap is causing any capacity constraint or similar inefficiency. The Commission therefore concludes that during the sunset period it should continue to keep the spectrum cap at 55 MHz in RSAs.

D. Partial Repeal of the Cellular Cross-Interest Rule

70. In the *NPRM*, the Commission sought comment on the possible repeal of the cellular cross-interest rule. Alternatively, it asked whether the rule could be modified so that it would not apply in certain circumstances in which other regulations would provide adequate safeguards. The Commission suggested the possibility of continuing to apply the rule only in markets where there are a limited number of competitors to the existing cellular providers. Accordingly, the Commission sought comment on whether there was a need to maintain any cellular-specific restrictions in more urban areas, where there are generally a larger number of competitive choices for consumers. While noting that cellular providers maintained large market shares in MSAs, the Commission asked whether cellular/cellular combinations remain more anticompetitive than cellular/PCS or PCS/PCS combinations in MSAs. Commenters were asked to provide empirical evidence and/or studies on the relative competitive and buildout status of cellular, SMR, and broadband PCS carriers on a market-by-market as well as comprehensive basis.

71. The majority of commenters who address the issue recommend elimination of the cellular cross-interest rule, particularly in MSAs. Some argue that the rule should be eliminated in its entirety. These commenters argue that the rule is unnecessary, outdated, and inequitable, noting that PCS licensees are not subject to a similar rule.

Moreover, they argue that meaningful competition now exists and the rule is not necessary to prevent harmful consolidation. Another commenter argues that, if the spectrum cap rule is retained, the cellular cross-interest rule should be eliminated in MSAs, though retained in RSAs, because in most MSAs, consumers have numerous choices. One commenter argues that the cross-interest rule remains a valuable competitive safeguard, particularly because there are still cellular markets in rural areas in which no broadband PCS provider has initiated service. Others argue that in the event that the spectrum cap or cellular cross-interest rules are modified or eliminated, the Commission must take other actions to ensure opportunities for small businesses and provision of service to underserved areas.

1. Elimination of Cellular Cross-Interest Restriction in MSAs

72. The Commission concludes that the cellular cross-interest rule is no longer necessary in urban markets, given the presence of numerous competitive choices for consumers in such markets. The Commission therefore repeals the rule in MSAs in order to provide relief from capacity constraints and in recognition of the fact that the cellular incumbents in MSAs no longer enjoy significant first-mover advantages. Unlike the case of the spectrum cap, the Commission finds that no transition period is necessary to eliminate the cellular cross-interest restriction in MSAs.

73. In the *First Biennial Review Order*, the Commission concluded that the cellular cross-interest rule was still necessary, given the strong market position held by the two cellular carriers in virtually all markets. The two cellular carriers held the vast majority of subscribers in all markets and were the only providers of mobile telephony service in many markets. The Commission therefore found that the rule was still needed to prevent these incumbents from merging or having significant cross-ownership interests. The Commission recognized, however, that the cellular carriers' relative market position was diminishing in certain markets as broadband PCS and digital SMR service providers attracted more subscribers and began service in more areas of the country, particularly urban markets. The Commission then noted that it would reassess the need for a separate cellular cross-interest rule as part of its year 2000 biennial review, by which time it expected that the market positions of the two cellular carriers and broadband PCS and digital SMR service providers would have narrowed further.

74. The Commission finds today that cellular carriers no longer possess market power in MSAs, and that the services offered by cellular and broadband PCS providers in these markets are indistinguishable to consumers. In MSAs, eighty-six percent of counties have four or more facilities-based CMRS providers that are offering service in some part of the county. Forty of the fifty most populous MSAs have six nationwide carriers, counting Nextel, with the remaining ten MSAs having five nationwide carriers. The significant drop in HHI calculations based on estimated subscribers in the top twenty-five MSAs from January 1999 to January 2001 is further indication that any market power that cellular carriers may have been able to exercise in the past has diminished in these urban markets. Moreover, the cellular providers' share of mobile telephony nationwide had declined to seventy percent by the end of 2000. In addition, most cellular carriers in MSAs have deployed digital technology extensively throughout their networks, and from a customer's perspective, digital service in the cellular band is virtually identical to digital service in the PCS band.

75. Accordingly, the Commission finds no reason to view the combination of cellular licensees in these markets less favorably than combinations of other CMRS licensees. Moreover, because the Commission finds that combinations of cellular carriers in MSAs are not presumptively anticompetitive today, and because restrictions on such combinations may be contributing to capacity constraints, it would be inappropriate to continue applying this rule on a transitional basis.

