following deficiencies in the Peninsula, Richmond, and Southeastern Virgina plans will be corrected.

a. Peninsula—The 89 percent projected reduction in emissions from "Other Metal Products Coating" sources must be reviewed and revised to reflect more accurately the reductions which will be achieved as a result of adopted regulations.

b. Richmond—The projected emission reductions for the following source categories must also be reviewed and revised in light of existing regulations to more accurately reflect the reductions which will be achieved: Gasoline Terminal Truck Loading; Paint Manufacturing; Flatwood Products Coating; Auto Refinishing.

c. Southeastern Virginia—The inventory must be revised to include emissions from the following sources: Swann Oil, Chesapeake; Hampton Roads Engery Company, Portsmouth; SPSA Resource Recovery Plant, Norfolk; and, increased emissions from vessels and rail cars due to the new refineries and increased coal handling facilities. It should be noted in Chapter 6 that emissions from HREC are included for completeness purposes only because these emissions and the appropriate offset are the subject of a separate SIP revision and cannot be included in the RFP curve or "bank" of accommodative emissions.

While the Commonwealth has also requested the Peninsula and Southeastern areas be redesignated based on ambient monitoring data, EPA believes the inventories should still be revised to accurately reflect actual and potential emissions. However, EPA will taken no further action regarding the deficiencies noted above until it has acted upon the redesignation request.

Other Actions

On August 19, 1980 (45 FR 55228), EPA proposed approval of a change in the boundary of the urbanized area of Northern Virginia to exclude Loudoun County.

The Commonwealth of Virginia had requested that the boundary of the urbanized area in Northern Virginia be modified to exclude Loudoun County, since this is primarily a rural area which accounts for only 5.0 percent of the light duty vehicle registrations in the Northern Virginia Region. The effect of this modification, if approved, would be to exclude Loudoun County from the requirement to implement I/M. It would not change Loudoun County's designation, under Section 107 of the Clean Air Act, as nonattainment for ozone. In addition, with this modification, Loudoun County will no longer be eligible to receive funds under Section 175 of the Act.

No public comments were received as a result of our Notice. Therefore, EPA is hereby approving the proposed boundary change.

Conclusion

As a result of EPA's decision to approve these revisions to the Virginia Implementation Plan, the following sections of 40 CFR Part 52 are revised: § 52.2420 (Identification of Plan); § 52.2435 (Compliance Schedules); § 52.2441 (Inspection and Maintenance Program); § 52.2442 (Bicycle lanes and bicycle storage facilities); § 52.2443 (Management of parking supply); § 52.2444 (Medium duty air/fuel control retrofit); § 52.2445 (Heavy duty air/fuel control retrofit); § 52.2446 (Oxidizing catalyst retrofit); and, § 52.2447 (Vacuum spark advance disconnect retrofit).

Under Executive Order 12291, EPA must judge whether a regulation is "Major" and therefore subject to the requirement of a Regulatory Impact Analysis. This regulation is not major because this action only approves State actions and imposes no new requirements.

This regulation was submitted to the Office of Management and Budget for review as required by Executive Order 12291.

Pursuant to the provisions of 5 U.S.C. 605(b) I certify that SIP approvals under Sections 110 and 172 of the Clean Air Act will not have a significant economic impact on a substantial number of small entities. See 46 FR 8709 (January 27, 1981). This action constitutes a SIP approval under Sections 110 and 172 within the terms of the January 27 certification. This action only approves State actions. It imposes no new requirements.

Under Section 307(b)(1) of the Clean Air Act, judicial review of this action is available *only* by the filing of a petition for review in the United States Court of Appeals for the appropriate circuit within 60 days of today. Under Section 307(b)(2) of the Clean Air Act, the requirements which are the subject of today's notice may *not* be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

List of Subjects in 40 CFR Part 52

Air pollution control, Ozone, Sulfur oxides, Nitrogen dioxide, Lead, Particulate matter, Carbon monoxide, Hydrocarbons.

(42 U.S.C. 7401–7642)

Dated: April 26, 1982.

Anne M. Gorsuch,

Administrator.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Title 40, Part 52 of the Code of Federal Regulations is amended as follows:

Subpart VV—Virginia

1. In § 52.2420, paragraphs (c) (48) and (49) are added as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) * * *

(48) The revisions submitted on December 17, 1979 by the Secretary of Commerce and Resources related to the ozone and carbon monoxide nonattainment area plans, except § 1.02, "Vapor Tight", §§ 4.54(h), 4.56(h), 4.55(m)(2), and 4.57(a)(5), Chapter 3 of the Roanoke plan, Chapter 6 of the Peninsula, Richmond, and Southeastern Virginia plans, and Appendix P.

(49) The May 15, 1980 revision, as amended by the April 3, 1981 revision, submitted by the Secretary of Commerce and Resources pertaining to Chapter 9 of the Richmond and Northern Virginia nonattainment plans. This submittal includes the State Statute authorizing an Inspection and Maintenance program and a schedule for the implementation of this program.

§§ 52.2441 through 52.2447 [Removed and Reserved]

2. The following provisions are removed and the sections "Reserved" because the provisions are obsolete, have been rendered null by recent court rulings, or have been or will be replaced by more appropriate regulations: § 52.2441 *Inspection and maintenance program*, § 52.2442 *Bicycle lanes and bicycle storage facilities*, § 52.2443 *Management of parking supply*, § 52.2444 *Medium duty air/fuel control retrofit*, § 52.2445 *Heavy duty air/fuel control retrofit*, § 52.2446 *Oxidizing catalyst retrofit*, and § 52.2447 *Vacuum spark advance disconnect retrofit.*

§ 52.2435 [Amended]

3. In § 52.2435, paragraphs (a), (b), (c) and (f) are removed.

§ 52.2435 [Amended]

4. In § 52.2435, paragraphs (g) and (h) are redesignated as (a) and (b).

[FR Doc. 82-12331 Filed 5-5-82; 8:45 am]

BILLING CODE 6560-50-M

40 CFR Part 81

[A-7-FRL-2099-4]

Designation of Areas for Air Quality Planning Purposes; Iowa

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rulemaking.

SUMMARY: EPA today takes final action to redesignate a portion of the City of Des Moines, Iowa, from nonattainment to attainment with respect to the primary National Ambient Air Quality Standards (NAAQS) for total suspended particulates (TSP). This portion remains designated nonattainment for the secondary TSP standard. This redesignation is based on a request from the Iowa Department of Environmental quality and data from the TSP monitoring site which shows that the primary standard was not exceeded in 1980 or 1981.

EFFECTIVE DATE: This action will be effective July 6, 1982 unless notice is received within 30 days that someone wishes to submit adverse or critical comments.

ADDRESSES: Comments should be sent to Daniel J. Wheeler, Environmental Protection Agency, 324 East 11th Street, Kansas City, Missouri 64106. The state submission is available at the above address and at the Iowa Department of Environmental Quality, Henry A. Wallace Building, 900 East Grand, Des Moines, Iowa 50319 and the Environmental Protection Agency, Public Information Reference Unit, Room 2922, 401 M Street, SW., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Daniel J. Wheeler at 816-374-3791.

SUPPLEMENTARY INFORMATION: On February 3, 1982, the Iowa Department of Environmental Quality (IDEQ) submitted a request to redesignate the attainment status of a portion of the City of Des Moines. The portion in question lies in the south central part of the city just to the east of the Des Moines Airport. The full description is in the state submission. The area was designated primary nonattainment for TSP on March 3, 1978 (43 FR 8962), and is one of four portions of the Des Moines area that remained primary nonattainment when the designated areas were redefined (46 FR 14569, March 6, 1980). It is completely surrounded by an area of secondary nonattainment.

There is one TSP monitoring site located in the area; no others are close enough to represent air quality in this area. Monitoring data from this site shows that the primary 24-hour standard of 260 micrograms per cubic meter ($\mu g/m^3$) was not exceeded in 1980 or in 1981. Also, the geometric mean of all readings for each year is less than the annual standard of 75 $\mu g/m^3$. These values meet the EPA criteria for an attainment designation with respect to the primary TSP standards.

