**Appendices A and B—[Amended]**

2. Appendices A and B are amended by removing the entry for CAS No. 732–11–6 for the chemical name Phosmet.

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 22, 24, and 90

**[WT Docket Nos. 02–381, 01–14, 03–202; FCC 03–222]**

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

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Federal Communications Commission examines ways of amending spectrum regulations and policies in order to promote the rapid and efficient deployment of quality spectrum-based services in rural areas.

**DATES:** Submit comments on or before December 29, 2003. Submit reply comments on or before January 26, 2004.

**FOR FURTHER INFORMATION CONTACT:** Nicole McGinnis, Wireless Telecommunications Bureau, at (202) 418–0317, or via the Internet at *Nicole.Mcginnis@fcc.gov.* For additional information concerning the information collections contained in this document, contact Judith-B. Herman at (202) 418–0214, or via the Internet at *Judith.B-Herman@fcc.gov.*

**SUPPLEMENTARY INFORMATION:** This is a summary of the Federal Communications Commission's *Notice of Proposed Rulemaking* (*NPRM*), FCC 03–222, adopted September 10, 2003, and released October 6, 2003. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the FCC's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov.* Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at *Brian.Millin@fcc.gov.*

**Synopsis of the NPRM**

**I. Introduction and Overview**

1. In this Notice of Proposed Rulemaking (*NPRM*), we continue to examine ways to promote the rapid and efficient deployment of quality spectrum-based services in rural areas. We build upon the record developed in response to our *Notice of Inquiry*, in which we sought comment on how we could modify our policies to further encourage the provision of wireless services in rural areas. *See* Facilitating the Provision of Spectrum-Based Service to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, WT Docket No. 02–381, *Notice of Inquiry,* 68 FR 723 (January 7, 2003) (*Rural NOI*). We also draw upon the findings and recommendations of the Spectrum Policy Task Force.

2. The Commission's primary mission is the promotion of ''communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.'' Furthermore, for auctionable services, the Commission is required to promote various objectives in designing a system of competitive bidding, including the development and rapid deployment of new technologies, products, and services for the benefit of the public, ''including those residing in rural areas,'' and ''the efficient and intensive use of spectrum.'' Under section 706 of the Communications Act, the Commission is also directed to ''encourage the provision of new technologies and services to the public.'' Consistent with these statutory mandates, the Commission's spectrum policy goals generally have been to facilitate efficient use, competition, and rapid, widespread service consistent with the goals of the Communications Act.

3. On a national scale, the deployment of wireless mobile services has been a huge success, resulting in increased competition and services overall. We believe that a number of measures that the Commission has already adopted have contributed to this successful deployment of wireless service. Recently, the Commission took steps to facilitate spectrum leasing in secondary markets, building upon existing, flexible, market-based policy efforts to encourage more efficient use of spectrum. The Commission did so with the belief that secondary markets would also facilitate investment in rural areas.

4. We recognize the inherent economic challenges of providing telecommunications services in sparsely populated, expansive rural areas. We note that the Federal-State Joint Board has solicited comment on issues relating to the eligibility of wireless carriers to receive universal service support. Further, the Wireless Telecommunications Bureau and the U.S. Department of Agriculture's Rural Utilities Service (RUS) have recently initiated a ''Federal Rural Wireless Outreach Initiative'' that seeks to harmonize the agencies' policies regarding rural wireless deployment and highlight the RUS loan programs available to wireless companies that serve rural communities. At present, programs are available to support the provision of spectrum-based services in rural areas.

5. We believe that rural as well as urban consumers and businesses have benefited from our market-oriented policies that promote facilities-based competition for telecommunications services. The Commission recently found that there is effective competition in the CMRS marketplace as a whole, including in rural areas. The Commission's policy to let market forces determine the number of firms operating in a given geographic area, subject to limits on spectrum availability and aggregation, recognizes this fact, and allows firms to operate at a competitive and efficient scale of operation. The Commission recognizes that, as a result of varying technical and demographic characteristics, the economics of providing service can be significantly different in rural areas as compared to urban areas. Our proposals attempt to acknowledge that market characteristics, especially demographics, will affect the optimal market structure.

6. Furthermore, there may well be a public interest in policies that encourage potential users to become mobile subscribers due to the network externalities that would result. In short, network externalities occur when adding a user to a communications network increases the value of the network for existing users who wish to communicate with that new user. For this reason, it is an especially important Commission goal to facilitate access to service broadly, not just in urban

markets but also in rural areas, to enable Americans who travel, reside or conduct business throughout the country to communicate effectively for the benefit of the general public interest.

7. The *NPRM* focuses upon the following issues: (1) Determining an appropriate definition of what constitutes a ''rural'' area for purposes of our policies and requirements; (2) creating mechanisms for access to ''unused'' spectrum; (3) relaxing performance requirements to remove disincentives to serve rural areas and to allow all geographic area licensees to satisfy construction requirements by providing ''substantial service'' in their initial license term; (4) determining whether geographic area licensees should be required to provide coverage to increased portions of their licensed areas after their initial license term; (5) amending our regulations to permit increased power limits in rural areas for both licensed services and unlicensed services; (6) evaluating the appropriate size of licensing areas for geographic area licenses; (7) determining what, if any, regulatory or policy changes should be made to complement the RUS program for low interest loans for deployment of broadband services; (8) considering whether we could enhance access to capital by permitting the grant of conditional security interests in spectrum licenses to RUS; (9) considering whether we should modify application of the cellular cross-interest rule in Rural Service Areas (RSAs) with greater than three competitors; (10) establishing a clear, predictable policy on infrastructure sharing; and (11) updating and refining our rules governing the Rural Radiotelephone Service (RRS) and Basic Exchange Telephone Radio Systems (BETRS).

## II. Notice of Proposed Rulemaking on Increasing Flexibility and the Deployment of Spectrum-Based Services in Rural Areas

### *A. Definition of ''Rural''*

8. As an initial matter, we seek comment on an appropriate definition of a ''rural area'' for use in conjunction with each of the policies addressed in this proceeding. Furthermore, given the various definitions of ''rural'' that already have been utilized, we believe that some clarification of the term is necessary. Although sections 309(j)(3) and 309(j)(4) of the Communications Act direct the Commission to promote the development and deployment of spectrum-based services to ''rural areas,'' the Communications Act does not define ''rural areas,'' nor has the Commission adopted a specific definition of ''rural areas'' for purposes of implementing section 309(j). In the *Seventh* and *Eighth Competition Reports,* 17 FCC Rcd 12985 (2002) and 18 FCC Rcd 14783 (2003), the Commission used three different proxy definitions of ''rural'' for purposes of analyzing the average number of mobile telephony competitors in rural versus non-rural counties. The Commission compared the number of competitors in: (1) RSA counties versus MSA counties; (2) non-nodal Economic Area (EA) counties versus nodal EA counties; and (3) counties with population densities below 100 persons per square mile versus those with population densities above 100 persons per square mile. In connection with administering universal service support programs for schools, libraries, and rural health care providers, the Commission defines ''rural area'' as any county outside of an MSA (with some exceptions). Moreover, the federal government has multiple ways of defining ''rural,'' reflecting the multiple purposes for which the definitions are used. The Commission has used RSAs as a proxy for ''rural'' in certain instances. In administering its financial assistance program for broadband access to rural areas, RUS defines ''rural'' as any place that is not located within an MSA and that has no more than 20,000 inhabitants (based upon the most recently available Census data). The Economic Research Service of the USDA, in conjunction with others, developed a definition of ''rural'' based on a set of metrics that delineates each census tract as being either rural or urban. By contrast, the Census Bureau established a different metric for defining ''rural'' areas during its 2000 census. Although there are many definitions of ''rural'' used by the federal government, we have developed a record in response to our *Rural NOI* proceeding that provides some guidance with respect to an appropriate definition of ''rural area.''

9. Based upon the record developed in the *Rural NOI* proceeding, as well as certain definitions used by the Commission and by other federal agencies as proxies for ''rural,'' we have identified and seek comment on the following potential definitions of ''rural area,'' or some combination of elements combined in these potential definitions: (1) Counties with a population density of 100 persons or fewer per square mile; (2) RSAs; (3) non-nodal counties within an EA; (4) the definition for ''rural'' used by the RUS for its broadband program; (5) the definition for ''rural area'' used by the Commission in connection with universal service support for schools, libraries, and rural health care providers; (6) the definition of ''rural'' based on census tracts as outlined by the Economic Research Service of the USDA; (7) the Census Bureau definition of ''rural'' counties; and (8) any census tract that is not within ten miles of any incorporated or census-designated place containing more than 2,500 people, and is not within a county or county equivalent which has an overall population density of more than 500 persons per square mile of land. In the event that commenters disagree with these potential definitions, we ask commenters to provide alternative definitions of ''rural.'' Commenters that believe that none of these potential definitions are workable or feasible should identify specific factors that the Commission should consider when determining whether an area is a ''rural area,'' such as population density, Census rankings, or other criteria. Finally, we seek comment on whether we should adopt different definitions of what constitutes a ''rural area'' depending upon the policy initiative for which the definition is used, as set out in this proceeding.

### *B. Improved Access to Unused Spectrum*

#### 1. Background

10. The Commission has promoted access to and efficient use of spectrum through a variety of means that may foster the rapid and efficient deployment of wireless services in rural areas. Applied to licensed spectrum, these approaches may be viewed as existing along a continuum, with voluntary, market-based mechanisms at one end, regulatory incentives and other approaches in the middle, and regulatory mandates and enforcement mechanisms at the other end. More specifically, the means by which the Commission may promote access to and use of spectrum range from allowing voluntary arrangements that move spectrum and licenses between users to establishing regulatory mechanisms by which the Commission reclaims and re-licenses unused spectrum.