2. Retention of Cellular Cross-Interest Restriction in RSAs

76. The Commission concludes, however, based on the record before it, that it would not be appropriate at this time to eliminate the cellular cross-interest rule in rural markets. The Commision therefore retains the rule in RSAs, subject to waiver of the prohibition where it is shown that the proposed cross-interest would not create a significant likelihood of substantial competitive harm. The Commission will, however, reassess the need for a cellular cross-interest restriction in RSAs as part of its next biennial review in 2002, by which time the Commission may have more comprehensive information regarding the state of competition in rural markets.

77. CMRS markets in rural areas are different from the markets in urban areas, in that, generally, the cellular providers seem to enjoy first-mover advantages and to dominate the marketplace. In seventy-six percent of RSA counties, no more than one broadband PCS provider is competing with the cellular incumbents in any part of the county. Indeed, fifty-six percent of RSA counties have two or fewer facilities-based providers of mobile telephony offering service, presumably in most instances the two cellular licensees. In addition, it is the Commission's understanding that, in some areas, any competitors to the cellular incumbents are serving only a small portion of the county, particularly in the western United States, where many states have large rural counties. It is also significant that cellular carriers still control 70 percent of mobile telephony markets nationwide as of year-end 2000, and this share is likely to be smaller in MSAs and larger in RSAs. In the absence of a record to the contrary, these facts suggest that the cellular carriers generally dominate the rural markets. Moreover, due to the economics of serving rural areas, potential entry by new competitors is likely to be difficult. Thus, based on the record in this proceeding, it appears that a combination of interests in cellular licensees in rural areas would more likely result in a significant reduction in competition. In this regard, the Commission notes that unlike the spectrum cap rule, the cellular cross-interest rule addresses not the aggregation of spectrum, but the competitive position of the two cellular licensees. Without more comprehensive information in the record, however, the Commission is unable to conclude that repeal of the cellular cross-interest rule in RSAs is appropriate at this time.

78. In addition, the cellular cross-interest rule in RSAs is well tailored to the harm that it seeks to prevent. Because the rule places cellular carriers in RSAs under no special constraints in obtaining PCS spectrum, and in most RSAs there is ample unused PCS spectrum available, the rule does not prevent cellular carriers from increasing their capacity or offering advanced services. The ability of cellular carriers in rural areas to obtain PCS spectrum may provide an additional opportunity to consumers in RSAs to have access to the same advanced services offered to consumers in MSAs. The Commission therefore concludes that it should continue to forbid a cellular licensee in an RSA from holding an attributable interest in the cellular licensee on the

other channel block in an overlapping CGSA. To the extent that it can be shown that an RSA exhibits market conditions under which a specific cellular cross-interest would not create a significant likelihood of substantial competitive harm, such a situation can be addressed through waiver of the cross-interest prohibition.

79. Further, the Commission rejects one commenter's arguments that the benchmark for attributable ownership interests under the cellular cross-interest rule should be increased from five to 20 percent, as under the spectrum cap rule, and that the Commission should include a provision for waiver in the case of a passive minority investor in a licensee that has a single majority shareholder. The commenter, which supports retention of the spectrum cap and the cellular cross-interest rule (in both MSAs and RSAs), argues that because of the evolution of mobile telephony since the inception of the cellular cross-interest rule, there currently may be situations in which attributable ownership interests of greater than five percent would pose ''no actual threat to competition.'' In the *First Biennial Review Order*, the Commission found that given the continued dominance of the cellular incumbents in CMRS markets, allowing a party with a controlling interest in one cellular licensee to hold up to twenty percent ownership of the other licensee in the same market would pose a substantial threat to competition. Specifically, significant cross-interests between the two largest service providers in RSAs generally would create a significant incentive for the two not to compete with one another as vigorously as otherwise. For the reasons discussed above, the Commission concludes that market conditions in RSAs have not changed sufficiently to generally permit such cross-holdings of cellular interests today. The Commission will, however, entertain requests for waiver in appropriate circumstances. Thus, it declines to make the above-suggested revisions to the cellular cross-interest rule.

80. In the *NPRM*, the Commission sought comment on whether the cellular cross-interest rule should be modified to account for the possible disaggregation of cellular spectrum. For example, it asked whether the cellular cross-interest rule should be replaced by a cellular spectrum cap of 35 MHz so as to permit combination of a 25 MHz cellular license with up to 10 MHz of cellular spectrum on the other channel block in the same geographic area. The Commission did not receive any comment on this issue. In light of the absence of comment to guide it deliberations, and in light of the lack of applications for disaggregation of cellular spectrum, the Commission declines to modify the rule at this time. Given the lack of record evidence regarding this issue, the Commission believes it is more appropriate at this time to address any such requests on a case-by-case basis.