Since the secondary standard of 150 $\mu g/m^3$ for a 24-hour average was exceeded three times in 1980, the area must remain designated secondary nonattainment. However, the primary standard nonattainment designation is hereby removed.

EPA is taking this action without prior proposal because it imposes no new requirements and is noncontroversial. The public is advised that this action will be effective July 6, 1982. However, if notice is received within 30 days that someone wishes to submit adverse or critical comments, this action will be withdrawn and two subsequent notices will be published before the effective date. One notice will withdraw the final action and another will begin a new rulemaking by announcing a proposal of the action and establishing a comment period.

Pursuant to the provisions of 5 U.S.C. 605(B), I hereby certify that the attached rule will not have a significant economic impact on a substantial number of small entities since it imposes no new requirements.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Under section 307(b)(1) of the Clean Air Act, as amended, judicial review of this action is available only by the filing of a petition for review in the United States Court of Appeals for the appropriate circuit within 60 days of today.

(Sec. 107 and 301 of the Clean Air Act, as amended (42 U.S.C. 7407 and 7601))

List of Subjects in 40 CFR Part 81

Air pollution, National parks, Wilderness areas.

Dated: April 22, 1982.

Anne M. Gorsuch,

Administrator.

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

Part 81 of Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

Subpart C—Section 107 Attainment Status Designation

§ 81.316 [Amended]

1. In § 81.316, in the table "Iowa-TSP," the line reading "areas in central and southern Des Moines, Ankeny and part of" is amended by removing the words "and southern."

[FR Doc. 82-12296 Filed 5-5-82; 8:45 am]

BILLING CODE 6560-50-M

40 CFR Part 761

[OPTS 00032; TSH-FRL 2118-4]

Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce and Use Prohibitions; Recodification

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This action recodifies 40 CFR Part 761 which deals with polychlorinated biphenyls (PCBs). The recodification provides for a more orderly organization of the material. No substantive changes are involved.

DATE: This recodification becomes effective May 6, 1982.

FOR FURTHER INFORMATION CONTACT: John A. Richards, Office of Pesticides and Toxic Substances (TS-788), Rm. E-125, Environmental Protection Agency, 401 M St. SW., Washington, D.C. 20460, (202-382-3637).

SUPPLEMENTARY INFORMATION: In order to make the Code of Federal Regulations easier for users to read and reference, Part 761, which regulates polychlorinated biphenyls, has been reorganized.

This regulation is a nonsubstantive redesignation and reorganization and as such no opportunity for comment or public participation is required.

List of Subjects in 40 CFR Part 761

Environmental protection, Hazardous materials, Labeling, Polychlorinated biphenyls, Recordkeeping and reporting requirements.

Dated: April 27, 1982.

John A. Todhunter,

Assistant Administrator for Pesticides and Toxic Substances.

Therefore, Part 761 of Chapter I of Title 40, Subchapter R, is amended as follows:

PART 761—POLYCHLORINATED BIPHENYLS (PCBs) MANUFACTURING, PROCESSING, DISTRIBUTION IN COMMERCE AND USE PROHIBITIONS

§ 761.2 [Redesignated as § 761.3]

1. In Subpart A, § 761.2 is redesignated as § 761.3.

§ 761.10 (Subpart B) [Redesignated as § 761.60 (Subpart D)]

2. Current Subpart B is redesignated as Subpart D, and § 761.10 is redesignated as § 761.60 under the new Subpart D.

§§ 761.40–761.43 [Redesignated as §§ 761.70, 761.75, 761.65 and 761.79 respectively]

3. Sections 761.40, 761.41, 761.42 and 761.43 are redesignated as §§ 761.70, 761.75, 761.65 and 761.79, respectively under the new Subpart D.

§ 761.20 [Redesignated as § 761.40]

4. Section 761.20 in Subpart C is redesignated as § 761.40 remaining in Subpart C.

§ 761.44 [Redesignated as § 761.45]

5. Section 761.44 is redesignated as § 761.45 under Subpart C.

§§ 761.30 and 761.31 (Subpart D) [Redesignated as §§ 761.20 and 761.30 (Subpart B) respectively]

6. Current Subpart D is redesignated as Subpart B, and §§ 761.30 and 761.31 are redesignated as §§ 761.20 and 761.30, respectively under the new Subpart B.

7. The heading for Subpart J is added to read as follows:

Subpart J—Records and Reports

§ 761.45 [Redesignated as § 761.80]

8. Section 761.45 is redesignated as § 761.80 under the new Subpart J.

Subpart E—Heading and Annex Nos. I through VI [Removed]

9. The heading for Subpart E and Annex Nos. I through VI are removed.

[FR Doc. 82-12336 Filed 5-5-82; 8:45 am]
BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[Docket No. 18921; RM-1197; RM-1218; RM-1330; FCC 82-129]

Cooperative Use and Multiple Licensing of Stations in the Private Land Mobile Radio Services

AGENCY: Federal Communications Commission.

ACTION: Final rule; Report and Order.

SUMMARY: The Federal Communications Commission is adopting rules to govern the cooperative sharing and multiple licensing of facilities in its private land mobile radio services. The rules which are adopted define the types of arrangements which will and will not be allowed. These rules have been adopted: (1) To remove certain procedural burdens heretofore required of licensees and user eligibles; (2) To assure adequate licensee control; and (3) To codify permissible licensee and user practices relating to multiple licensed and cooperatively shared systems.

EFFECTIVE DATE: May 20, 1982.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: John Borkowski, Private Radio Bureau, (202) 632-7597.

SUPPLEMENTARY INFORMATION:

List of Subjects in 47 CFR Part 90

Radio, Cooperative use, Multiple licensing.

In the matter of amendment of Parts 89, 91, 93 and 95 of the Commission's rules and regulations to adopt new practices and procedures for cooperative use and multiple licensing of stations in the private land mobile radio services;[1] [2] Docket No. 18921; RM-1197; RM-1218; RM-1330.

Report and Order

Adopted: March 18, 1982.

Released: April 13, 1982.

1. On June 11, 1981 the Commission released a *Tentative Decision and Further Inquiry and Notice of Proposed Rule Making* (hereinafter *Tentative Decision)* in the above-captioned matter relating to the multiple licensing of facilities and the cooperative sharing of systems in the private land mobile radio service.[3] [4] [5] In this opinion, we concluded: (1) that third-party equipment companies which furnish services and equipment to private land mobile radio services licensees on a shared basis are not common carriers within the meaning of section 3(h) of the Communications Act of 1934, as

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[1] Parts 89, 91, and 93 have been consolidated under New Part 90, 47 CFR Part 90. Part 95 retained its prior designation. In view of this, reference to the rule parts herein will be to the pertinent provisions under new Part 90. *See Report & Order,* Docket No. 21348, 43 FR 54788 (November 22, 1978).

[2] The rule changes for Part 95 will not be adopted in this proceeding. Instead, these issues will be addressed as part of a comprehensive review of the Part 95 rules.

[3] *Tentative Decision and Further Inquiry and Notice of Proposed Rule Making,* Docket No. 18921, FCC 81-263. Adopted June 4, 1981, released June 11, 1981.

[4] Earlier in this proceeding, in 1970, we had released a *Memorandum Opinion and Order and Notice of Proposed Rule Making* which considered petitions for rule making filed by Chalfont Communications (RM-1197), the National Association of Radiotelephone Systems (RM-1218), and American Radio-Telephone Service, Inc., Caprock Radio Dispatch, Fresno Mobile Radio, Inc., Radiofone, and Rogers Radio Communications Services, Inc. jointly (RM-1330), and granted, in part, the relief requested through the initiation of this proceeding. *Multiple Licensing—Safety and Special Radio Services,* 24 FCC 2d 510 (1970). Although at that time we ruled that neither the cooperative sharing of communications systems nor the multiple licensing of transmitting facilities was unlawful or conflicted with public interest or policy, we did propose rules to better define the nature of the sharing and joint use arrangements we would permit in the private land mobile radio services.