11. In many spectrum-based services, the Commission has established rules by which it reclaims unused spectrum and makes it available to other parties. This process for reclaiming unused licensed spectrum differs across services. For example, with site-based private land mobile radio services, licensees generally are given one year to construct particular sites. A licensee with an unconstructed site after one year loses its authorization to operate at that site,

and other parties subsequently may request a license to operate in that unused spectrum. In the geographically-based cellular service, initial licensees are given five years to construct facilities and begin providing service within a geographic service area. At the end of the initial five-year period, the licensee is allowed to keep those portions of its licensed area in which it has constructed, while the unconstructed portions of the market become available for licensing to other parties via the cellular ''unserved area'' licensing process. We refer to this standard as a ''keep what you use'' approach.

12. Other geographically licensed services, in contrast, face notably different construction benchmarks and means by which unused spectrum may be reclaimed and re-licensed by the Commission. For example, PCS licensees must meet five- and ten-year benchmarks that mandate coverage of a certain percentage of the population of their licensed areas, or where applicable, make a showing of substantial service. Failure to meet these benchmarks results in automatic cancellation or non-renewal of the entire license, including the rights to operate from any facilities already constructed under the authorization. Moreover, for many services, if the licensee loses its authorization for failing to meet the coverage requirements, it is often ineligible to reapply for that authorization. However, once these benchmarks are achieved, licensees are generally afforded exclusive rights and a renewal expectancy for the entire area and band under the license regardless of whether service is being provided in all parts of the area or over all of the spectrum. Because licensees that fail to comply with this coverage requirement lose their entire license, we refer to this standard of termination or forfeiture as the ''complete forfeiture'' approach. Among the advantages of this model, since licensees do not have to cover their entire geographic license areas or use all of their licensed spectrum capacity, there is a greater incentive for licensees to build out those areas that will ensure their economic viability as providers. Among the disadvantages is the potentially lower likelihood that rural and less-populous areas will be served by the licensee, because there may be an incentive for construction to focus first on populous areas and little corresponding incentive for licensees to construct in rural areas.

13. In addition, there are other approaches the Commission may use to transition spectrum to higher-valued uses. For example, as the Spectrum Policy Task Force observed, the Commission could create expanded ''overlay'' rights to licensed spectrum, whereby usage rights are given to new licensees. To address issues related to the incumbent licensees in these bands, the Commission could adopt various policies, including mandatory relocation of incumbents to other bands, grandfathering incumbents in the existing band, or providing incentives for band-clearing. Overlays with relocation of incumbents were used in broadband PCS, while grandfathering of incumbents was used in services such as paging and SMR. Among the advantages of this approach, overlays may be more flexible and, in some cases, less burdensome on incumbents. Among the disadvantages of this approach are potential incumbent hold-out problems, lengthy periods for incumbent relocation, and the expense of additional auctions. Because the ''keep what you use,'' ''complete forfeiture,'' and other approaches such as overlays may not be effective tools to ensure prompt delivery of service to rural and underserved areas, we explore below alternative methods to facilitate access to and use of spectrum in these markets.

2. Discussion

a. What Constitutes ''Use'' of Spectrum

14. As the Commission attempts to increase efficient access to and use of spectrum, and as it subsequently establishes policies for access to unused spectrum, we must provide a clear definition of ''use'' for all parties affected by these rules. That is, licensees that construct or lease their spectrum must understand how this use is construed in terms of construction requirements, re-licensing, and other policies that may affect them so that they will know what rights licensees will retain in the event they do not ''use'' their spectrum, however we define it. We seek comment on how to define ''use'' in order to effectively promote access to and use of spectrum in rural areas. We also inquire how to define this term in a flexible manner so as to recognize the many ways in which licensees provide service, or allow other parties to provide service, with their licensed spectrum. Under our current rules for many service bands, ''use'' is defined to reflect construction and operation of specified facilities by the licensee. We seek comment on whether this is the appropriate baseline standard for determining use and, if not, what this standard or other ''performance'' criteria should be.

15. We recognize that leasing via secondary markets may require viewing the concept of use from a different perspective. That is, under a negotiated spectrum leasing arrangement, a licensee assigns a usage right to a third party. We propose that spectrum in rural areas that is leased by a licensee, and for which the lessee meets the performance requirements that are applicable to the licensee, should be construed as ''used'' for the purposes of this proceeding and any other performance criteria we adopt. We note that merely leasing spectrum, where the lessee does not fully meet the lessors' performance requirements, would not be considered ''use'' under this proposal. We seek comment on this approach and other ways we could better tailor or expand the concept of ''use'' to encourage service by licensees or lessees in rural and underserved areas. Finally, should our definition of ''use'' be in any way limited as it applies to leasing?

16. Under one approach to defining construction, the Commission would rely on the filings of wireless providers, perhaps with certain reporting criteria. This approach is based on the presumption that wireless providers are in the best position to determine the meaning of ''built'' for their particular technology and application. Moreover, such an approach is consistent with recent Commission precedent and trends. With broadband PCS licensees, for example, the Commission did not attempt to specify a particular signal level, but instead required licensees to provide a signal level ''sufficient to provide adequate service'' to one-third of the population in the market within five years, and to two-thirds within ten years. In applying this approach to measuring construction, the Commission could provide guidance regarding what type of range would be acceptable and how this might vary from service to service. Alternatively, we could decline to provide direction and simply monitor the various means by which licensees report their construction.

17. We recognize that the approach described above, however, may present certain risks, particularly in the event that a licensee claims that it is satisfying the more flexible ''substantial service'' standard, instead of satisfying a concrete coverage benchmark. The Commission may not have sufficient resources to verify that the many different uses of rural spectrum likely to emerge will actually serve the goals of our build out requirements. Additionally, we note that this approach might present some risk for the licensee. For example, were

it able to do so, the Commission could determine, upon receiving an assertion of compliance by a licensee, that the indicated build out is insufficient and that the licensee must do more in order to satisfy its construction requirements. This would require additional construction and investments not planned for by the licensee, which ultimately could prove more expensive to comply with than if they had been planned for and completed with the original build out. We therefore seek comment regarding whether the Commission should establish a baseline above which a licensee must reach in order to minimally comply with our substantial service requirements. We seek comment on whether this baseline should be determined in terms of signal strength or using some other metric.

18. We also seek comment on two other approaches for determining whether spectrum is being used in accordance with construction requirements or for purposes of finding available spectrum in rural areas. First, the Commission has developed rules defining protected service areas for site-based incumbents, such as 220 MHz, 800 MHz SMR, and paging licensees. We seek comment on how we should address these and other differences in estimating coverage in rural areas. In light of the fact that our rules defining protected service areas vary by service, we ask commenters whether we should harmonize these regulations across services and establish a data base of available ''white space'' in rural areas. Second, we seek comment on expanding the use of spectrum ''audits'' and on exploring the means and methodologies for making in situ measurements of signal strength in selected rural areas to maintain an ''inventory'' of available spectrum resources. We inquire as to whether expanded use of such audits would help identify unused spectrum in rural areas so as to ultimately make more spectrum, and thus more service, available in these markets. We also inquire as to what may be an appropriate way to test whether a spectrum inventory is feasible. Should we limit such an inventory to the most rural or underserved areas? We believe markets in Alaska, Appalachia, and the Mississippi Delta may be particularly appropriate, and we inquire as to whether commenters recommend these or other areas.

b. Re-licensing vs. Market-Based Mechanisms

19. As described above, the Commission practices re-licensing in several different forms, both in terms of the conditions under which licensed spectrum is returned to the Commission, and in terms of how that spectrum subsequently is made available to other users. Generally, licensed spectrum may return to the Commission due to non-use under a ''complete forfeiture'' standard, as applied to PCS licensees, or under a ''keep what you use'' standard, as applied to cellular licensees. Once this spectrum is reclaimed, the Commission may then re-license via competitive bidding, as with PCS licenses, or it may use a non-auction mechanism such as the cellular unserved area re-licensing rule.

20. We seek comment on when, and under what circumstances, the Commission should use re-licensing as a means to increase access to spectrum, and thus service, especially in rural areas. We do not propose to change the current re-licensing rules for any current wireless service. Rather, we inquire as to whether we should apply one of the current rules, or some other rule, to future spectrum allocations. We also inquire as to whether we should apply a new standard to spectrum that has been returned, under the current rules, to the Commission for re-licensing at the end of a licensee's second term.

21. In the event of spectrum re-licensing, we seek comment on whether there are particular construction standards, such as ''complete forfeiture'' or ''keep what you use,'' that are most effective in promoting access and service, especially in rural areas. In particular, we seek comment on whether a ''keep what you use'' standard based on the cellular unserved area model is most appropriate to advance our goal of promoting rural service, should we decide to extend this approach to additional services. Further, how might the ''keep what you use'' approach work in tandem with the substantial service safe harbor that we propose below?

22. As described above, in the cellular service, after the initial five-year period, there is an unserved area licensing process whereby unconstructed portions of a market become available to other parties. In a Petition for Reconsideration filed in WT Docket 01–108, Dobson proposed that licensees should be permitted to extend into unserved areas of less than 50 square miles operating on a secondary non-interference basis to any licensee that might be authorized to cover the area in the future. While we intend to address Dobson's petition in the context of that proceeding, we seek comment on whether there are other changes to the cellular unserved area rules that could promote service in rural areas. We also seek comment on whether, for purposes of defining use, the most appropriate approach would be based on the PCS model (*i.e.*, allowing providers to define construction based on their particular technology and application). We note that the approach with the PCS model is technology neutral, yet it requires a sufficiently strong signal to produce a reasonable level of service.