E. Clarification and Streamlining of Divestiture Provisions

81. The current spectrum cap and cellular cross-interest rules impose different time frames for divestiture of interests. The cellular cross-interest rule requires that a divestiture transaction be consummated prior to consummating the transaction that gives rise to the need to divest. The spectrum cap rule, however, considers parties to be in compliance with the divestiture provisions if, prior to consummating the primary transaction, an application is filed to transfer control of or assign any interest that would conflict with the rule. Based on its experience over the past two years, particularly in reviewing applications that combined cellular and PCS divestitures in one transaction, the Commission believes that the required timing of divestiture under these two rules should be harmonized.

82. Rather than tighten the divestiture provision in § 20.6, the Commission concludes that the better approach is to afford parties more leeway in the timing of divestiture transactions by revising § 22.942 of its rules to permit a transaction that causes a conflict with this rule to close as long as an application (or other request for Commission approval) has been filed that, if granted and the transaction is consummated, would remove the conflict. In choosing this more lenient course, however, the Commission notes that there may be circumstances in which a party that must divest an interest to comply with the spectrum cap and/or cellular cross-interest restriction should not be allowed a full 180 days to consummate a divestiture transaction. Divestiture transactions, by definition, occur to relieve potential anti-competitive effects of additional concentration. Therefore, because of specific competitive consequences of individual transactions, the Commission may decide on a case-by-case basis that it would serve the public interest to shorten the consummation and notification period to minimize the amount of time that such overlap occurs.

83. The Commission also takes this opportunity to clarify certain issues with respect to placing licenses (or interests in licenses) into a divestiture trust. As a preliminary matter, the Commission will revise § 22.942 of its rules to state explicitly that divestiture of licenses or interests pursuant to this rule is permitted via divestiture trust. In the *First Biennial Review Order,* the Commission stated that a licensee may divest to a trust if the trust will be of limited duration (six months or less) and the terms of the trust are approved by the Commission prior to the transfer of the assets to the trust. Further, the Commission stated that: (1) The divesting party must not have any interest in or control of the trustee; (2) the trust agreement must clearly state that there will be no communications with the trustee regarding the management or operation of the subject facilities; and (3) the trustee must have the authority to dispose of the license(s) as he or she sees fit.

84. Based on its experience over the past two years reviewing such trust arrangements, the Commission believes that certain clarifications are appropriate to its policy on divestiture trusts. First, with respect to communications between the trustee and the beneficiary (*i.e.,* the divesting party), the Commission recognizes that the nature of communication required between the trustee and the beneficiary will differ depending on the nature of the trust property. For example, if the trust property is merely equity in a licensee that the beneficiary formerly held, very little communication between the trustee and the beneficiary will be necessary. If, however, the trustee is holding an entire business and managing operations, the beneficiary must have the freedom, and the responsibility, to respond to inquiries from the trustee, but must not be given additional knowledge about the operations of the divested property that could be used to influence the operations that the beneficiary retained in the affected market(s). Second, to enable the Commission to keep track of the progress toward ultimate divestiture, the Commission clarifies that its policy is to require, in individual transactions, trustees to report to the Commission every sixty days on the status of attempts to transfer the trust property to a third party. Third, the Commission clarifies that material revisions to an approved trust agreement that relate to the types of provisions it has identified herein or in the *First Biennial Review Order* require prior Commission approval. Fourth, the Commission clarifies that, in the case of an approved divestiture trust, the trust property will be attributed during the period held in

trust to the trustee, and because of the protections that are required of such trusts, not to the beneficiary.

Final Regulatory Flexibility Analysis

85. As required by the Regulatory Flexibility Act of 1980, as amended, (RFA) an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM* in this proceeding. The Commission sought written public comment on the proposals in the *NPRM,* including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the R&O

86. In the *NPRM* in this proceeding, as part of its biennial regulatory review pursuant to section 11 of the Communications Act, the Commission solicited comment on whether it should retain, modify, or eliminate the CMRS spectrum cap and the cellular cross-interest rule. In asking these questions, the *NPRM* looked at recent competitive changes in CMRS markets, reexamined the public interest objectives that the spectrum aggregation limits were designed to achieve, and asked whether there were alternatives to the existing rules that would avoid any potential public interest costs.

87. This *R&O* concludes that the CMRS spectrum cap is no longer necessary in the public interest as the result of meaningful economic competition in CMRS markets. Accordingly, the Commission provides for the elimination or ''sunset'' of the spectrum cap rule effective January 1, 2003. The Commission will no longer rely on this prophylactic rule in its approach to the aggregation of CMRS spectrum, but instead it will examine spectrum aggregation on a case-by-case basis, along with enforcement of safeguards in cases of misconduct. During the transition period, the Commission will consider substantive and processing guidelines to guide its case-by-case review of transactions that would raise concerns similar to those that the spectrum cap was designed to address. The Commission further decides, on the basis of the current state of competition in CMRS markets, to raise the spectrum cap to 55 MHz in all markets during the transition period. The Commission believes that this change should address certain carriers' concerns about near term capacity constraints in the most constrained urban areas during the period until the rule is eliminated and reliance solely on case-by-case review of CMRS spectrum aggregation is initiated, while not posing an undue risk of anti-competitive consequences during the transition period.