Briefly, we expressed our concern with arrangements for jointly used facilities or cooperatively used systems wherein "packaged" communications services are provided (*i.e.,* all major equipment and associated maintenance, as well as telephone answering and message dispatching, is provided by a single third party). We, therefore, proposed rules to preclude the offering of "packaged" service in these situations and, pending adoption of final rules, implemented this approach as an interim policy. *See Multiple Licensing—Safety and Special Radio Services, supra,* at 519. We also proposed a number of specific rules relative to the joint licensing of facilities and the cooperative sharing of systems. *Id.,* pp. 520-523.

[5] Sharing in the private land mobile radio services is loosely used to cover two entirely separate types of arrangements: (1) Cooperative sharing of a licensee's system by eligible participants or (2) The licensing of several eligibles to use a single transmitting facility (i.e., multiple licensing).

In cooperative use arrangements a base station transmitter ordinarily is authorized to and controlled by a single licensee. The licensee shares this transmitting facility with other persons eligible in the same radio service. All use of the licensee's facility takes place under the licensee's control. Ordinarily the capital and operating expenses associated with the shared system are divided among the system sharers (*i.e.,* the licensee and the other users) on a pro-rated, equitable basis. The licensee is precluded from profiting from the arrangement. *See* 47 CFR 90.179, 90.181, 90.183, 90.185.

In the multiple licensing of facilities, ordinarily the base station transmitter (or as it is sometimes called, the "community repeater") is situated at a desirable site in the area to be served. In most instances, unlike the cooperative sharing approach, the transmitting facility is separately licensed to, and controlled by, each person authorized to use it from stations installed at their respective places of business. Individually assigned "tone" signals are generally employed to activate the repeater, so that the communications of each licensee, to and from his/her respective mobile units are heard only by the licensee, of his/her dispatcher, and the employees in his/her radio equipped vehicles. The spectrum and the transmitter in the multiple licensing situation, in essence, are time-shared. The number of persons that can be accommodated over a repeater varies; sometimes it is as high as 16 but most often it is in the five to ten range, depending on the number of mobile units and the message loads of the individuals sharing the station.

For a discussion of the evolution of sharing arrangements in the private land mobile radio services *see Tentative Decision and Further Inquiry and Notice of Proposed Rule Making, supra,* at paras. 4-11.

amended;[6] (2) that such competition as does exist between equipment companies furnishing physical facilities and associated services to eligibles in the private land mobile radio services and common carriers is neither unjust nor unfair;[7] and (3) that the public interest is served by continuing the authorization of these types of arrangements in the private land mobile radio services.[8]

2. Regarding the specific regulatory plan we had proposed in 1970,[9] based on the comments of the parties, we stated in our Tentative Decision our intention to: (1) Discontinue our "packaged service" policy;[10] (2) modify somewhat the cooperative sharing rules;[11] and (3) alter, in part, our multiple licensing proposal.[12] We also again rejected the application of Section 309 notice procedures [13] to private land mobile applications.[14] Additionally, several miscellaneous matters relating to sharing between parent and subsidiary corporations, sharing among joint venturers, and the identity of dispatching agents were addressed.

3. After tentatively adopting the policies and conclusions discussed above, in consideration of the time that had elapsed since our original Notice, we offered interested parties the opportunity to restate and update their positions. Additionally, we asked for specific views, data and briefs of law on the following subjects.

(a) *Characteristics of Common Carriage.* Do such characteristics as (1) provision of equipment and related services by profit-making third-party entrepreneurs, (2) particular advertising practices, (3) interconnection to the telephone network, (4) failure to observe strict cost sharing, (5) profit making by one or more members directly from cooperative radio activities, or (6) lack of proprietary interest (e.g., lease or ownership) in facilities make it necessary or desirable, as a matter of law or policy, that some multiply licensed or cooperatively shared private radio systems be classified as common carriers?

(b) *Forbearance.* Assuming *arguendo* that at least some cooperative or multiple licensed private radio systems might be or should be classified as common carriers, may the Commission forbear, as a matter of law, from exercising its Title II powers? Is such forbearance desirable as a matter of policy, particularly in terms of its effects on the actual users of cooperative and multiply licensed radio communications systems? If so, what changes in statutes or regulations might be necessary or desirable to achieve such forbearance for cooperative and multiply licensed systems?

(c) *Third Part Licensing.* Would direct licensing of any entrepreneurs now providing equipment or services to cooperative and multiply licensed private radio systems be permissible as a matter of law? Is either mandatory or voluntary licensing of such entrepreneurs a policy that would benefit either the users of these systems or the public interest? What would be the advantages and disadvantages of allowing or requiring the provision of radio communications services to current users of cooperative and multiply licensed systems in a manner analogous to the rules applied now to the Specialized Mobile Radio Systems above 800 MHz?

(d) *Interservice Competition between Private Radio and Common Carriers.* To what extent is competition permissible or desirable between at least some cooperative/multiply licensed private radio systems and common carrier systems in the provision of land mobile radio communications? Should cooperative or multiply licensed systems be differentiated from other private systems in this regard? Should and how may the Commission assess the effects of interservice competition differentially as it affects (1) common carriers, (2) third-party profit making radio entrepreneurs not classified as common carriers, (3) the ultimate users of cooperatively shared or multiply licensed private radio systems, and the public at large?

(e) *Benefits.* What are the relative benefits of common carrier service contrasted to that provided by equipment companies to eligibles in the private services under competitive marketplace conditions? In this connection, consideration should be given to such factors as spectrum efficiency, effective spectrum utilization, availability of service, economics of the several service offerings, and the ability of system operation to satisfy the needs and desires of the users.

(f) *Proposed Rules.* Are the regulations proposed needed and reasonable? Are they sufficient to assure compliance with the underlying policies governing cooperative use and multiple licensing in the private services; and what, if any, additional limitations or restrictions should be imposed?

(g) *Packaging Policy.* Should the packaging policy be retained?

(h) *Cooperative use.* Should licensees be required to submit their plans for sharing radio equipment for approval by the Commission prior to providing service to participants? Should annual reports be required? What records should the licensees keep? Should the line of demarcation between cooperative use and multiple licensing be drawn as rigidly as contemplated under the original proposal or should the more flexible approach now proposed be followed?

(i) *Multiple Licensing.* Should the Commission prohibit payments among persons sharing radio facilities under multiple licensing? Would such a limitation be useful in maintaining a distinction between multiple licensing and cooperative use arrangements? What records should persons sharing facilities under multiple licensing be required to keep? What reports should the licensees make to the Commission?

4. Comments and replies on this phase of this proceeding were submitted by the following parties:

Comments

—Telocator Network of America (TNA)
—Page A Fone Corp. (PAF)
—Tactec Systems (Tactec)
—Central Committee on Telecommunications of the American Petroleum Institute (API)
—The National Association of Business and Educational Radio, Inc. (NABER)
—Metro Mobil Communications, Inc. (MMC)
—John D. Pellegrin, Esquire
—Utilities Telecommunications Council (UTC)
—Special Industrial Radio Service Association, Inc. (SIRSA)
—General Electric Company (GE)
—Motorola, Inc. (Motorola)
—The National Mobil Radio Association (NMRA)
—Mobil Communications Corporation of America (MCCA)
—Mr. P. Randall Knowles
—Mr. Edward W. N. Smith
—Forest Industries Telecommunications (FIT)

[6] *Tentative Decision and Further Inquiry and Notice of Proposed Rule Making, supra,* at paras. 19–28.

[7] *Id.* paras. 29–40.

[8] *Id.* paras. 41–57.

[9] *See, Multiple Licensing—Safety and Special Radio Services,* 24 FCC 2d 510 (1970), Appendix.

[10] *Id.* paras. 58–61; *see also* 24 FCC 2d 510 (1970) at 519, 521.