23. In addition, we seek comment on the relative merits of re-licensing as compared to secondary markets. Are there particular circumstances or factors that we should consider in deciding to use one approach or the other? We recognize that re-licensing is a more regulatory approach, and we therefore inquire as to whether we should limit its application. What market conditions or other measures should we consider in determining whether to apply re-licensing to a particular service or in a particular market? Is this approach more appropriate for rural markets, and if so, why?

24. Finally, we note that while the Spectrum Policy Task Force recommended that the Commission focus on secondary markets as the primary means to increase access to spectrum, it also recommended that, after there has been sufficient time to consider the effectiveness of this approach, the Commission also consider alternative mechanisms such as government-defined easements. We seek comment on whether now is an appropriate time to consider the use of spectrum easements for new licenses.

*C. Performance Requirements*

25. Subsequent to the enactment of section 309(j), the Commission initiated the *Competitive Bidding* proceeding, which, among other things, addressed how the Commission intended to implement the statutory mandate for ''performance requirements'' for licenses awarded through competitive bidding. *See* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93–253, *Notice of Proposed Rulemaking*, 58 FR 53489 (October 15, 1993). Depending upon the service, the Commission's construction benchmarks may require coverage of a certain percentage of the licensed area's population or coverage of a certain percentage of the licensed area's geographic area. For many services, the Commission has adopted a flexible ''substantial service'' construction standard that allows licensees that are providing a beneficial use of the spectrum to retain their authorizations. While the definition of ''substantial service'' is generally consistent among wireless services, the

factors that the Commission will consider when determining if a licensee has met the standard vary among services. Substantial service generally means service that is sound, favorable, and substantially above a level of mediocre service that would barely warrant renewal.

1. Substantial Service Construction Benchmarks

a. Background

26. As we have explained, the Commission has taken a market-oriented approach to spectrum policy that, where possible, has allowed economic forces to determine build-out of wireless facilities and the provision of wireless services. The Commission has shifted towards providing licensees increased flexibility to tailor use of their spectrum to unique business plans and needs. This increased flexibility is evident in our adoption of the ''substantial service'' benchmark for many of our services. In more recently adopted rules for wireless services, the Commission established the substantial service standard as the only construction requirement. In addition, for licensees subject only to the substantial service requirement, the Commission often has included ''safe harbors,'' *i.e.*, examples of how a licensee would meet the substantial service standard.

b. Discussion

27. As a general matter, we believe that our current performance requirements, in combination with economic incentives and the licensing of multiple competitors, have served to promote significant build out. Nevertheless, we believe that current geographic area licensees without a ''substantial service'' option or a rural-specific construction requirement may be unduly constrained and may lack sufficiently flexibility to provide service to rural areas or to offer niche services. Moreover, given the unique characteristics and considerations inherent in constructing within rural areas, we believe that a construction standard that is based upon coverage of a requisite percentage of an area's population may be an inappropriate measure of levels of rural construction. Accordingly, while we intend to keep our current construction requirements, as they are set forth in our service-specific rule sections, we propose to adopt a ''substantial service'' alternative for all wireless services that are licensed on a geographic area basis and that are subject to construction requirements. This proposal therefore would affect the following licensees: 30 MHz broadband PCS licensees; 800 MHz SMR licensees (blocks A, B, and C only); certain 220 MHz licensees; LMS licensees; MDS/ITFS licensees; and 700 MHz public safety licensees. If we adopt our proposed modification of our build-out rules, these licensees would have the flexibility to comply with existing service-specific benchmarks or to satisfy the substantial service benchmark, at their option.

28. We are concerned that current population-or geographic area-specific benchmarks may impinge upon licensees' abilities to serve niche or less populated areas, and may unintentionally discourage construction in rural areas. Particularly in the case of a population-based construction requirement, a licensee has both an economic and practical incentive to achieve compliance with the requirement by providing service only to the urban areas of its licensed area. In addition, because each licensee must satisfy the same population-based benchmark, we are concerned that, as multiple licensees enter a market, they likely will construct systems in the same populous areas, thereby duplicating coverage. Consequently, within any given market, urban areas are likely to have multiple wireless competitors providing service, whereas rural areas may have fewer options.

29. We believe that providing all geographic area wireless licensees with a substantial service option will address concerns that construction requirements based on population or geographic coverage may discourage the build-out of rural areas. As we have explained in past proceedings, the substantial service option provides licensees with greater flexibility and therefore may result in the more efficient use of spectrum and the provision of service to rural, remote, and insular areas. Furthermore, in light of the fact that we have been moving towards a more flexible approach to coverage requirements, offering all geographic area wireless licensees a substantial service option will increase regulatory parity. We also note that, by providing terrestrial wireless licensees with greater flexibility in satisfying their construction requirements and by alleviating the pressure of satisfying minimum population-based benchmarks, licenses that are comprised largely of rural areas might be more likely to appeal to a wider range of potential bidders at auction.

30. We intend to retain our current construction benchmarks and propose adopting the substantial service benchmark as an additional means of satisfying our construction requirements. Our proposal effectively would harmonize construction benchmarks across all wireless services licensed on a geographic-basis (and that are subject to construction requirements) so that all geographic area licensees have the increased flexibility of a substantial service option. Licensees may elect to satisfy either the construction benchmark options already available to them today or the substantial service benchmark, according to their preference. In the past, in evaluating substantial service showings, we have considered factors such as whether the licensee is offering a specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers, and whether the licensee's operations serve niche markets. In the context of providing substantial service to rural areas, we are particularly interested in the following factors: (1) Coverage of counties or geographic areas where population density is less than or equal to 100 persons per square mile; (2) significant geographic coverage; (3) coverage of unique or isolated communities or business parks; and (4) expanding the provision of E911 services into areas that have limited or no access to such services. We intend to limit this proposal to wireless services that are currently licensed on a geographic area basis. In the event we adopt geographic areas for new wireless services at a future date, we will examine the appropriateness of adopting a substantial service or alternative construction requirement for the new service at that time.

31. We seek comment on our proposal to adopt a ''substantial service'' benchmark for all wireless services that are licensed by geographic area and are subject to build-out requirements, but currently do not have a substantial service option. We also seek comment on whether any services should be excluded from our proposal. In the event that commenters believe that a substantial service standard is inappropriate for certain services, we ask commenters to suggest alternative benchmarks that might promote the deployment of service within rural areas. We ask commenters whether the adoption of a substantial service requirement is likely to increase deployment of wireless services in rural areas. Finally, because this proposed modification of our rules will apply generally to all geographic area licensees, and not just those licensees serving rural areas, we ask how the adoption of a substantial service

requirement might affect the deployment of wireless services in non-rural areas.

32. We also seek comment on whether we should adopt geographic-based construction requirements for those private and commercial terrestrial wireless services that are licensed on a geographic area basis and that currently do not have a geographic area coverage option. A geographic benchmark would provide an alternative for licensees who do not intend to focus construction efforts on population centers. Further, like population-based benchmarks, geographic benchmarks would provide increased certainty for licensees, in comparison to the more flexible substantial service standard. Commenters supporting geographic-based construction requirements should identify the applicable radio service(s) and recommend benchmark levels, or percentages, for the relevant market sizes. We seek comment on whether the benchmark levels may be reduced where the geographic areas in question are rural areas.

33. In addition to proposing the adoption of a substantial service benchmark for all wireless services that are licensed by geographic area, we propose the adoption of a substantial service ''safe harbor'' based on provision of rural service. We propose two different rural safe harbors, depending on whether a licensee is providing mobile or fixed wireless service. With respect to mobile wireless services, we propose that a licensee will be deemed to have met the substantial service requirement if it provides coverage, through construction or lease, to at least 75 percent of the geographic area of at least 20 percent of the ''rural'' counties within its licensed area. We propose that ''rural'' counties be defined as those counties with a population density less than or equal to 100 persons per square mile. For example, if a licensee's market contains five counties (all having a population density of 100 persons per square mile or fewer), the licensee could meet the safe harbor by providing coverage to 75 percent of the geography in one of those five counties. With respect to fixed wireless services, we propose to define the substantial service requirement as met if a licensee, through construction or lease, constructs at least one end of a permanent link in at least 20 percent of the ''rural'' counties within its licensed area (using the same ''rural'' county definition). For example, if a licensee's market contains five counties (all having a population density of 100 persons per square mile or fewer), the licensee could meet the safe harbor by constructing one end of a permanent link in one of those five counties. Our proposal to base the safe harbor on a population density of 100 persons per square mile or fewer is derived from our finding in the *Eighth Competition Report,* which indicates that counties with population densities of 100 persons per square mile or less ''have an average of 3.3 mobile competitors, while the more densely populated counties have an average of 5.6 competitors.'' We note that these proposed ''safe harbors'' are intended to provide licensees with a measure of certainty in determining whether they are providing substantial service, but are not intended to be the only means of demonstrating substantial service.

34. We seek comment on whether we should adopt rural safe harbors and, if so, whether it is advisable to adopt the specific safe harbors described above. We note that although the analyses of competition in counties with population densities of 100 persons per square mile or fewer were based upon data pertaining to the mobile telephony industry (dominated by cellular, broadband PCS, and digital SMR providers), we believe that 100 persons per square mile nevertheless provides a usable and reasonable proxy for ''rural'' for the purpose of establishing a rural substantial service safe harbor. We seek comment on this proposed population-density based standard. In particular, we seek comment on whether this safe harbor is suitably flexible to accommodate variances in service areas and how we might modify our safe harbors to accommodate various geographic service areas and uneven population distributions. In the event commenters disagree with our proposed safe harbors, we ask that commenters suggest examples of alternative rural safe harbors, in light of their practical experience and based upon their own service-specific demands and requirements. Should we adopt a rural safe harbor that applies to all services, or are services sufficiently specialized that we should adopt service-specific safe harbors?