88. The Commission also eliminates the cellular cross-interest rule in MSAs without a transition period, in recognition that the cellular carriers in these areas no longer enjoy significant first-mover advantages. However, based on the current record, the Commission retains the cellular cross-interest rule in RSAs, where it appears that the cellular incumbents continue generally to dominate the market. The Commission will reassess the continued need for the cellular cross-interest rule in RSAs during the 2002 biennial review.

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

89. The Office of Advocacy of the U.S. Small Business Administration (SBA) and the National Telephone Cooperative Association (NTCA) filed comments in response to the IRFA. The SBA asserts that the Commission failed to (1) clearly state its regulatory objectives, (2) describe the impact its proposed rules would have on small businesses, and (3) propose alternatives designed to minimize this impact. The Commission disagrees.

90. First, the deregulatory goal of this biennial regulatory review proceeding is clear. The Communications Act requires the Commission to review certain of its rules biennially and determine whether those rules are no longer necessary in the public interest as a result of meaningful economic competition. Subsequent to making those determinations, the Commission is directed to ''repeal or modify any regulation it determines to be no longer in the public interest.'' Pursuant to that mandate, the Commission has reviewed whether competitive or other developments in CMRS markets warrant elimination or modification of any Commission regulations. In particular, in this proceeding, the Commission reviewed whether to retain, modify or eliminate two regulations that currently limit the aggregation of broadband CMRS spectrum: (1) the CMRS spectrum cap and (2) the cellular cross-interest rule. The *NPRM* addressed possible modifications to the spectrum cap and cellular cross-interest rules, including, among other things: (1) Increasing the amount of spectrum that a single entity may hold in a given geographic area beyond 45/55 MHz; (2) modifying the spectrum cap's ten percent population overlap threshold and/or attribution rules; (3) eliminating or modifying the rule that limits attributable SMR spectrum to 10 MHz; (4) altering the cellular cross-interest rule's provisions as they relate to disaggregation of spectrum and/or post-licensing divestiture; and (5) modifying the ownership attribution standards under both rules. Finally, the Commission notes that by its nature, the Commission's statutory biennial regulatory review obligation contemplates a somewhat open-ended review of the Commission's rules with an eye toward deregulation.

91. Second, the *NPRM* sufficiently described the impact the Commission's proposed rules would have on small businesses, as required by the RFA. SBA states, ''the Commission should explain whether lifting the spectrum cap would tend to discourage small business new entry or drive existing small businesses from the marketplace.'' Again, the Commission notes that its statutory biennial regulatory review requires it to review certain of its rules biennially and determine whether those rules are no longer necessary in the public interest as a result of meaningful economic competition. In the *NPRM,* the Commission stated:

> Since [September 1999], there have been international and economic developments that have significantly affected CMRS markets. For example, consolidation within the CMRS industry in an effort to create national service footprints has tended to reduce the number of smaller entities providing broadband CMRS on a purely local level. As part of this 2000 biennial review, we seek to develop a record regarding whether the CMRS spectrum cap and cellular cross-interest rule continue to make regulatory and economic sense in CMRS markets in the current-, mid-, and long-term. In doing so, we generally request comment on whether retention, modification, or elimination of the CMRS spectrum cap and/or cellular cross-interest rule is appropriate with respect to small businesses that are licensees in the cellular, broadband PCS and/or SMR services. We seek comment on whether there continues to be a need for these rules to ensure that new entrants, including small businesses, have access to spectrum licenses both at auction and in the secondary market. We inquire whether these bright-line rules continue to create efficiencies and reduce transaction costs for small business. We consider the impact on small businesses if we were to adopt alternative approaches that rely more heavily on case-by-case review. We also seek specific comment on various aspects of these rules that particularly affect small business, such as the [sic] whether our September 1999 decision to increase attribution standards to 40 percent has benefited small businesses.

92. The above-quoted language demonstrates that the Commission raised and addressed the very issues SBA claims were absent in the *NPRM.* The Commission believes it sufficiently raised questions to obtain comment on these issues. For instance, the

Commission notes that the above language asks whether ''there continues to be a need for these rules to ensure that new entrants, including small businesses, have access to the spectrum licenses both at auction and in the secondary market.'' Accordingly, the *NPRM* met the RFA's requirements.