[11] *Id.* paras. 62–67.

[12] *Id.* paras. 68–73.

[13] *See* Section 309 of the Communications Act of 1934, as amended, as implemented at Section 1.962 of the Rules.

[14] *Tentative Decision and Further Inquiry and Notice of Proposed Rule Making, supra,* paras. 77–79.

Reply Comments

—SIRSA
—UTC
—Tactec
—NABER
—MCCA
—TNA
—Motorola

5. As in the case of previous comments in this proceeding, the comments basically fell into two categories: (1) Those interests representing the private land mobile radio services (including equipment manufacturers), and (2) those representing the common carrier interests. The private service interests generally endorsed the conclusions reached in the Tentative Decision regarding the legality and public interest benefits of cooperative sharing and multiply licensing. They agreed that third party equipment companies which furnish services and equipment to private land mobile radio services eligibles are not common carriers within the meaning of Section 3(h) of the Communications Act, and that the public interest is served by the Commission's authorizing cooperative sharing and multiple licensing in the private land mobile services. In contrast, the carrier interests disputed those conclusions and maintained, as a matter of law and public policy, that sharing of systems and facilities in the private services should not be allowed. They also maintained that if sharing is allowed, it should only be with rigorous regulation. Regarding the specific rule proposals, there was a great diversity of opinion among the parties.

6. With the exception of the comments and replies directed to the proposed rules themselves, the positions of the parties remained essentially the same as those advanced by them earlier in this proceeding, as modified by more recent precedents which they felt supported their respective positions.

Decision

Summary

7. We have considered the entire record of this proceeding. Based upon this review, we affirm our earlier conclusions that the cooperative sharing of systems and the multiple licensing of facilities in the private radio services are permissible practices as a matter of law, and desirable as a matter of public policy. We also determine that the sale, lease or rental of communications equipment and associated services to licensees in the private radio services by third parties is not common carriage. We also decide that these conclusions are not modified by advertising practices prevalent among licensees of cooperatively shared systems or third party equipment suppliers in multiple licensing situations, or by interconnection with the public switched telephone system, as authorized in the private services.[15] Further, we conclude that there has been no demonstration in the record of this proceeding that such competition as exists between third-party equipment suppliers and common carriers is unfair, destructive, or subjects carriers to a significant economic harm which impedes their ability to provide service to the public. Lastly, we affirm that there are significant public interest benefits in continuing cooperative sharing and multiple licensing practices in the private land mobile radio services.

8. In light of our conclusions that cooperative sharing and multiple licensing in the private land mobile radio services are permissible practices as a matter of law, and that the offering for sale, lease or rental of communications equipment and associated services to eligibles in the private services by third parties does not constitute common carriage, we decline to reach in this proceeding the issue of whether the Commission may forbear from exercising its Title II powers under the Communications Act. This matter is not germane to this proceeding; and we will defer a decision on the issue of forbearance to the resolution of our proceeding in CC Docket No. 79–252.[16]

9. We also decline to adopt rules at this time which would license third party providers of equipment and services in the bands below 800 MHz. Such an approach is not necessary to our regulatory objectives below 800 MHz and the record of this proceeding does not definitively support a need for such a service in these bands.[17]

10. With regard to the major specific rules which we are herein adopting, we have determined to require in the case of cooperatives that all costs associated with the shared service must either be absorbed by the licensee on a no-charge basis to other participants or must be prorated among all participants in the cooperative sharing arrangement. Thus, we have determined not to permit the so-called "stage two" and "stage three" cooperative arrangements [18] which we have heretofore allowed. Both of these types of arrangements have undesirable aspects inimical to true cost sharing. Thus, in the Stage II and Stage III cooperative oftentimes equipment costs and services associated with the cooperative use are not prorated and cost shared among participants. This, we conclude, is not desirable within the framework of our cooperative sharing rule, which contemplates an equitable prorating of costs associated with the sharing of the communications system. Thus, we are confining cooperative sharing to systems in which the licensee shares with the users the costs associated with the operation of his/her system. We are also adopting rules which limit the joint use of multiple licensed facilities to situations in which no consideration is paid by any licensee of the facility to any other licensee for or in connection with any of the equipment or for any services used or rendered in connection with the jointly licensed facility. Lastly, we have decided upon consideration of the record before us to retain the "packaged service" policy which we adopted on an interim basis in 1970.

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[15] *See* 47 CFR 90.476–90.483 and 90.389, as well as the Report and Order in Docket No. 20846. There we conclude that interconnection did not change the essential nature of the private services. *See* 69 FCC 2d 1831, 1837–38 (1978). Nothing in the record of this proceeding causes us to alter our earlier conclusion.

[16] *Deregulation of Telecommunications Service, Further Notice of Proposed Rule Making, In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefore,* CC Docket No. 79–252, 84 FCC 2d 445 (1981).

[17] The SMRS concept derives from our proceeding in Docket No. 18262. *See Report and Order,* Docket No. 18262, 46 FCC 2d 752 (1974); *Memorandum Opinion & Order,* Docket No. 18262, 51 FCC 2d 945 (1975); *Memorandum Opinion & Order,* Docket No. 18262, 55 FCC 2d 771 (1975); *aff'd. sub nom. NARUC v. FCC,* 525 F 2d 630 (1976), *cert. denied,* 425 U.S. 992 (1976). It is a concept specifically tailored to promote the Commission's goal of a potential for increased spectral efficiency and/or grade of service via the introduction of a new and expensive technology. The Commission had large amounts of spectrum then unoccupied which could be structured around this concept. The situation below 800 MHz is vastly different. We therefore choose not to adopt an SMRS concept below 800 MHz.

[18] In our Tentative Decision, *supra,* we defined a Stage II cooperative as an arrangement in which the licensee owned or leased the base station transmitter and made it available to sharing participants either at no charge or at less than cost, but provided participants with some other equipment or service (e.g., mobile stations/paging receivers or equipment service) on a for-profit basis. A Stage III cooperative is a situation in which an eligible in one of the radio service categories agrees with other eligibles in the same radio service to assume the responsibilities as licensee for the cooperative arrangement and arranges for the needed physical radio gear and maintenance service. Under such an arrangement the licensee of the system is paid nothing at all by the other participants; instead, all consideration flows directly to the third party suppliers of goods and services, with the licensee and each participant paying the third-party suppliers individually for any equipment or services provided to them. *See Tentative Decision and Further Inquiry and Notice of Proposed Rule Making, supra.,* para. 7.

Discussion

The Offering of Equipment and Services by Third Parties Is Not Common Carriage

11. In our Tentative Decision, we concluded that the third-party equipment companies which furnish services and equipment to a group of private land mobile licensees are not common carriers within the meaning of Section 3(h) of the Communications Act of 1934, as amended.[19]

12. As an initial point, we agreed that a business enterprise is a common carrier depending on what it does, and not on what the parties concerned characterize it as being or on what it purports to be. *United States* v. *California*, 297 U.S. 175 (1936); and *United States* v. *Drum*, 368 U.S. 370 (1961). We also agreed that a business enterprise need not serve all the world to be a common carrier. *Terminal Taxicab Co.* v. *District of Columbia*, 241 U.S. 252 (1916) and *Anderson* v. *Fidelity and Casualty Co.*, 228 N.Y. 475, 127 N.E. 584 (Ct. App., N.Y. 1920). Further, we accepted the proposition that the courts have uniformly rejected schemes and devices designed to avoid statutory requirements relating to the control and regulations of public carriers or utilities. *State ex rel. Board of Railroad Commissioners* v. *Rosenstein*, 217 Iowa 985, 252 N.W. 251 (Sup. Ct. Iowa, 1934); *Restivo* v. *West*, 149 Md. 30, 129 Atl. 884 (Ct. App. Md., 1925); *Affiliated Service Corp.* v. *Public Utilities Commission*, 127 Ohio St. 47, 186 N.E. 703 (Sup. Ct. Ohio, 1933) and *Gornish* v. *Pennsylvania Public Utilities Commission*, 134 Pa. Super. 565, 4 A. 2d. 569 (1939).