2. Renewal License Terms

a. Background

35. At present, we require compliance with our construction requirements during the initial license term. Depending upon the particular service, we require licensees to satisfy minimum coverage benchmarks at an interim period prior to the end of the initial license term, and/or at the conclusion of the initial license term. Licensees obtain authorizations to use designated spectrum for a specific period of time (typically a term of ten years), and may request renewal of their authorizations prior to the expiration of their license terms. Once a licensee renews its license, however, no additional performance requirements are imposed in subsequent license terms.

b. Discussion

36. We seek comment on whether we should require geographic area licensees to satisfy performance requirements during their renewal license terms (we refer to license terms subsequent to the initial license term as ''renewal terms''). This question of whether licensees should satisfy additional performance requirements during renewal terms is particularly relevant as licensees approach the end of their initial license terms or enter into their renewal terms. We ask whether additional performance requirements are likely to increase the provision of wireless services to rural areas.

37. With respect to commercial mobile wireless services, we have seen the prompt use of at least a portion of the spectrum and provision of at least a minimum level of service. While this data appears to suggest that our construction requirements have facilitated competition and have promoted the deployment of wireless services, it is nevertheless difficult to identify whether wireless deployment is the result of our minimum coverage requirements or the operation of market forces. We ask commenters whether market forces, and not build out requirements, should govern any additional construction during renewal terms. Will the imposition of additional performance requirements during renewal terms likely result in uneconomic construction?

38. In the event that commenters believe additional construction requirements are appropriate and necessary to promote the continued deployment of wireless services to consumers in rural areas, we ask what form these construction requirements should take. For example, should we adopt a population- or geography-based benchmark? Should we adopt a modified version of substantial service and require the provision of additional coverage beyond what is sufficient to satisfy ''substantial service'' during the initial license term (in effect, a ''substantial service plus'' requirement)? Should we require compliance with these benchmarks at the expiration of the renewal term, or at some interim period prior to the end of the renewal term? Furthermore, given our objective of promoting service to rural consumers, we ask whether renewal term

construction requirements should be specifically targeted towards construction in rural areas or otherwise include a rural component.

*D. Relaxed Power Limits*

1. Background

39. In the following sections, we propose modifications to our regulations governing power limits and technical specifications for operations in rural areas. In its report, the Spectrum Policy Task Force recommended that in less congested areas (*i.e.,* rural areas) spectrum users should be permitted to operate at higher power levels so long as they do not cause interference and do not receive additional interference protection. Similarly, in the *Rural NOI* we observed that technical and operational rules throughout the spectrum-based services are necessary to facilitate efficient use of the radio spectrum while minimizing the potential for interference among licensees. We sought comment on the degree of flexibility that these regulations afford to providers of spectrum-based services in rural areas.

2. Discussion

a. Part 15 Unlicensed Devices and Systems

40. Unlicensed devices are permitted to operate under Part 15 of our rules at very low power levels. One of the more significant developments in the use of unlicensed devices is the emergence of wireless Internet service providers or ''WISPs.'' Using unlicensed devices, WISPs around the country are beginning to provide an alternative high-speed connection to cable or DSL services. In addition to providing competition to cable and DSL, the record reflects that WISPs have taken root in many rural areas where these services have been slow to arrive.

41. We remain committed to exploring more flexible spectrum policies for rural areas to help foster, where possible, a viable last mile solution for delivering Internet services, other data applications, or even video and voice services to underserved or isolated communities. The record in the *Rural NOI* identifies legitimate issues under our Part 15 policies, such as interference with other Part 15 devices and how to design a framework that reasonably ensures that Part 15 devices operate using different parameters in different locations or under differing RF conditions. Cognitive radio technologies, which permit radio systems to modify their performance in response to such external information, would appear to hold great promise in resolving such issues. In this connection, we plan to initiate a proceeding shortly to consider how to leverage these technologies to permit more intensive use of spectrum in a number of situations, including possible rule changes that would permit greater use of spectrum in rural areas. In this proceeding, we plan to invite comment on any specific factors that may need to be considered to allow cognitive radios to operate with higher power in rural America. This impending proceeding also will address power limits for the operation of ''dumb'' or ''non-cognitive radio'' unlicensed devices in rural areas.

b. Licensed Services

42. Two commenters responding to the *Rural NOI* address the issue of whether we should modify our regulations to permit increased power levels in the context of mobile voice systems. South Dakota Telecommunications Association (SDTA) points out that higher power levels could reduce the number of transmitters required to connect stretches of roadways between small rural towns and to serve ranches and farms beyond the highways, but cautions that while it may be feasible to increase power and still safeguard urban and suburban operations, such safeguards must include ''clear-cut interference definitions and protections.'' CTIA, however, argues that an increase in base station power levels would not improve matters unless mobile station (*i.e.,* handset) power levels are increased as well. CTIA contends that it is unlikely that handset manufacturers would make special ''high power'' handsets for rural areas.

43. Increasing the range of radio systems is one means of making it more economical to provide spectrum-based radio services in rural areas by potentially lowering infrastructure costs. One way to increase the range of radio systems is by increasing power levels. While there may be challenges in implementing increased power levels for cellular-like mobile systems, we would like to further investigate whether power increases may be beneficial for other mobile or fixed services. In doing so, we must consider increasing power levels in rural areas in the context of base/mobile systems, point-to-point systems, and point-to-multipoint systems. Base/mobile systems (*e.g.,* cellular, PCS, SMR, private land mobile) consist of a base station antenna intended to provide coverage over a specific area, and the mobile units that communicate with the base station. The base station operates at a sufficient power level to cover the desired area, while the battery-powered mobile units operate at relatively low power. The ability of the base station to reach a mobile unit is limited by, among other things, transmitter power, the propagation characteristics of the frequency band, antenna directionality (gain), antenna height, terrain, clutter, man-made obstructions, and the sensitivity of the mobile unit receiver. As stated above, there are challenges related to increasing power levels. First, increasing the base station power may cause unacceptable levels of interference to nearby systems. Second, simply guaranteeing that a mobile unit can ''hear'' the base station, however, is not sufficient for two-way communications. The low power mobile unit, which is likely located close to ground level, must also be able to return a signal to the base station antenna, *i.e.,* the base station must be able to ''hear'' the mobile unit. One can observe that, at the fringe of the base station coverage area, the most significant limiting factors to two-way transmissions are the power level and the location of the mobile unit. Thus, merely increasing the base station power level may not improve the communications range unless the mobile unit is capable of returning a signal to the base station antenna.

44. It is instructive to provide examples of the likely results of increasing base station power for specific types of base/mobile systems. Because received signal levels decrease exponentially as the receiver moves farther from the transmitter, we would expect that relatively large increases in power would yield only small increases in communications range. In the case of a rural 800 MHz cellular system, we found that increasing the base station power by 10 percent (500 W ERP to 550 W ERP) and 20 percent (500 W ERP to 600 W ERP) increased the base station range by 1.5 km (0.93 mi) and 3 km (1.86 mi) respectively. We note, however, that our calculations show that a typical 0.5 W ERP mobile unit would not have sufficient range to reach the base station from the edge of the base station coverage area regardless of whether the base station power is 500 (maximum under the rules today), 550, or 600 W ERP. Similarly, in the case of a rural 1,900 MHz PCS system, we found that increasing the base station power by 10 percent (1,640 W EIRP to 1,804 W EIRP) and 20 percent (1,640 W EIRP to 1,968 W EIRP) increased the base station range by 1 km (0.62 mi) and 2 km (1.24 mi) respectively. We note, however, that our calculations show that a typical 0.8 W EIRP mobile unit

would not have sufficient range to reach the base station from the edge of the base station coverage area regardless of whether the base station power is 1,640 (maximum under the rules today), 1,806, or 1,968 W EIRP.

45. Microwave point-to-point systems generally consist of a highly directional, high gain transmitting antenna and a highly directional, high gain receive antenna separated by some distance along a path. System performance is impacted by, among other things, transmitter power, propagation characteristics of the frequency band, antenna directionality (gain), height of transmit and receive antennas, terrain between the antennas, interference, clutter, man-made obstructions, weather, type of modulation, and sensitivity of the receiver. Unlike a base/mobile system, however, the system designer can increase the distance of the path by increasing transmitter power or using a higher gain antenna as well as elevating the receive antenna. Point-to-multipoint microwave systems share many of the characteristics of point-to-point microwave systems, except that there are multiple receive antennas situated in an area of desired service and the transmitting antenna may not be as highly directional. In either case, as with base/mobile systems, increasing the transmitter power may cause unacceptable levels of interference to neighboring paths, or limit the number of paths in a particular area.

46. For example, in the theoretical case of a typical rural microwave path in the 6.8 GHz band, a 45 percent increase in transmitter output power yields only a one km (0.62 mi) increase in path length. We seek comment on whether the benefits of such a modest increase in path length outweigh the potential for unacceptable levels of interference to neighboring paths, or siting limitations on new paths in the same area.

47. We seek comment on whether it is beneficial, feasible, and advisable to increase the current power limits for stations located in rural areas licensed under parts 22, 24, 27, 80, 87, 90, and 101. A licensee can increase power by increasing transmitter output power and/or by using a directional antenna that focuses energy on the specific area to be covered and reduces energy in other directions, serving to limit interference potential, and potentially improving reception of signals from mobile units. Commenters should indicate which radio service(s) and power level(s) should be increased, specify a particular amount of additional power (either transmitter output power, EIRP, or both), specify directional antenna parameters if applicable (*e.g.,* front to back ratio or beamwidth), and quantify the benefits that one could expect from the power increase. In particular, we are interested in how such increases may increase the potential for unacceptable levels of interference to other stations, increase exposure to electromagnetic radiation for workers and consumers, or limit future use of the spectrum in such areas.