93. Finally, SBA states that ''the Commission should raise and explore alternative ways to encourage nationwide networks, alleviate spectrum shortages, or safeguard competition, and analyze how these alternatives would affect entities with varied resources.'' As noted in the above-quoted language, the *NPRM* raised a series of issues concerning small entities, affording such entities adequate opportunity to comment on these issues. In addition, as previously noted, biennial regulatory review by its nature contemplates a somewhat open-ended review of the Commission's rules with an eye toward deregulation, as opposed to a more targeted rulemaking. The deregulatory nature of the *NPRM* focuses on whether to retain, modify or eliminate two rules—the CMRS spectrum cap and the cellular cross-interest rule—because they may no longer be necessary in the public interest as a result of meaningful economic competition. Therefore, within the context of its biennial regulatory review, the Commission believes the *NPRM* raised and explored the possible alternatives (*i.e.,* whether to retain, modify or eliminate the two rules). In addition, the *NPRM* sought comment on alternative courses of action if the Commission does eliminate the spectrum cap.

94. NTCA argues that ''[t]he unconditional raising or lifting of the spectrum cap will likely result in further consolidation within the CMRS industry and diminish the opportunities for smaller entities to provide broadband CMRS service.'' Notably, NTCA does not, in its comments on either the body of the *NPRM* or the IRFA, oppose modifying or eliminating either the spectrum cap or the cellular cross-interest rule. Nor does NTCA identify any specific inadequacy in the IRFA. Rather, as an ''alternative to its proposed rule changes,'' NTCA urges the Commission to take several actions unrelated to its spectrum aggregation limits: (1) license spectrum according to smaller geographic service territories, (2) take actions to increase the availability of spectrum to small carriers on the secondary market, and (3) enforce strict construction requirements against CMRS licensees.

95. The alternatives that NTCA advocates are beyond the scope of this proceeding. Specifically, the Commission considers the size of geographic licensing areas in the context of establishing licensing rules for particular bands of spectrum. The Commission is considering in another proceeding potential measures to facilitate the availability of spectrum in secondary markets. *Notice of Proposed Rulemaking* (65 FR 81475, December 26, 2000). Any potential changes in the Commission's construction requirements, or establishment of construction requirements for newly assigned spectrum, are also best considered separately from spectrum aggregation limits. The Commission has considered in this *R&O* alternatives to eliminating the spectrum cap rule, and has adopted measures to minimize the impact of its decision on small entities.

96. No other comments were submitted specifically in response to the IRFA.

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

97. 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 their rules. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small organization,'' ''small business,'' and ''small governmental jurisdiction.'' 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 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. ''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 ninety-six 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 (ninety-one percent) are small entities. According to SBA reporting data, there were 4.44 million small business firms nationwide in 1992.

98. The rule changes adopted in this *R&O* will affect small businesses that currently are or may become licensees in the cellular, broadband PCS and/or SMR services. The Commission estimates the following number of small entities may be affected by the proposed rule changes:

99. *Cellular Radiotelephone Service.* Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons. According to the Bureau of the Census, only twelve radiotelephone firms from a total of 1,178 such firms, which operated during 1992, had 1,000 or more employees. Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. In addition, the Commission notes that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. In addition, according to the most recent Telecommunications Industry Revenue data, 808 carriers reported that they were engaged in the provision of either cellular service or PCS, which are placed together in the data. The Commission does not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, the Commission estimates that there are fewer than 808 small cellular service carriers that may be affected by the policies adopted in this *R&O*.

100. *Broadband Personal Communications Service (PCS).* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined ''small entity''' for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. Subsequently, the Commission defined an additional classification—''very small business''—for blocks C and F for entities that, together with their affiliates, have had average gross revenues of not more than $15 million

for the preceding three calendar years. These regulations defining ''small entity''' in the context of broadband PCS auctions and licensing have been approved by the SBA.

101. The Commission has held six auctions of broadband PCS licenses to date. No small businesses within the SBA-approved definition bid successfully for licenses in the first of these auctions, Auction No. 4, in which the Commission made available licenses in blocks A and B. In Auction No. 5, the initial C block auction, eighty-nine (89) winning bidders qualified as small entities, winning 493 licenses. In the next C block auction, Auction No. 10, seven (7) winning bidders qualified as small entities, winning eighteen (18) licenses. A total of ninety-three (93) small and very small business bidders won approximately forty percent of the 1,479 licenses for blocks D, E, and F in the next broadband PCS auction, Auction No. 11. In Auction No. 22, forty-eight (48) bidders claiming small or very small business status won 277 of the 347 licenses offered. In Auction No. 35, the most recent broadband PCS auction, twenty-nine (29) of the thirty-five (35) winning bidders qualified as small or very small businesses and won 247 licenses. Accordingly, a maximum of 266 small entities have been awarded or placed high bids on licenses in broadband PCS block auctions to date.