13. Additionally, there was no issue that the fact that an association or corporation is to be non-profit, or that a cooperative arrangement is to be available on a cost shared basis does not perforce mean that such entities or arrangements are not to be classified and regulated as common carriers. *Celina & Mercer County Telephone Co.* v. *Union Center Mutual Telephone Company Association*, 120 Ohio St. 487, 133 N.E. 540 (Ohio Sup. Ct., 1921); *State Public Utilities Commission* v. *Noble Mutual Telephone Co.*, 268 Ill. 411, 109 N.E. 298 (Sup. Ct. Ill., 1915); and *Peoples Telephone Exchange* v. *Public Service Commission*, 239 Mo. App. 166, 186 S.W. 2d 531 (Kan. Cty. App., 1945). *See also North Shore Fish and Freight Co.* v. *North Shore Businessmen's Trucking Association*, 195 Minn. 336, 263 N.W. 98 (Sup. Ct. Minn. 1935); *State ex rel. Board of Railroad Commissioners* v. *Rosenstein, supra; Affiliated Service Corp.* v. *Public Utilities Commission, supra;* and *Surface Transportation Corporation* v. *Reservoir Bus Lines*, 67 N.Y.S. 2d 135, 271 App. Div. 556 (Sup. Ct. N.Y., App. Div. 1943).

14. Finally, we recognized that the operation of an unregulated third party equipment supplier in a regulated field could give rise to "special problems," and requires "careful analysis" in terms of the public benefits and possible public detriment. *Industrial Gas Co.* v. *Public Utilities Commission of Ohio*, 135 Ohio St. 408, 21 N.E. 2d 166 (Sup. Ct. Ohio, 1939); and *United States* v. *Drum, supra.*

15. Nevertheless, in light of the record in this proceeding, we considered that the "holding out" by equipment companies to provide radio gear and related services to eligibles in the private radio services on a for profit basis did not transform these equipment companies into common carriers. In this regard, we pointed out that all businesses which vend goods or services hold their products out, and that the offering of a combination of services, including equipment rental, antennae sites, maintenance, etc. to a person authorized by the Commission to use the radio spectrum does not result in common carriage. We found this to be true, whether the services are offered by the third party to a single eligible or to a group of eligibles.

16. We also emphasized that a significant factor in our determination was that equipment suppliers had no right to use the radio spectum. Without this right, we concluded, there could be no offering by these parties of a communications service.

17. We concluded our analysis on this first point by stating that in most communications systems, be they private or common carrier services, there is usually some third party to manufacture, supply, and at times, maintain the physical radio gear involved. This is so whether or not facilities are shared (*see e.g., Coleman Petroleum Engineering Co.*, 24 FCC 378 (1970); *Frequency Band 806–960 MHz*, 55 FCC 2d 771 (1975).

18. TNA has challenged our conclusions in the Tentative Decision on this point. It maintains that third party equipment suppliers of facilities which are shared by more than one eligible are engaged in "telecommunications carriage," and that as a matter of law they must be licensed therefore.

19. In support of this proposition TNA essentially makes the following points: (1) That common carriage is only one subset of telecommunications carriage under the Communications Act and that the Act requires all telecommunications carriers, whether or not they are common carriers, to be licensed as such; (2) that the case history of *ATS Mobile Telephone, Inc.* v. *General Communications Co., Inc.* (ATS v. GCC) is a typical example of the multiple licensed sysem;[20] (3) that the Commission's Second Computer Inquiry proceeding [21] makes clear that third party equipment suppliers are common carriers; (4) that the Mississippi Public Service Commission in *Yazoo Answer-Call, Inc.* v. *Motorola Communications and Electronics, Inc.*,[22] has found third party equipment companies to be public utilities; and (5) that the holding of the United States Court of Appeals for the District of Columbia in *NARUC* v. *FCC* (NARUC I) compels the conclusion that third party equipment companies must be licensed as telecommunications carriers.[23]

20. We have reviewed TNA's arguments carefully and disagree with its opinions. We conclude that under the rules we are adopting, the licensees in a multiple licensing situation, and not the third party equipment supplier, will be in both *de jure* and *de facto* control of their systems. (*See* Appendix, § 90.185). There is no communications service, therefore, being provided by these suppliers of radio equipment. With regard to TNA's specific points, Section 3(h) of the Act and Title II speak to common carriers. We find no basis in the cases TNA cites for the conclusion that third party equipment suppliers are telecommunications carriers which must be licensed under the Act. Second, without addressing the merits of the *ATS* v. *GCC* case cited by TNA, we find no basis in TNA's submissions to extrapolate that the GCC operation is typical of the practices of third party equipment suppliers, and we decline to conclude it is. TNA provides no support for its assertion that we should generalize for an entire industry based on one example. Moreover, by the

[19] No issue of common carriage is raised with respect to the licensees in a multiple licensing arrangement since the typical licensee's use is confined to internal business communications. As noted above, we are not allowing an equipment supplier to also be a licensee on a facility which it makes available for multiple licensing by eligibles. A licensee in a cooperative sharing arrangement is not a common carrier because there is no for profit holding out of the system. *See* fn. 30, *infra.*

[20] *See in the Matter of Petition for Issuance of a Cease and Desist Order and an Order to Show Cause Filed by ATS Mobile Telephone, Inc. against General Communications Company, Inc., a Licensee in the Business Radio Service*, Gen. Docket No. 80-619, for a description of the GCC facility.

[21] 77 FCC 2d 384 (1980), on recon. 84 FCC 2d 50 (1980), appeals pending.

[22] Docket U-3536.

[23] 173 U.S. App DC 413, 525 F.2d 630 (1976), *cert. den.* 425 U.S. 992 (1976).

action we took in Docket 20846 and the action we are herein taking arrangements similar to the one involved in the *ATS* v. *GCC* case would be precluded.[24]

21. With regard to the Computer II proceeding, TNA cites it for the proposition that third-party equipment suppliers provide a "basic service" and therefore, within this decision, are "telecommunications carriers." TNA, however, assumes the very issue in question—that a third-party provider of equipment and service is offering a basic communications service. We do not find our decision in the Computer II proceeding to reach the conclusion that unlicensed third-parties who do not employ spectrum and who sell or lease radio equipment and related services to those eligible for licensing are engaged in offering a basic communications service within the meaning of that proceeding. Quite the contrary, in Computer II we determined that the provision of stand alone customer premises equipment is not a common carrier activity. *Second Computer Inquiry*, on recon., 84 FCC 2d 50, 98 (1980), appeals pending.

22. Addressing the *Yazoo* Case, *supra*, TNA cites it for the proposition that numerous State commissions have routinely found after investigation of community repeater system. (*i.e.* multiple licensing arrangements) that they operate as common carriers. TNA did not mention that the Mississippi Public Service Commission's decision was reversed by the United States District Court.[25] There, the U.S. District Court, *inter alia*, concluded:[26]

> Motorola is not a public utility as defined in this statute, inasmuch as it does not operate equipment or facilities for the transmission of messages by radio "by or for the public." The leasing of a community repeater to users licensed by the FCC, under its Part 91 private Business Radio Service is not an offering to the public for hire. As previously mentioned, only persons licensed by the FCC under Part 91 may be leased a slot on the community repeater and, even then, may be denied the slot. Plaintiff's services are clearly not those offered for public hire, and therefore, cannot be and are not a public utility. 515 F. Supp. 793, 798 (S. D. Miss. 1979).