48. We also seek comment on how best to define the term ''rural'' for purposes of permitting increased power levels. In the case of base/mobile systems, would both the base stations and mobile stations need to be located in a rural area? For point-to-point and point-to-multipoint systems, would both ends of the transmission path need to be in a rural area? Rather than defining certain geographic areas as rural for these purposes, would some other measure (*e.g.,* taking into account a combination of terrain and nearby spectrum usage) be more appropriate?

49. We also seek comment on other measures that licensees may be using to minimize the costs associated with serving rural areas, and whether our rules and policies are sufficiently flexible to facilitate and encourage such innovations. For example, cellular and PCS licensees in rural areas may be using tower top amplifiers to boost incoming mobile signals. Similarly, licensees may deploy ''smart antenna'' systems capable of increasing base station range and suppressing interference from unwanted sources.

### *E. Appropriate Size of Geographic Service Areas*

#### 1. Background

50. Over the past decade, the Commission has moved from the use of site-based licenses to the use of geographic areas for licensing commercial wireless services. In selecting the initial size of geographic service areas for licenses with mutually exclusive applications (and thus competitive bidding), section 309(j)(4)(C) directs the Commission to promote certain goals. Specifically, section 309(j)(4)(C) requires the Commission to, consistent with other objectives, prescribe service areas ''that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applications, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services.''

#### 2. Discussion

51. We believe that the Commission's choice for the initial size of geographic service areas plays an important role in promoting a number of policy goals, including efficiency of spectrum use, competition among providers, and advancing service to rural areas. If geographic service area licenses are assigned with an initial size that does not represent the needs of service providers, then transaction costs are incurred, as carriers seek to acquire rights to spectrum in areas they wish to serve and divest their interest in areas they do not wish to serve. While we hope that the Commission's recent efforts to facilitate the development of secondary markets will make these transaction costs less burdensome, we recognize that some costs to moving spectrum to its highest valued use will remain.

52. Since it is costly to aggregate or disaggregate spectrum, it is important that the Commission select initial license sizes and boundaries that are appropriate for the likely users and services to be provided. We recognize that there are tradeoffs between the use of large service areas and small service areas. Large service areas provide economies of scale and reduce coordination costs. On the other hand, smaller service areas allow local, independent operators to better tailor their services to local conditions and provide greater financial incentives to local licensees than if they were managers in very large enterprises. Adopting small license areas also may allow smaller enterprises with limited financing to acquire spectrum licenses. In addition, license boundaries are also a concern of the Commission, which has attempted to choose boundaries that combine people and firms who are part of the same community and who are likely to communicate with each other. The Commission also has attempted to avoid setting boundaries that would preclude incumbents from bidding on licenses because of cross-ownership rules.

53. We recognize that carriers are divided on the issue of the appropriate size of geographic service areas. In various Commission proceedings, representatives of small, regional, and rural providers have argued that CMAs are the most appropriate size. In contrast, representatives of large regional and nationwide CMRS providers and other parties have argued that service areas that are too small may be inefficient. Still other parties have

argued that the size of service areas should be tailored to the wireless service in question.

54. We seek comment on the costs of partitioning post-auction as compared to the costs of aggregating spectrum during or after the auction process. We observe that spectrum aggregation within auctions is fairly common. While we recognize the concerns of small carriers regarding their access to spectrum in rural markets, especially when large geographic areas are used, we note that partitioning also is relatively common. Partitioning appears to be occurring across all regions of the country and includes many counties that fall within the various definitions of ''rural'' that are proposed above.

55. We seek comment on the lessons we should draw from the Commission's experience in choosing initial service area sizes. Is there evidence of net aggregation towards nationwide service areas for certain services such as cellular and PCS? Is there evidence of net partitioning for other services? To the extent partitioning is more common in some services and less so in others, is this trend indicative of some miscalculation by the Commission in choosing the initial size of service areas? Alternatively, could this activity reflect changes in the demand for services that could be provided in this band, or changes in technologies or other factors that affect what services could be supplied in this band? We also seek comment as to whether the difference in the level of partitioning across services could reflect the application of different Commission rules, such as build-out requirements. Finally, we note that there are certain transaction costs associated with any partitioning. Should we expect that licenses for highly valued spectrum, in highly valued services, will be more likely to be partitioned, given the greater likelihood that the value created by this trade will exceed the transaction costs? Similarly, as secondary markets develop and transaction costs decline, should we expect that partitioning through leasing arrangements will become more feasible in more services? To what extent might such partitioning be limited by a hold-out problem? That is, might licensees with large geographic areas refuse to make spectrum available to small providers that want to serve small or niche markets, which tend to be in rural areas?

56. We tentatively conclude that it is in the public interest for the Commission to balance the needs of different providers, including the larger carriers' need for economies of scale and the smaller carriers' need for license areas that more closely resemble their service areas. We recognize that, since users of spectrum have a variety of needs, one size of service area does not fit all. We intend to continue establishing geographic areas on a service-by-service basis, and we seek comment on steps we can take to effectively balance the competing needs of different users as we make these service area decisions. Would such an approach produce economically efficient results? Is such an approach necessary, given our expectation that secondary markets will become more prevalent in the future? We especially encourage commenters to use empirical evidence to support their assessment of partitioning costs, aggregation costs, and the efficiency of any approach they recommend.

57. In addition, while the largest geographic service area the Commission may adopt would be a nationwide area, there is some question as to what would be the smallest size that would still be functional. That is, at what point is it more appropriate for the Commission to use site-based licenses instead of very small geographic area licenses? Also, to the extent we believe small license areas are appropriate for specific bands, what size is most appropriate? Are there particular frequencies that are better suited for allocations to small license areas? We also inquire as to whether it is possible that use of relatively small geographic areas would introduce an unreasonable risk of another type of hold-out problem. In particular, might such an approach result in many small incumbent licensees who could then frustrate post-auction attempts to aggregate licenses efficiently by refusing to sell except at excessive prices?

58. We also seek ways to make it easier for providers in need of larger areas to acquire them with minimal transaction costs. One way to achieve this objective may be to adopt bidding design mechanisms that permit the aggregation of geographic areas or spectrum blocks during an auction. Typically, the Bureau uses a simultaneous multiple-round auction design, which facilitates aggregation by making all licenses in the auction available at the same time. Recently, the Bureau selected a package bidding design for two auctions. This relatively new approach to auctions allows bidders to submit all-or-nothing bids on combinations of geographic areas or spectrum blocks in addition to bids on individual licenses or authorizations. We believe that, in instances in which the Commission has determined that smaller size license areas are appropriate, a package bidding format may be helpful to bidders seeking to acquire larger geographic areas or spectrum blocks. We recognize, however, that in such circumstances, the use of package bidding may introduce significant computational complexities.

59. We also observe that choosing a geographic service area that represents a ''middle solution'' may be an inefficient approach. We note that, as an alternative to such a ''middle solution'' in which service area size represents a compromise that may not be ideal for either small or large service providers, there may be situations in which it is possible to create geographic service areas of mixed sizes. In particular, if there is sufficient bandwidth available, both large regional (or even national) and small local license areas can be created. We inquire as to whether such a mixed plan may reduce the aggregation/disaggregation transaction costs inherent in a single size geographic licensing scheme, and we seek comment on what other costs, as well as benefits, may be associated with such an approach. We recognize that, while a mixed approach may be useful in some bands with spectrum users that have very different needs, it may not be appropriate in other bands, and we conclude that our approach must be tailored to the needs of each band or service in question.

*F. Facilitating Access to Capital*

1. Rural Utilities Service

a. Rural Loan Programs

(i) Background

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

61. The infrastructure loan program is technology neutral, requires broadband-capable facilities, and provides financing for infrastructure (*e.g.*, building and equipment), but not financing for the costs of operating the business. Within the infrastructure loan program, there are four types of financing: (1) Hardship loans; (2) cost-of-money loans; (3) rural telephone bank loans; and (4) federal financing bank

loans. For fiscal year 2003, the total authorized loan level for these four programs is $670 million.

62. The broadband loan program is technology neutral; requires provision of high-quality data transmission service and may provide voice, graphics, and video; and must enable a subscriber to transmit and receive at a rate of no less than 200 kilobits per second. Similar to the infrastructure loan program, the broadband loan program finances the construction or acquisition of new facilities and facility improvements. RUS makes broadband loans available to any legally organized entity that has sufficient authority to enter into a contract with RUS and carry out the purposes of the loan, so long as the entity is providing or proposes to provide service to an area that meets the following criteria: (1) There are no more than 20,000 inhabitants, and (2) the service area does not fall within a standard metropolitan statistical area. For fiscal year 2003, RUS has $80 million for 4 Percent loans, $80 million for Guaranteed loans, and $1.3 billion for Treasury Rate loans. In fiscal year 2004, the total loan level is anticipated to be $418 million.

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

(ii) Discussion

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

b. Security Interests

(i) Background

65. As a historical matter, the Commission has not permitted third parties to take a security interest in spectrum licenses. At the same time, the Commission's legal and policy bases for various restrictions on transactions involving licenses have evolved over the years. For instance, at one time, the policy of prohibiting the sale of bare licenses, as well as the policies against security and reversionary interests in licenses, were based on the Commission's interpretation of the Communications Act. In various decisions, the Commission modified its views on the statutory basis for these policies in the context of cellular and other wireless licenses. For all spectrum-based services, the Commission has expressly permitted licensees to grant security interests in the stock of the licensee, in the physical assets used in connection with its licensed spectrum, and in the proceeds from operations associated with the licensed spectrum. The Commission and the courts have likewise determined that security interests in the proceeds of the sale of a license do not violate Commission policy. In connection with the auction installment payment program, the Commission itself has taken an exclusive security interest in licenses subject to installment payments and a senior security interest in the proceeds of a sale of an auctioned license. In its *Secondary Markets Policy Statement,* the Commission considered ways in which licensees may be able to maximize their efficient use of spectrum by leveraging ''the value of their retained spectrum usage rights to increase access to capital.'' *See* Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, WT Docket No. 00–230, *Policy Statement,* 65 FR 81475 (December 26, 2000) (*Secondary Markets Policy Statement*). Specifically, the Commission said ''we plan to evaluate our policies prohibiting security and reversionary interests in licenses.''