102. *Specialized Mobile Radio (SMR).* Pursuant to 47 CFR 90.814(b)(1), the Commission has defined ''small business'' for purposes of auctioning 900 MHz SMR licenses, 800 MHz SMR licenses for the upper 200 channels, and 800 MHz SMR licenses for the lower 230 channels on the 800 MHz band as a firm that has had average annual gross revenues of $15 million or less in the three preceding calendar years. The SBA has approved this small business size standard for the 800 MHz and 900 MHz auctions. The auction of the 1,020 geographic area licenses for the 900 MHz SMR band began on December 5, 1995, and was completed on April 15, 1996. Sixty (60) winning bidders for geographic area licenses in the 900 MHz SMR band qualified as small businesses under the $15 million size standard. The auction of the 525 800 MHz SMR geographic area licenses for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten (10) winning bidders for geographic area licenses for the upper 200 channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard.

103. The lower 230 channels in the 800 MHz SMR band are divided between General Category channels (the upper 150 channels) and the lower 80 channels. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels (plus three (3) 800 MHz licenses for the upper 200 channels from a previous auction) began on August 16, 2000, and was completed on September 1, 2000. At the close of the auction, 1,030 licenses were won by bidders. Eleven (11) winning bidders for geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. The auction of the 2,800 geographic area licenses for the lower 80 channels of the 800 MHz SMR service began on November 1, 2000, and was completed on December 5, 2000. Nineteen (19) winning bidders for geographic area licenses for the lower 80 channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. The Commission, therefore, estimates that there are up to 100 geographic area licensees that are small entities in the 800 MHz and 900 MHz SMR bands. In addition, there are 1,144 incumbent site-by-site SMR licensees on the 800 and 900 MHz bands.

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

104. The rules in this *R&O* do not impose any additional reporting, recordkeeping or other compliance measures.

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

105. In this proceeding, the Commission considered whether to retain, modify, or, alternatively, to eliminate the CMRS spectrum cap and cellular cross-interest rules. The Commission also asked whether there were alternatives to these rules that could avoid any potential public interest costs. The Commission has weighed the benefits of such alternative means of reviewing CMRS spectrum aggregation, specifically considering whether to continue using prophylactic rules or to review spectrum aggregation issues on a case-by-case basis.

106. As an alternative to eliminating the spectrum cap rule, the Commission considered continuing to apply a prophylactic approach to the potential anti-competitive effects of CMRS spectrum aggregation. The Commission recognized that different costs and benefits can be associated with bright-line rules and case-by-case review with respect to degree of flexibility, predictability of outcome, likelihood of rejecting beneficial (or approving harmful) transactions, ability to account for the particular attributes of a transaction or market, speed of decision-making, and resource demands on the Commission and carriers. On balance, and in light of the growth of both competition and consumer demand in the CMRS market, the Commission concludes that case-by-case review, accompanied by enforcement of sanctions in cases of misconduct, is now preferable to the spectrum cap rule because it gives the Commission flexibility to reach the appropriate decision in each case, on the basis of the particular circumstances of that case. The Commission is persuaded that competition is now robust enough in CMRS markets that it is no longer appropriate to impose overbroad, *a priori* limits on spectrum aggregation that may prevent transactions that are in the public interest.

107. The Commission believes its provision for a transition period prior to January 1, 2003, for eliminating the spectrum cap will minimize the impact of its decision on small businesses. The Commission notes that several commenters argue against eliminating or increasing the spectrum cap on the ground that the cap preserves opportunities for entrepreneurs and providers of niche services. As other commenters point out, however, the spectrum cap rule does nothing in and of itself to create opportunities for entrepreneurs, and may actually harm small businesses by limiting their access to existing carriers as sources of capital and management expertise. To the extent the spectrum cap does create some potential opportunities for entrepreneurs, the Commission finds this benefit is insufficient to outweigh the benefits of moving away from a bright-line rule approach, particularly in light of the other tools the Commission has to help preserve opportunities for small businesses—its ability to carry out case-by-case review of transactions and its ability to shape the initial distribution of licenses through the service rules adopted with respect to specific auctions. Nevertheless, although it believes that opportunities for small businesses can be fully protected through a case-by-case approach, the Commission recognizes that advancing one's positions in a case-by-case regime could require resources that small businesses may not be immediately prepared to commit. Furthermore, regulatory certainty and speed of processing are likely to be particularly important to small businesses, which typically are less able

to withstand extended or costly administrative processes. Therefore, in considering the adoption of guidelines and procedures, the Commission will take account of the needs of small businesses. The Commission fully expects that case-by-case review, properly performed, will offer large and small businesses alike the benefits of flexibility and attention to the specific details of a particular transaction. The Commission also commits itself to vigorous enforcement of safeguards against anti-competitive activity.