23. Turning now to *NARUC* v. *FCC*, 525 F.2d 630 (1976), *cert. denied* 425 U.S. 992 (1976) (NARUC I), we had noted in our Tentative Decision our belief that the key elements of common carriage as described by the Court did not apply here.[27] We stated that we saw no quasi-public character, as such, in what third-party equipment companies offer within the framework of the marketplace in which they do business. Moreover, we stated our belief that equipment suppliers do not and could not as a matter of law undertake to carry for all persons indifferently, since they have no spectrum authorized to them to implement such an offering. We emphasized that is was our licensees, not the equipment suppliers, which hold authorizations from us to employ spectrum; and we pointed out that the right to use the spectrum ran to the licensee, not to the equipment which the licensee employed. We concluded that, contrary to TNA's assertion, NARUC I is not to be read in a fashion which precludes the Commission from allowing licensees in the private land mobile radio services, who are otherwise eligible, from sharing equipment furnished by third-parties at the risk of having these systems classified as common carriers.

24. In view of TNA's repeated assertions in its comments that we are wrong in this view, we have again reviewed the NARUC I holding. We conclude nothing in NARUC I is inconsistent with our conclusion that third-party suppliers of equipment and services do not fall within the test of common carriage described by the Court. Thus, there is nothing in the record which would demonstrate that these third-parties' activities are imbued with a quasi-public character which causes them to carry for all people indifferently. TNA's own submission (Appendix C of its Comments) seems to indicate it is the practice of third-party equipment suppliers to make individualized decisions, in particular cases, whether and on what terms to deal.[28] We also note that in the NARUC I case the Court concluded that an SMRS is not a common carrier although it satisfied two of the three criteria there enunciated for common carriage (*i.e.* a for hire offering of a communications service). The non-carrier status of a third-party equipment supplier here is even stronger when it is considered that provision of equipment alone is not provision of a communications service; in this case, only the "for hire" criterion is met. Lastly we point out that the Court recognized the practice of multiple licensing of systems and that it did not conclude that this practice would itself change the classification of a system from non-common carriage to common carriage.[29]

25. In addition, the court in NARUC I ruled that the Commission does not have discretion to confer or not to confer common carrier status on an entity depending on the regulatory goals it seeks to achieve, *NARUC* v. *FCC*, *supra*, at 644. That is a legal determination to be made under the three-part test enunciated therein. We conclude that, as a matter of law, third-party equipment suppliers are not providing a communications service. We also conclude that third-party equipment suppliers do not carry for all persons indifferently. We therefore conclude they are not common carriers within the meaning of the Act and there is no basis for regulating them under Title II. Similarly, since multiple licensed systems and cooperative cost-shared systems also fail to satisfy the three-part test of common carriage, they also are not common carriers and there is no basis for regulating them under Title II.[30]

26. In light of these conclusions we also determine that the advertising practices of third party equipment suppliers[31] or the inter-connection of

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[24] *First Report & Order*, Docket No. 20846, 69 FCC 2d 1831 (1978); *Memorandum Opinion and Order*, Docket No. 20846, (FCC 79-720), 44 FR 67119 (November 23, 1979); *See also* the Appendix of this document at § 90.185.

[25] *Motorola Communications* v. *Mississippi Public Service Commission*, 515 F. Supp. 793 (S. D. Miss. 1979), *aff'd* 648 F. 2d 1350 (5th Cir. 1981).

[26] This case involved a suit filed by Yazoo Answer-Call, Inc. with the Mississippi Public Service Commission alleging that Motorola, Inc., as the supplier of equipment and services to eligibles under Part 91 (now Part 90) of the Commission's Rules & Regulations, was operating as a public utility within the meaning of the Mississippi public utility law (Section 77-3-3 of the Mississippi Code of 1972) and required a prior certificate of public convenience and necessity.

[27] Common carriage has a three pronged test: (1) provision of a communications service, (2) for hire, (3) to the public. *See NARUC* v. *FCC*, *supra*, *construed in American Telephone and Telegraph Co.*, v. *FCC*, 572 F. 2d 17, 24 (1978); *see also FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979). "* * * (A) common carrier is one which undertakes indifferently to provide communications service to the public for hire * * *" *American Telephone and Telegraph Co.* v. *FCC*, *supra*, at 24.

[28] This is a characteristic which the Court in NARUC I said would be indicative of non-common carrier status.

[29] The Court considered the specific case of cost shared "community repeater" systems. *NARUC* v. *FCC*, *supra*, at 639 n. 45.

[30] The licensee on a multiple licensed system does not provide a communications service to the public, one of the NARUC I tests. *See* note 19, *infra*. The licensee of a cooperative cost-shared system does not operate for profit, one of the significant indicia that a communications service is offered to the public. *See American Telephone and Telegraph Co.* v. *FCC*, *supra*, at 26. Therefore, neither of these licensees is properly regulated as a common carrier. With respect to the non-common carrier status of cooperative ventures, we recognize, of course, that a profit-making entity may offer a communications service and nonetheless not be deemed a common carrier; factors other than profit may indicate that a service is not offered indiscriminately to the public and, hence, is not common carriage. *See NARUC* v. *FCC*, *supra*, at 641. However, because the record and issues in this proceeding have focused principally on the non-profit nature of cooperatives, our findings as to their private status are based primarily on that factor. *See also* note 31, *infra*.

[31] Individual licensees in a multiple licensing arrangement, as a general rule, do not advertise,

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private systems with the public switched telephone network does not alter the essential nature of these private systems and does not result in their becoming common carriers. We have applied the three-pronged test of common carriage to these arrangements and found that they are not common carriers. Neither the existence of advertising nor interconnection affects the reasons we reached this conclusion.[32]

Do Third-Party Suppliers Constitute Unjust or Unfair Competition for Radio Common Carriers?

27. In the Tentative Decision, the Commission concluded that it could not find in this rule making record, nor could it conclude based on its experience, that unjust or unfair competition exists between common carriers and equipment companies furnishing physical facilities and associated services to licensees. We stated that if was not unjust, because it arises essentially out of our decision to make radio spectrum available to certain classes of users to give these users options to conduct their affairs through the use of radio and, in this way, ultimately to promote the public interest.[33]

28. We also pointed out that inherent in our rule making determinations to allocate radio spectrum to the private services is the conclusion that certain classes of eligibles should not be required to take service from common carriers. We added that the fact that we had allocated spectrum to common carriers to permit them to offer radiotelephone and dispatch services to the public did not carry with it any reasonable implication or expectation on their part that licensees in the private services are to be limited or restricted in the arrangements they are to be allowed to make in the marketplace to secure the radio equipment necessary to employ the radio spectrum we have authorized for their use.[34]

29. From an historical perspective, we also pointed out that sharing was allowed in the private services even before the Commission allocated spectrum to the radio common carriers, and that we did not change this approach when these carriers were created.[35] Finally, we noted that we have consistently affirmed this concept in the face of strong carrier opposition.[36]

30. In sum, for many years equipment and services have been provided to private land mobile licensees as an alternative to equipment and services which might be provided to the public by radio common carriers. Because of this, we concluded in our Tentative Decision that continued provision of such equipment and services on a non-common carrier basis is an appropriate user option in the public interest, and not unjust.

31. With regard to the second issue, whether such choices for consumers subject radio common carriers to significant economic harm, or whether such choices impede or destroy these carriers' ability to provide service to the public, we tentatively concluded that such adverse effects have not arisen and will not arise. We noted that we had found no case where such availability of alternatives had resulted in the failure of any carrier. Nor could we find any demonstration that provision of equipment and services by third parties to users of multiple licensed facilities, or of cooperative sharing arrangements, had adversely affected the development of the radio common carrier industry as a whole. To the contrary, we noted that the radio common carrier industry has grown, not only in the number or composite size of radio common carriers, but also in the types and variety of services offered to the public.

32. TNA, PAF, and MCCA dispute these tentative conclusions. They assert that, at least in the case of multiple licensing, a continuation of this practice is contrary to the public interest, convenience and necessity.[37] The thrust of these parties' positions is that in the proceeding in Docket No. 79–107 (an Inquiry addressing multiple licensing at 800 MHz[38]), TNA has made allegations that third-party equipment suppliers, through the way in which they provide equipment and services to licensees under multiple licensing arrangements, do in fact, or are in a position to, restrain or foreclose competition. The carrier interests therefore assert it would "pre-judge" the 79–107 proceeding to act until we have addressed and disposed of this issue.