(ii) Discussion

66. Pursuant to our stated intent in the *Secondary Markets Policy Statement*, we initiate a discussion regarding whether we should permit RUS to obtain security interests in the spectrum licenses of their borrowers. We seek comment on whether, and to what extent, licensees in rural areas would benefit from the opportunity to pledge their licenses to RUS as collateral as a means of overcoming their difficulties in raising capital.

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

68. Our primary goal is to determine whether further relaxation of the security interest restrictions—by allowing at least a modified form of collateralization of FCC licenses by licensees obtaining RUS funds—could increase opportunities to raise capital or avoid financial collapse. We therefore seek comment on the extent to which a licensee's ability to grant RUS a security interest directly in an FCC license would, in fact, create new financing opportunities and facilitate the

construction, deployment and continuity of new and existing wireless services in rural and underserved areas. We also ask how this change in our policy would affect the ability of small businesses to obtain much needed startup capital.

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

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

71. First, in addition to the benefits from lower costs of and greater access to capital, we seek comment on whether modifying our policy to permit RUS to take a security interest in FCC licenses is a natural outgrowth of the Commission and judicial developments discussed above, which recognize the value and ability of a lender obtaining a security interest in the licensee's stock, proceeds and other assets without infringing upon the Commission's statutory obligations. For instance, in *MLQ Investors , L.P.* v. *Pacific Quadracasting, Inc.,* 146 F.3d 746 (9th Cir. 1998), the U.S. Court of Appeals for the Ninth Circuit determined that a security interest in the proceeds of the sale of a broadcast license can be perfected prior to the sale of the license, and that ''[g]overnment licenses, as a general rule, are considered to be 'general intangibles' under the Uniform Commercial Code, ''*i.e.,* personal property interests in which security interests may be perfected.''' The Ninth Circuit identified the Commission's primary policy concern by stating that ''[t]he FCC may prohibit security interests in licenses themselves because the creation of such an interest could result in foreclosure and transfer of the license without FCC approval.'' The Ninth Circuit went on to explain that the Commission's interest in regulating spectrum to promote the public interest is not implicated ''by a security interest in the proceeds of licenses, which does not grant the creditor any power or control over the license.'' We also note that application of state laws under Article 9 of the Uniform Commercial Code is generally limited in connection with the treatment of security interests of non-assignable ''personal property'' governed by federal law. We seek comment on how cases like *MLQ Investors* and the application of the UCC provisions have affected lending practices for FCC licensees and what, if any, impact the grant of security interests in spectrum licenses to RUS might have on established law in this area, including the appropriate method of how RUS would perfect a security interest in FCC licenses.

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

73. We recognize that permitting RUS to obtain security interests in FCC licenses would provide RUS with greater rights vis-à-vis the license and licensee than it currently can obtain. We therefore ask whether our proposed condition requiring prior FCC approval before RUS can foreclose on the license would satisfactorily and adequately preserve existing regulatory relationships. The type of security interest that we are seeking comment on would be a right between the licensee and RUS, exercisable only upon Commission approval. Would such a right be fully consistent with our responsibilities under the Communications Act? We ask whether it would not be different than granting RUS an option to purchase a license, for example. We note that we would review and require our approval of an assignment to RUS in accordance with our transfer and assignment policies before RUS could assume control of a license. Such a process is designed to ensure that the federal government retains appropriate control over use of the spectrum consistent with sections 301 and 304 of the Act, and that the perfection of a security interest in a license does not interfere with these or other statutory obligations and policy prerogatives. For example, would a security interest in a license give RUS any rights that might conflict with the Commission's regulatory oversight (other than an unapproved foreclosure or assertion of control) that it could exercise against the licensee? Furthermore, in light of the fact that RUS is a federal government agency, we ask whether we may have greater statutory latitude to grant it a security interest while still ensuring that the federal government retains control over spectrum.

74. Our next concern relates to any unintended consequences that may result from this potential policy change, especially as it relates to existing and future financial and regulatory relationships and any new claims or conflicts that may arise. It appears that one of the main conceptual differences between the current limits on the scope of permissible security interests and our proposal is that a security interest in a

license itself would link the secured party more directly to the Commission. It is our understanding that under current financing practices involving FCC licensees, the secured party's rights stem from its relationship as a lender (and possibly an equipment vendor, bondholder or stockholder) to the licensee, not directly to the Commission, even after default and foreclosure on the secured assets. We seek comment on whether the grant by a licensee of a contingent interest in a Commission authorization to RUS—without the Commission's permission or review—would undermine our regulatory authority embodied in sections 301 and 304. We also ask how the existence of RUS, as a secured creditor, may affect the ability of the licensee to seek financing from other sources in this situation? In sum, we seek comment on what, if any, difference from the perspective of RUS, a third-party lender, or the licensee, would there be on a relaxation of the current security interest policies in the circumstances described above.

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

2. Cellular Cross-Interests in Rural Service Areas

a. Background

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

77. The Commission initiated a comprehensive review of the cellular cross-interest rule in January 2001 as part of its 2000 biennial regulatory review of spectrum aggregation limits. In December 2001, pursuant to section 11 of the Communications Act, the Commission released its *Spectrum Cap Sunset Order* and, on the basis of the state of competition in CMRS markets, sunset the CMRS spectrum cap rule in all markets effective January 1, 2003. *See* 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, WT Docket No. 01–14, *Report and Order,* 67 FR 1626 (Jan. 14, 2002) (*Spectrum Cap Sunset Order*). In that order, the Commission also determined that cellular carriers in urban areas no longer enjoyed first-mover, competitive advantages, and it therefore eliminated the cellular cross-interest rule in MSAs on that basis, also pursuant to section 11 of the Act. While the Commission left the cross-interest rule in place in RSAs, it indicated that it would consider waiver requests and reassess the need for the rule at a future date.

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

79. In its December 2002 *Rural NOI,* the Commission sought comment on the cellular cross-interest rule as it reviewed its policies to encourage the provision of wireless services in rural areas. The Commission received comments supporting either modification or elimination of the rule so as to facilitate investment and financing arrangements for rural cellular providers.

b. Discussion

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

81. In the *Spectrum Cap Sunset Order,* the Commission concluded that it would be more efficient and less costly to the Commission to maintain a prophylactic cross-interest rule applicable to all RSAs and to entertain waiver requests for the small subset of transactions in RSAs where competition was more robust. As a consequence of that decision, cellular licensees in MSAs are free to procure financing that involves ownership interests that fall below the threshold that triggers the cross-interest rule, while cellular licensees in all RSAs are not. While the Commission attempted to address this barrier to investment in rural areas by providing a specific waiver process, the transactions costs and regulatory uncertainty surrounding any waiver procedure may deter some beneficial investment in these areas.

82. We seek comment on whether changing the cellular cross-interest rule for RSAs that enjoy a greater degree of competition will spur needed investment in these rural areas and foster even more competition in others. As an initial matter, we seek comment regarding what constitutes a ''competitor'' for purposes of this rule. We also seek comment regarding whether, in the event we do eliminate the cellular cross-interest rule for RSAs with greater than three competitors, we should adopt a transition period after which time the rule would sunset for these RSAs. In the event that

commenters support such a sunset period, we seek comment regarding the appropriate length of the sunset period.

83. We also ask commenters for additional suggestions regarding how we may modify our cellular cross-interest rule to promote investment in rural areas while retaining adequate competitive safeguards. For example, should we eliminate the cellular cross-interest restriction for all RSAs where the ownership interest being transferred, assigned or acquired is not a controlling interest (*i.e.*, where the interest is a non-controlling interest and where the transaction otherwise would not require prior FCC approval)? We ask parties to focus their comments on the effect of the cross-interest rule on licensees' acquisition of adequate capital in these areas. Commenters supporting our proposal should identify and discuss specific past instances in which they have had difficulty obtaining financing in rural areas due to the cellular cross-interest rule. We also request parties to provide examples of the extent to which the waiver process has deterred or prevented acquisition of capital in a rural market(s). We seek specific market data and historical examples to assist our public interest determination of the extent to which application of the cellular cross-interest rule in RSAs impedes market forces that drive development in these rural and underserved areas.

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

*G. Infrastructure Sharing*

1. Background

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

86. In the United States, several infrastructure sharing arrangements have been announced in the past two years. The providers claim that such infrastructure sharing will allow them to cover a larger geographic area at lower cost. In addition, because two or more providers share the infrastructure, these arrangements may allow for more providers to serve a market than otherwise would be possible. Finally, to the extent that these arrangements make it possible for providers to cover a larger geographic area, and thus serve a greater number of consumers, they may provide an important public interest benefit.

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

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

2. Discussion

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

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

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

92. We also seek comment on the potential costs and benefits of this proposed policy. With regard to the potential benefits, we note that comments by European Commission regulators in support of such arrangements in the E.U. generally focus

on the ability of carriers to lower costs and increase their coverage area, especially to rural markets. Can we assume similar benefits for rural areas in the U.S.? We recognize that the Commission has stressed the value of facilities-based competition, and that infrastructure sharing by definition limits competition between two potential competitors. We seek comment on the factors we should consider in evaluating infrastructure sharing arrangements that require section 310 approval so as to effectively balance promoting competition among providers and promoting expanded coverage in rural areas.