108. During the transition period, the Commission raises the spectrum cap to 55 MHz in all geographic areas. The Commission considered and rejected the alternative of leaving the spectrum cap at 45 MHz in MSAs because it determined that a 45 MHz cap may over the next fourteen months impose capacity constraints, and ensuing costs to consumers, on carriers in certain urban markets. The Commission also determined that a moderate increase in the spectrum cap, under current market conditions, does not pose an undue risk of anti-competitive conduct during the transition period. Finally, the Commission notes that it will continue to review the competitive consequences of transactions that are at or below the spectrum cap if specific evidence of competitive concerns is presented either by interested parties or through review by Commission staff.

109. With respect to the cellular cross-interest rule, the Commission determines that the rule is no longer necessary or appropriate in MSAs because the cellular duopoly conditions that prompted the rule's adoption no longer exist. Thus, under current market conditions in MSAs, there is no reason to treat the aggregation of cellular spectrum any differently than other aggregation of CMRS spectrum. In RSAs, by contrast, the record, though limited on this point, indicates that competition to the incumbent cellular licensees is not as developed as in MSAs. Thus, based on the record in this proceeding, it appears that a combination of interests in cellular licensees would more likely result in a significant reduction in competition. The Commission, therefore, retains the cellular cross-interest rule in RSAs, subject to waiver of the rule for those RSAs that are shown to exhibit market conditions under which cellular cross-interests may be permissible without a significant likelihood of substantial competitive harm.

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

Paperwork Reduction Act Analysis

111. This *R&O* has been analyzed with respect to the Paperwork Reduction Act of 1995, Public Law No. 104–13, and does not contain any new or modified information collections subject to Office of Management and Budget Review.

Procedural Matters and Ordering Clauses

112. Pursuant to the authority of sections 1, 4(i), 11, 303(g), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 161, 303(r), and 309(j), this *R&O* is adopted, and §§ 20.6 and 22.942 of the Commission's Rules, 47 CFR 20.6, 22.942, are amended as set forth in the *R&O,* effective February 13, 2002.

113. The Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

List of Subjects in 47 CFR Parts 20 and 22

Communications common carrier.

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 20 and 22 as follows:

PART 20—COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for part 20 continues to read as follows:

Authority: 47 U.S.C. 154, 160, 251–54, 303, and 332 unless otherwise noted.

2. Section 20.6 is amended by revising paragraphs (a) and (e)(4)(i) and adding a new paragraph (f) to read as follows:

§ 20.6 CMRS spectrum aggregation limit.

(a) *Spectrum limitation.* No licensee in the broadband PCS, cellular, or SMR services (including all parties under common control) regulated as CMRS (*see* 47 CFR 20.9) shall have an attributable interest in a total of more than 55 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any geographic area.

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(e) * * *

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(4)(i) Parties holding controlling interests in broadband PCS, cellular, and/or SMR licensees that conflict with the attribution threshold or geographic overlap limitations set forth in this section will be considered to have come into compliance if they have submitted to the Commission an application for assignment of license or transfer of control of the conflicting licensee (*see* § 1.948 of this chapter; *see also* § 24.839 of this chapter (PCS)) by which, if granted, such parties no longer would have an attributable interest in the conflicting license. Divestiture may be to an interim trustee if a buyer has not been secured in the required period of time, as long as the applicant has no interest in or control of the trustee, and the trustee may dispose of the license as it sees fit. Where parties to broadband PCS, cellular, or SMR applications hold less than controlling (but still attributable) interests in broadband PCS, cellular, or SMR licensee(s), they shall submit a certification that the applicant and all parties to the application have come into compliance with the limitations on spectrum aggregation set forth in this section.

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(f) *Sunset.* This rule section shall cease to be effective January 1, 2003.

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PART 22—PUBLIC MOBILE SERVICES

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

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

2. Section 22.942 is amended by revising paragraphs (a) and (c) to read as follows:

§ 22.942 Limitations on interests in licensees for both channel blocks in RSAs.

(a) *Controlling Interests.* A licensee, an individual or entity that owns a controlling or otherwise attributable interest in a licensee, or an individual or entity that actually controls a licensee for one channel block in a CGSA may not have a direct or indirect ownership interest of more than 5 percent in the licensee, an individual or entity that owns a controlling or otherwise attributable interest in a licensee, or an

individual or entity that actually controls a licensee for the other channel block in an overlapping CGSA, if the overlap is located in whole or in part in a Rural Service Area (RSA), as defined in 47 CFR 22.909.

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(c) *Divestiture.* Divestiture of interests as a result of a transfer of control or assignment of authorization must occur prior to consummating the transfer or assignment.