33. While these parties concede that PR Docket No. 79–107 is concerned with multiple licensing at 800 MHz,[39] they argue "the public interest considerations involved are not peculiar to the 800 MHz band, but reflect (adversely) on the propriety of the licensing technique in general."[40] [41]

34. We have considered this point. However, we are unable to agree that the Comments which TNA submitted in Docket No. 79–107, in and of themselves, constitute the predicate for terminating this proceeding and merging it with Docket 79–107 (as at least one of the carrier interest requests), or for delaying a decision here. Docket 79–107 is only at the Inquiry stage and we have not even made a determination that new rules at 800 MHz are necessary. Furthermore, the proceeding was initiated in the context of the 800 MHz regulatory structure where SMRS's provide a possible substitute for multiple licensing. These same options do not exist below 800 MHz. At the bottom line,

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since their systems are not shared, but are used only for internal business communications. There is, therefore, no issue of common carriage. In the cooperative sharing situation, in the context of the rules we are adopting, there is no profit to the licensee and we conclude that such advertising as normally exists in these arrangements does not convert such a shared system into common carriage. *See Resale & Shared Use of Common Services*, 60 FCC 2d 261 (1976) *amended on reconsideration*, 62 FCC 2d 588 (1977), *affirmed American Telephone and Telegraph Co. v. FCC, supra.*

[32] In Docket No. 20846, *supra*, we concluded that interconnection does not change the basic nature of private systems. *See* 69 FCC 2d 1831, 1837–1838 (1978).

[33] In this regard we noted that the allocation of spectrum to the private services is not to produce or create a "private" benefit, but rather to enhance the "public" benefit which accrues from the use of radio by licensees in the private services.

[34] Thus, for example, in *Special Emergency Radio Service*, 24 FCC 2d 310 (1970), we stated: ". . . the Commission's allocation of frequencies for common carriers and for privates systems is premised on the basic philosophy that potential radio users, subject to certain limitations, should have the freedom to choose between meeting their needs through private facilities or taking service from carriers." *Id.* at 312.

[35] *See General Mobile Radio Service*, 13 FCC 1190 (1949).

[36] *See Cooperative Sharing of Operational Fixed Stations*, 4 FCC 2d 406 (1966); *In the Matter of Allocation of Frequencies Above 890 MHz*, 27 FCC 359 (1959). *See also, Aeronautical Radio Inc. v. AT&T Co.*, 4 FCC 155 (1937); and *Preston Trucking Company, Inc.*, 31 FCC 2d 766 (1970).

[37] No issue has been raised concerning the public interest benefits of cooperative sharing arrangements, where capital and operating expenses are prorated among participants (with no profit component). *See*, TNA Comments, 19, n. 12; *see also*, Page A Fone Comments, at 12, Mobile Communications Corp. of America Comments, at 23.

[38] Notice of Inquiry, PR Docket No. 79–107, 71 FCC 2d 1391 (1979).

[39] We characterized this proceeding thus, "The principal motivation for initiating an inquiry into community repeaters at 800 MHz is our desire to gain a better understanding of the relationship of multiple licensing practices and the major objectives of the Commission's regulatory plan for the private services at 800 MHZ * * * if the public interest requires specific action to eliminate or curtail the practice, that would be the subject of the next phase of this proceeding." *Id.* at 1391.

[40] Comments of TNA, at 19.

[41] Page A Fone argues: "These Comments [those of TNA], although clearly relevant to this proceeding, were not considered in the Tentative Decision. Whether or not the Commission accepts the legal and factual analysis presented in PR Docket No. 79–107 on behalf of the RCC industry, that analysis must be dealt with on a rational basis in any decision sanctioning the continuation of the present policies regarding community repeaters, as liberalized by the Tentative Decision." Comments of Page A Fone, at 26. A similar position is taken by MCCA, *viz.* Comments of MCCA, at 12–13.

TNA's comments are not dispositive of the charges of the anti-competitive practices which it alleges. It appears that its conclusions in several cases are either not supported by factual data or they are inadequately supported. In instances the submission draws conclusions which are inconsistent with assertions made elsewhere. In short, TNA's Comments in Docket 79–107 have arguable probative value at this point and cannot now be used to rationalize the affirmative conclusions urged by TNA. In light of the foregoing, we believe the public interest is served by defining once and for all without further delay the types of sharing we will allow in the private land mobile services below 800 MHz. These matters have been unsettled for almost twelve years, and have fostered uncertainty in the user community. Further delay is not warranted.

35. On the issue of whether the activities of third-party providers of radio equipment are detrimental to and destructive of common carrier service, as we noted in para. 31, *supra.*, there has been no demonstrated substantive injury to the common carrier industry or the public from the authorization of cooperative sharing and multiple licensing in the private services. We conclude that such activities are not detrimental to or destructive of common carrier service.

36. The beneficial effects of competition and open entry in the communications field are well known. *See e.g., Resale and Shared Use,* Docket No. 20097, 62 FCC 2d. 588 (1972), *aff'd sub nom. AT&T* v. *FCC,* 572 F. 2d. 17 (2nd Cir. 1978); *In re Regulatory Policies and Procedures for the Domestic Public Land Mobile Radio Service,* Docket No. 20870, 61 FCC 2d. 266 (1976); *Commonwealth Telephone Co.,* 61 FCC 2d. 246 (1976); *Carterfone,* 12 FCC 2d. 571 (1968); *Above 890,* 27 FCC 359 (1959). While most of these cases concern competition within the carrier industry, we do feel they stand for the general proposition that competition can spur innovation, flexibility and the development of the communications art.

37. It is also well settled that the speculative possibility of adverse effects will not support a policy to curtail competition. *AT&T* v. *FCC, supra; In re Regulatory Policies and Procedures for the Domestic Public Land Mobile Radio Service, supra; Above 890, supra; Carterfone, supra.* As we stated in a somewhat analogous situation:

> Any party who would have us retain restrictive licensing policies should be prepared to support such a position with concrete factual matter.[42]

Here, where what is being sought is the elimination of a long established licensing option that will affect thousands of licensees in the private services, we think such a standard is even more appropriate.[43] Moreover, the dramatic growth in the land mobile industry in the last decade, both in private and common carrier systems,[44] and the continuing demand by the carriers for additional spectrum in the very urban areas where the growth of private systems has been greatest in order to enable them to serve increasing numbers of customers clearly weakens the persuasiveness of their claims of "destructive" competition.[45]

38. The Commission's statutory mandate is to regulate interstate and foreign communications so as to make available to all the Nation's people rapid, efficient service with adequate facilities at reasonable charges and to encourage the larger and more effective use of radio in the public interest. This is promoted by sharing of systems and facilities in the private services.

Benefits

Spectrum Efficiency

39. Turning now to the issue of whether the multiple licensing of facilities and the cooperative sharing of systems have public benefits, in our Tentative Decision we concluded that permitting these arrangements in the private land mobile radio services promotes spectrum efficiency because it permits better frequency utilization of the limited spectrum resource than a multiplicity of base station transmitters would permit.[46] Additionally, we noted that compatible groupings of users are possible in these situations, so that channel assignments may be employed more efficiently by all. Further, we said that when facility costs are shared, each participant is more responsive to the day-to-day operating requirements of others. Finally, we pointed out that sharing permits the use of better mobile relay facilities and better sites (*i.e.,* ones from which better coverage is possible) and that this allows licensees to make more efficient use of the radio channels assigned to them and therefore enhances their ability to use radio in the furtherance of the public good.

40. At the same time we emphasized that we were not weighing the question of whether private systems or common carrier systems were more spectrally efficient. We pointed out that the two schemes of regulation are totally different.[47]

Effective Spectrum Utilization

41. With regard to the question of effective spectrum utilization, we pointed out in our Tentative Decision that the issue we were addressing was whether sharing within the private services promoted effective utilization, not whether common carrier offerings made more effective utilization of the spectrum than private land mobile joint use arrangements.