93. In addition, we recognize that, as in the case of secondary market spectrum leasing, infrastructure sharing may require reconsideration of our regulatory definitions of spectrum use. As described above, we propose that licensees that make their spectrum in rural areas available to other parties via secondary markets are, in a sense, using that spectrum. Should we similarly consider spectrum involved in infrastructure sharing arrangements to be ''used'' and thus not subject to re-licensing or any other mechanism to make the spectrum available to third parties?

*H. Rural Radiotelephone Service and Basic Exchange Telecommunications Radio Service*

1. Background

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

95. The *BETRS R&O* provided that traditional RRS and BETRS would be co-primary with other services that were authorized to use the same spectrum. *See* Basic Exchange Telecommunications Radio Service, CC Docket No. 86–495, *Report and Order*, 53 FR 3210 (February 4, 1988) (*BETRS R&O*). Prior to the establishment of BETRS, RRS was licensed on a secondary, non-interfering basis. In 1997, the Commission established rules to auction the 152/158 MHz and 454/459 MHz bands and issue paging licenses on a geographic basis. As a result, existing RRS and BETRS licensees authorized for these spectrum bands were afforded protection as incumbent licensees and could continue operating on a primary basis. However, we indicated that subsequent RRS and BETRS licenses in these bands would be issued on a secondary basis to the geographic area licensee. Similarly, in 1997, the Commission established rules to auction the 816–820/861–865 MHz bands and issue SMR licenses on a geographic basis. As a result, existing BETRS licensees authorized in the 800 MHz band were afforded protection as incumbent licensees and could continue operating on a primary basis. Again, we indicated subsequent BETRS licenses in these bands would be issued on a secondary basis to the geographic area licensee. Today new RRS and BETRS licenses are issued on a secondary, non-interfering basis.

2. Discussion

96. We seek to establish a more complete record regarding these services in order to allow us to determine if certain rules and policy changes are needed to facilitate the use of RRS and BETRS. As discussed below, we seek comment on whether: (1) There is a current demand for RRS and BETRS; (2) other wireless services have supplanted RRS and BETRS as alternatives to wireline service; (3) access to spectrum is a limiting factor for RRS and BETRS and (4) current Commission rules and polices are prohibiting/limiting the effectiveness of RRS and BETRS to provide service in rural areas.

97. As an initial matter, we would like to determine the level of demand for RRS and BETRS. We reviewed licensing data, locations where basic exchange service does not appear to be available, and the availability of equipment for RRS and BETRS. It appears, on the surface, certain areas that do not have basic telephone service might benefit from RRS or BETRS. For example, we note that no RUS or BETRS facilities are licensed in Mississippi, which according to 2000 Census data, has the lowest household telephone penetration rate in the U.S. In addition, we cannot find evidence that 800 MHz BETRS equipment has ever been manufactured and made available in the U.S. Furthermore, we only found one company that claimed it provided new RRS and BETRS equipment. We seek comment on whether there is still a demand for RRS and BETRS, beyond what is currently offered, and whether RRS and BETRS are viable options in the provision of basic telecommunications services. If there is a demand for these services, are there ways that RRS and BETRS could be used more efficiently and/or effectively?

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

99. In some instances, there may be a demand for a service; however, access to the spectrum needed to provide such services may not be readily available. We noted in the *Secondary Markets* proceeding that facilitating spectrum

leasing arrangements permits additional spectrum users to gain access to spectrum. Furthermore, several commenters in the *Secondary Markets* proceeding specifically indicated that facilitating leasing arrangements would increase service offerings to rural customers by enabling rural telephone companies and others to access underutilized spectrum. We seek comment on whether there is a problem for potential providers of RRS or BETRS in accessing spectrum and if so, whether parties feel secondary markets will provide the appropriate means for access to the desired spectrum.

100. We are also interested in determining if the Commission's current rules and policies for RRS and BETRS are limiting factors towards a more expansive use of these services. We note that currently there is an eligibility restriction for BETRS that restricts the issuance of a license to only those entities that receive state approval to provide basic exchange telephone service. We believe that this rule may be unnecessary and may serve as a potential regulatory hurdle towards a more rapid and efficient use of the BETRS spectrum. We therefore propose to remove the eligibility restrictions contained within section 22.702 of our rules regarding state approval prior to the issuance of a BETRS license. Furthermore, the current service rules for RRS and BETRS provides that new licenses are issued on a secondary, non-interfering basis. In a Petition for Rulemaking filed by several parties, which eventually lead to the establishment of BETRS, a request was made to provide 2 MHz of dedicated spectrum for the use of BETRS. At the time, we determined that the demand for BETRS was not clear and therefore made the decision not to provide discrete spectrum for the use of BETRS. However, we indicated that if the spectrum that was made available for BETRS proved to be insufficient at a future date, we would revisit the problem at that time. We note that in the *Rural NOI* we sought comment on how we might revise existing RRS and BETRS rules to further facilitate the provision of wireless services to rural areas. We did not receive any comments that specifically addressed the need to revise RRS or BETRS rules. We seek comment on our proposal to remove the eligibility restrictions in section 22.702 of the Commission's rules for BETRS licensees. Based on the current RRS and BETRS licensing scheme, we seek comment on whether there is a need for us to expand the secondary status for RRS and BETRS to other spectrum bands in order to facilitate and encourage construction in rural areas. If so, what spectrum bands could RRS and BETRS be expanded to include? If additional spectrum should be designated on a primary basis for BETRS, what band(s) would be viable? How much spectrum would be needed? Is there existing equipment or equipment that can be manufactured and made readily available for use in the band(s)?

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

## III. Procedural Matters

### *A. Ex Parte Rules—Permit-But-Disclose Proceeding*

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

### *B. Initial Regulatory Flexibility Analysis*

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

Need for, and Objectives of, the NPRM

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

105. As a complement to the measures the Commission has already taken, we seek to minimize regulatory costs and eliminate unnecessary regulatory barriers to the deployment of spectrum-based services in rural areas. As reflected in the proposals set forth in this *NPRM*, we believe there are additional spectrum policy initiatives the Commission can adopt to reduce the overall cost of regulation and increase flexibility in a manner that will facilitate access, capital formation, build-out and coverage in rural areas. Specifically, in this *NPRM*, we seek comment on the appropriate definition of what constitutes a ''rural area'' for the purposes of this proceeding. We also seek comment on how to define ''built'' spectrum and we inquire as to whether the most efficient approach may be to rely on providers' filings of their construction notifications, an approach used with broadband PCS. Notably, we propose that spectrum in rural areas that is leased by a licensee, and for which the lessee meets the performance requirements that are applicable to the licensee, should be construed as ''used'' for the purposes of this proceeding and any performance requirements we adopt. Furthermore, we seek comment on ways the Commission could modify its regulations pertaining to unused spectrum.

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

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

Legal Basis

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

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

109. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

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

111. 220 MHz Radio Service—Phase I Licensees. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to ''Cellular and Other Wireless Telecommunications'' companies. This category provides that a small business is a wireless company employing no more than 1,500 persons. According to the Census Bureau data for 1997, only twelve firms out of a total of 1,238 such firms that operated for the entire year, had 1,000 or more employees. If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business standard.

112. 220 MHz Radio Service—Phase II Licensees. The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. In an order relating to this service, we adopted a small business size standard for defining ''small'' and ''very small'' businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. This small business standard indicates that a ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. In the first auction, 908 licenses were auctioned in three different-sized geographic areas: Three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses. A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.

113. Lower 700 MHz Band Licenses. We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small size standards. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area

Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 CMA licenses. Seventeen winning bidders claimed small or very small business status and won sixty licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.

114. Upper 700 MHz Band Licenses. The Commission released an order authorizing service in the upper 700 MHz band. This auction, previously scheduled for January 13, 2003, has been postponed.

115. Paging. In a recent order relating to paging, we adopted a size standard for ''small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. An auction of Metropolitan Economic Area (MEA) and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold. 132 companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses. Currently, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service,* 608 private and common carriers reported that they were engaged in the provision of either paging or ''other mobile'' services. Of these, we estimate that 589 are small, under the SBA-approved small business size standard. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

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

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

118. Specialized Mobile Radio (SMR). The Commission awards ''small entity'' bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards ''very small entity'' bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

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

120. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these

providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by the SBA.

121. Private Land Mobile Radio (PLMR). PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we could use the definition for ''Cellular and Other Wireless Telecommunications.'' This definition provides that a small entity is any such entity employing no more than 1,500 persons. The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. Moreover, because PMLR licensees generally are not in the business of providing cellular or other wireless telecommunications services but instead use the licensed facilities in support of other business activities, we are not certain that the Cellular and Other Wireless Telecommunications category is appropriate for determining how many PLMR licensees are small entities for this analysis. Rather, it may be more appropriate to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.

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

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

124. Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions. The FCC auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670–1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

125. 39 GHz Service. The Commission defines ''small entity'' for 39 GHz licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. ''Very small business'' is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these definitions. The auction of the 2,173 39 GHz licenses began on April 12, 2000, and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses.

126. Local Multipoint Distribution Service. An auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined ''small entity'' for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. An additional classification for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These regulations defining ''small entity'' in the context of LMDS auctions have been approved by the SBA. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winning bidders that won 119 licenses.

127. 218–219 MHz Service. The first auction of 218–219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs). Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years. In an order relating to the 218–219 MHz service, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million for the preceding three years. The SBA has approved of these definitions. At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218–219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we

assume for purposes of this IRFA that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

128. Location and Monitoring Service (LMS). Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million. A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $3 million. These definitions have been approved by the SBA. An auction for LMS licenses commenced on February 23, 1999, and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses. We cannot accurately predict the number of remaining licenses that could be awarded to small entities in future LMS auctions.