(1) Parties needing to divest controlling or otherwise attributable interests set forth in this section will be considered to have come into compliance if they have submitted to the Commission an application for assignment of license or transfer of control of the conflicting interest (*see* § 1.948 of this chapter) or other request for Commission approval by which, if granted, such parties no longer would have an attributable interest in the conflicting interest. Divestiture may be to an interim trustee if a buyer or acquirer of the interest has not been secured in the required period of time, as long as the buyer or acquirer of the interest has no interest in or control of the trustee, and the trustee may dispose of the interest as it sees fit. Where parties to such applications or requests for Commission approval hold less than controlling (but still attributable) interests, they shall submit a certification that the applicant or acquirer of the interest and all parties to the application or request for Commission approval have come into compliance with the limitations on interests in licensees for both channel blocks set forth in this section.

(2) [Reserved]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 20 and 64

[CC Docket No. 92–105, WT Docket No. 00–110; FCC 01–351]

The Use of N11 Codes and Other Abbreviated Emergency Dialing Arrangements

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, through this document, takes several steps towards implementation of 911 as the universal emergency assistance number for both wireline and wireless telephones. Specifically, the Commission adopts a maximum period for all carriers, serving areas with a designated public safety answering point (PSAP) or serving areas where a PSAP has not yet been designated, to transition to routing 911 calls to a PSAP, an existing statewide established default point, or an appropriate local emergency authority. The decision also addresses steps the Commission will take to encourage and support States in their efforts to develop and implement end-to-end emergency communications infrastructure and programs for the improved delivery of emergency services to the public. Finally, the decision clarifies that VHF Public Coast Station licensees are not required to use 911 dialing for accessing emergency services to the extent that they are providing maritime services. The action is taken to satisfy the Commission's legislative mandate and to promote public safety through the deployment of a seamless, nationwide emergency communications infrastructure that includes wireless communications services.

EFFECTIVE DATE: February 13, 2002, except for § 64.3002, which contains modified information collection requirements that are not effective until approved by the Office of Management and Budget. The Commission will publish a document in the **Federal Register** announcing the effective date for this section. Public comment on the information collections are due March 15, 2002, and comments by the Office of Management and Budget are due May 14, 2002.

ADDRESSES: A copy of any comments on the information collection contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *jboley@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: Susan Kimmel or David Siehl,202–418–1310, or Cheryl Callahan, 202–418–1806. For further information concerning the information collection contained in this Order, contact Judy Boley, Federal Communications Commission, 202–418–0214, or via the Internet at *jboley@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Fifth Report and Order in CC Docket No. 92–105, First Report and Order in WT Docket No. 00–110 (Order), and Memorandum Opinion and Order in CC Docket No. 92–105 and WT Docket No. 00–110, FCC No. 01–351 (cited collectively as Order), adopted November 29, 2001, and released December 11, 2001. The complete text of this Order is available for inspection and copying during normal business hours in the FCC Reference Information Center, Courtyard Level, 445 12th Street, SW., Washington, DC, and also may be purchased from the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Copies of the full text of this decision may also be found at the Commission's Internet site at *www.fcc.gov*.

Synopsis of the Order

1. The Commission, in the Order, takes further steps to implement the provisions in the Wireless Communications and Public Safety Act of 1999 (911 Act), enacted by Congress to promote public safety through the deployment of a seamless, nationwide emergency communications infrastructure that includes wireless communications services and to implement 911 as the universal emergency assistance number. (A summary of the Third Notice of Proposed Rulemaking in CC Docket No. 92–105 may be found at 65 FR 56752, September 19, 2000. The First Notice of Proposed Rulemaking in WT Docket No. 00–110 was summarized at 65 FR 56757, September 19, 2000.)

2. The Commission first adopts a flexible transition approach to implementation of 911 as the emergency assistance number. This approach reflects the different technical and operational measures that carriers need to undertake and provides carriers the flexibility necessary for them to effectuate transition to 911 expeditiously. The Commission notes that the transition period adopted in the Order does not apply to those carriers who currently route 911 calls to PSAPs in their service area.

3. As an initial matter, paragraph 14 of the Order discusses the use of the term ''appropriate authorities'' as used in the 911 Act, and finds it reasonable to interpret this term to include emergency answering points such as county sheriff offices, volunteer fire departments, or other similar points that are effectively functioning as PSAPs for purposes of receiving emergency calls, and, if necessary, relaying the calls to other emergency service providers, for the purpose of responding to emergencies.

4. As discussed in paragraphs 15 through 31 of the full text of the Order, the Commission establishes a flexible transition approach to 911 implementation. First, where carriers do not currently route 911 calls to officially designated PSAPs, the Commission