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

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

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

132. Multiple Address Systems (MAS). Entities using MAS spectrum, in general, fall into two categories: (1) Those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, the Commission defines ''small entity'' for MAS licenses as an entity that has average gross revenues of less than $15 million in the three previous calendar years. ''Very small business'' is defined as an entity that, together with its affiliates, has average gross revenues of not more than $3 million for the preceding three calendar years. The SBA has approved of these definitions. The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of January 20, 1999, there were a total of 8,670 MAS station authorizations. Of these, 260 authorizations were associated with common carrier service. In addition, an auction for 5,104 MAS licenses in 176 EAs began November 14, 2001, and closed on November 27, 2001. Seven winning bidders claimed status as small or very small businesses and won 611 licenses.

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

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

135. Future 24 GHz Licensees. With respect to new applicants in the 24 GHz band, we have defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million. ''Very small business'' in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years. The SBA has approved these definitions. The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

136. 700 MHz Guard Band Licenses. In an order relating to the 700 MHz Guard Band, we adopted a small business size standard for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. An auction of 52 Major Economic Area

(MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

137. Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service. Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as ''wireless cable,'' transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In connection with the 1996 MDS auction, the Commission defined ''small business'' as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years. The SBA has approved of this standard. The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 MDS licensees that are defined as small businesses under either the SBA's or the Commission's rules. Some of those 440 small business licensees may be affected by the proposals in the Further Notice.

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

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

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

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

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

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

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

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

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

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

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

**Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rules**

147. None.

*C. Initial Paperwork Reduction Act of 1995 Analysis*

148. This *NPRM* seeks comment on a proposed information collection. As part of the Commission's continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *NPRM,* as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due at the same time as other comments on this *NPRM* and must have a separate heading designating them as responses to the Initial Paperwork Reduction Analysis (IPRA). OMB comments are due 60 days from

date of publication of this *NPRM* in the **Federal Register.** Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Judith B. Herman, Federal Communications Commission, room 1–C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to <*Judith.B-Herman@fcc.gov*> and to Kim A. Johnson, OMB Desk Officer, room 10236 NEOB, 725 17th Street, NW., Washington, DC 20503 via the Internet to *Kim_A._Johnson@omb.eop.gov* or by fax to 202–395–5167.

*D. Comment Dates*

149. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before December 29, 2003 and reply comments on or before January 26, 2004. Comments and reply comments should be filed in WT Docket No. 03–202. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, interested parties must file an original and four copies of all comments, reply comments, and supporting comments. If interested parties want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies.

150. Comments also may be filed using the Commission's Electronic Comment Filing System (ECFS). Comments filed through the ECFS can be sent as an electronic file via the Internet to <*http://www.fcc.gov/cgb/ecfs*>. Generally, only one copy of an electronic submission must be filed. Commenters should transmit one electronic copy of the comments to WT Docket No. 03–202. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit electronic comments by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, ''get form <your e-mail address>.'' A sample form and directions will be sent in reply.

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

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

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

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

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

## IV. Ordering Clauses

155. Pursuant to the authority contained in sections 4(i), 11, 303(r), 309(j) and 706 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 157, 161, 303(r), and 309(j), the *NPRM* is adopted.

156. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of the *NPRM,* including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

## List of Subjects

*47 CFR Part 22*

Communications common carriers, rural areas.

*47 CFR Part 24*

Communications equipment, telecommunications.

*47 CFR Part 90*

Communications equipment, reporting and recordkeeping equipment.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

## Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Parts 22, 24, and 90 as follows:

## 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 22.702 is revised to read as follows:

### § 22.702 Eligibility.

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

## PART 24—PERSONAL COMMUNICATIONS SERVICES

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

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

4. Section 24.203(a) is revised to read as follows:

### § 24.203 Construction requirements.

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

* * * * *

## PART 90—PRIVATE LAND MOBILE RADIO SERVICES

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

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

6. Section 90.155(d) is revised to read as follows:

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

* * * * *

(d) Multilateration LMS EA-licensees, authorized in accordance with § 90.353, must construct and place in operation a sufficient number of base stations that utilize multilateration technology (*see* paragraph (e) of this section) to provide multilateration location service to one-third of the EA's population within five years of initial license grant, and two-thirds of the population within ten years. Alternatively, licensees may provide ''substantial service'' to their licensed area within ten years. In demonstrating compliance with the construction and coverage requirements, the Commission will allow licensees to individually determine an appropriate field strength for reliable service, taking into account the technologies employed in their system design and other relevant technical factors. At the five and ten year benchmarks, licensees will be required to file a map and FCC Form 601 showing compliance with the coverage requirements (*see* § 1.946 of this chapter).

* * * * *

7. Section 90.685(b) is revised to read as follows:

### § 90.685 Authorization, construction and implementation of EA licenses.

* * * * *

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

* * * * *

8. Section 90.767 is revised to read as follows:

### § 90.767 Construction and implementation of EA and Regional licenses.

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

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

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

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

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

9. Section 90.769 is revised to read as follows:

### § 90.769 Construction and implementation of Phase II nationwide licenses.

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

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

(c) Failure by a nationwide licensee to meet the construction requirements of paragraph (a) of this section, as applicable, will result in automatic cancellation of its entire nationwide license. In such instances, nationwide

licenses will not be converted to individual, site-by-site authorizations for already constructed stations.

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

[FR Doc. 03–28047 Filed 11–10–03; 8:45 am]

**BILLING CODE 6712–01–U**

## DEPARTMENT OF TRANSPORTATION

## Federal Motor Carrier Safety Administration

## 49 CFR Part 393

**[DOT Docket No. FMCSA–02–13589]**

**RIN 2126–AA80**

## Parts and Accessories Necessary for Safe Operation; Fuel Systems

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of proposed rulemaking; request for comments.

**SUMMARY:** The FMCSA proposes to revise the requirements concerning fuel tank fill rates for gasoline- and methanol-fueled light-duty vehicles contained in Subpart E of the Federal Motor Carrier Safety Regulations (FMCSRs). The purpose of the proposal is to: (1) Remove a conflict between the fuel tank fill rate requirements of the FMCSRs and those of the Environmental Protection Agency for gasoline and methanol-fueled vehicles up to 14,000 pounds (lbs) Gross Vehicle Weight Rating (GVWR); and (2) to make permanent the terms of the exemptions previously granted to motor carriers operating certain gasoline-fueled commercial motor vehicles (CMVs) manufactured by Ford Motor Company (Ford) and by General Motors (GM). The FMCSA also proposes to incorporate into the FMCSRs previously issued regulatory guidance concerning the applicability of the agency's fuel tank rules to vehicles subject to the National Highway Traffic Safety Administration (NHTSA) fuel system integrity standard at the time of manufacture.

**DATES:** Comments must be received on or before January 12, 2004.

**ADDRESSES:** You may submit comments to DOT Docket Management Systems (DMS) Docket Number 13589 by any of the following methods:

- *Web site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal Holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

*Instructions:* All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation subheading at the beginning of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://dms.dot.gov* including any personal information provided. Please see the Privacy Act heading under Regulatory Notices.

*Docket:* For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Ms. Deborah M. Freund, Office of Bus and Truck Standards and Operations, (202) 366–4009, Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

### Public Participation

The DMS is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help guidelines under the ''help'' section of the DMS web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

### Background

Section 393.67(c)(7)(ii) of Title 49, Code of Federal Regulations (CFR), requires the fill pipe and vents of a CMV with a fuel tank of more than 25 gallons capacity to permit the tank to be filled at a rate of at least 20 gallons per minute (gpm) without fuel spillage.

In 1999, Ford and GM filed applications for limited exemptions from this fuel system requirement.

Ford manufactures a line of vehicles under the ''Econoline'' brand for additional work and sale by second-stage manufacturers, including use as CMVs as defined in 49 CFR 390.5. Specifically, finished vehicles are based on a ''light-truck'' platform with load-or passenger-carrying capabilities that place them within the weight-or passenger-carrying thresholds of the FMCSRs.

The fill pipe of the fuel system of these light-duty vehicles is routed to minimize its exposure in the event of a crash. Because of the design characteristics of the fuel fill-pipe and system and the vapor generated when filling such tanks with gasoline, Ford found that the fuel systems in the gasoline versions of these light-duty vehicles could not meet the FMCSA requirement of § 393.67(c)(7)(ii). However, Ford noted that the diesel versions complied with the 20 gallon per minute minimum filling rate. Ford applied for exemptions for the gasoline fueled light-duty vehicles from § 393.67(c)(7)(ii), and also 49 CFR 393.67(f)(2) and (f)(3), which require that liquid fuel tanks be marked with the manufacturer's name and display a certification label that the tank conforms to all applicable rules in § 393.67.

On August 10, 1999, the Federal Highway Administration (FHWA), now the FMCSA, published a Notice of Intent to grant Ford's application for exemption (64 FR 43417). The FHWA requested public comment on Ford's application and the agency's safety analysis and presented other relevant information. After considering all the comments received, the agency granted an exemption to Ford on December 20, 1999 (64 FR 71184). In that notice (at 71185), the agency noted that the 20 gallon per minute rate, while appropriate for diesel fuel-powered vehicles, mandates that fill pipes on gasoline-powered vehicles be capable of receiving fuel at twice the maximum rate gasoline pumps are allowed to dispense fuel.[1] The vehicles in question are gasoline-fueled and are capable of receiving fuel at a rate of 17 gallons per minute.

[1] As noted in our discussion below, the Environmental Protection Agency (EPA) standard is 10 gpm.