42. Thus, we observed that carrier managed radio facilities might in some cases more effectively use spectrum in the sense that channels are not assigned to carrier systems until "need" is demonstrated, and additional radio frequencies are not authorized unless a carrier licensee demonstrates that the capacity of its authorized facility is exhausted.[48] We added, however, that

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[42] *See In re Regulatory Policies and Procedures for the Domestic Public Land Mobile Radio Service, supra,* para. 8.

[43] TNA, MCCA, and Page A Fone also blame the Commission's Rules and Regulations in hindering their competition with third-party equipment suppliers. We are mindful of these types of concerns and we are attempting to address them. *See, e.g., Further Notice of Proposed Rule Making,* Docket No. 20870, 84 FCC 2d. 857 (1981).

[44] *See, e.g.,* Docket No. 80–440, FCC 80–484, 45 FR 83305 (Sept. 24, 1980) for a discussion of the growth in the use of land mobile radio.

[45] *See, e.g., Notice of Proposed Rule Making,* General Docket No. 80–183, 45 F.R. 32013 (May 15, 1980); *Supplemental Notice of Proposed Rule Making,* General Docket No. 80–183, 45 F.R. 73979 (Nov. 7, 1980); *Memorandum Opinion and Order and Notice of Proposed Rule Making,* Common Carrier Docket No. 80–189, 45 FR 32025 (March 15, 1980); *Report and Order,* Common Carrier Docket No. 80–189, 46 F.R. 38509 (July 28, 1981); *Errata,* Common Carrier Docket No. 80–189, 46 FR 44758 (Sept. 8, 1981); *Docket 20870,* 80 FCC 2d. 294 (1980). And further in this regard we noted, in *In re Elimination of Financial Qualifications in the Public Mobile Radio Service,* 82 FCC 2d. 152 (1980), at para. 5, that the common carrier mobile radio industry is a "relatively low-cost, low-risk business venture."

[46] Although it could be argued that a single large multiple licensed system is not as spectrally efficient as several smaller systems which would reuse the same channel, this disadvantage is offset by the operational incompatibilities and the greater expense associated with several systems.

[47] In this regard we noted that efficiency is a relative term and can be measured in a variety of ways. Thus, if interference contours (service areas) are employed, as in most common carrier operations, then the number of individual systems in a given area employing a common channel may be signficantly less than is possible in the absence of protected interference contours. We also pointed out, however, that the general aproach in the private land mobile services does not look towards the maintenance of a particular grade of service, as would be the case in most common carrier operations. We concluded that if grade of service is viewed as an important element of efficiency, then we had no way of comparing the efficiency of common carrier operations with the efficiency achieved through the assignment approach employed in the private land mobile services.

[48] In this regard we are constrained to add, however, that the Commission is in the process of

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the rule-making record before us clearly manifested the dissatisfaction of some parties with the carrier services available to them. We also pointed out that the Commission's approach to allocating spectrum to private systems and carriers was different.[49]

43. We, therefore, concluded in our Tentative Decision and conclude herein that within the context of the private land mobile radio service where channels are generally not assigned on an exclusive basis, there were benefits in spectrum utilization gained from eligibles sharing common transmitting facilities. This cut down on the number of separate transmitter installations (sites) and on "equipment clutter." It also promoted greater assurance of compliance with our technical requirements, since it meant there were fewer transmitters which had to be maintained and inspected. Finally, we recognized that sharing could enable greater flexibility in locating transmitters at advantageous sites because sites too expensive for an individual licensee might be available if the site costs were spread over a broader economic base.

Economic Considerations Associated With Multiple Licensing and Cooperative Use

44. The next area of benefit we addressed in our Tentative Decision was the economic consideration associated with permitting these two types of arrangements. After considering the positions of the various parties, we concluded in the Tentative Decision and conclude herein that shared facilities are often cheaper than individual systems and therefore the public interest is furthered by allowing them.

Availability of Service

45. The last area we addressed under benefits was the "availability of service." Specifically, the private interests and their representatives maintained that cooperative sharing and multiple licensing should be allowed since common carrier facilities may not always be available or tailored to the individual and particularized requirements of potential users.[50] The carriers themselves had acknowledged that their facilities are not available everywhere or always. They had argued, however, when they are available they should be used in lieu of sharing.

46. After considering the matter, we stated in the Tentative Decision our belief that the issue of whether or not sharing in the private land mobile radio services should be allowed did not turn on the question of the availability or non-availability of carrier services. Rather, we stated the fundamental question went to the basic allocation issue: should radio spectrum be made available to classes of users to permit them to establish radio facilities of their own and to arrange freely in the marketplace for such equipment and services as they needed to enable them effectively to use the radio spectrum allocated to them for the conducting of their affairs?

47. We then pointed out that the Commission had answered this point affirmatively on a number of occasions.[51] We also noted that based on the record before us, we believed sharing facilities in the private land mobile radio services was a valuable option and that it should not be denied to persons classified by us as eligible in the private services.

48. In summation on this point, we stated that the allocations of spectrum to the private services have their own basis in terms of the public interest, convenience and necessity standard laid down in the Communications Act. These public interest findings are entirely separate and distinct from those which support the allocations made to systems for public communications. Each group has its own public interest rationale. This being so, we concluded there was public benefit to consumers in having a choice between private and common carrier services, and we therefore rejected the notion that in regions where both are available the former should give way to the latter. This being so, we concluded there was no reason to compel private licensees to forego cooperative sharing or multiple licensing options merely because common carrier service was available.

49. Generally, the private radio service interests enthusiastically endorsed these tentative conclusions. The carriers on the other hand reiterated their views that multiple licensing and cooperative sharing were undesirable because they placed carriers at a competitive disadvantage. In light of our previous discussion, we affirm our prior conclusions with regard to the public interest benefits involved in multiple licensing and cooperative sharing.

Rules

We now turn to the specific rules which we are herein adopting.

Packaging

50. The packaging policy, which has been described above, derived from a controversy in *Coleman Petroleum Engineering Co., supra.* Very briefly, in the Coleman case, Caprock Radio Dispatch, an RCC, had complained that Mrs. Nellie Woodruff, a third party, had combined her telephone answering service functions with dispatching and equipment rental. Caprock contended that the arrangement was *de facto* and *de jure* common carriage. We rejected this notion, but stated our intention to look into arrangements of this type in a rule making proceeding.

51. In this docket, therefore, we put into issue the question whether licensees of cooperatively shared or multiple-licensed systems of communications should be permitted to obtain both equipment and dispatching (including transmitter control) services from the same third party. Our concern was not that expressed by the carriers,

considering means of eliminating and/or objectively quantifying "need" showing for applicants and licensees in the Domestic Public Land Mobile Radio Service. *See Notice of Proposed Rule Making,* General Docket No. 80-183, 45 F.R. 32013 (May 15, 1980); *Supplemental Notice of Proposed Rule Making,* General Docket No. 80-183, 45 F.R. 73979 (Nov. 7, 1980).

[49] Frequencies are assigned to common carriers and made available to enable them to provide public communications services, of a grade which is, in essence, assured through our frequency asignment and interference protection policies. In such circumstances, there may be a regulatory requirement to examine need ("necessity" under the Act) in terms of the services offered and utilization of existing channels; concomitantly, others have standing to protest licensure of common carriers on the basis that they have no need for spectrum to support proposed services. In contrast, in the private services the Commission determines need in terms of generic categories of users (e.g., power companies, police departments, hospitals, businesses, etc.). These determinations are made through the rulemaking process, with radio frequencies allocated for use by generic classes of "eligibles" (categories of licensees eligible for licensing for such frequencies) based on a demonstration in the proceeding of each generic class' need. After such rulemaking, individual frequency assignments are made within the allocation to users which are eligible for use of the frequency, as defined by the adopted rules. These eligibles must share channels with other eligibles (for example, business licensees must share channels with other business licensees). The grade of service attained may be significantly inferior to the grade of service obtainable from a radio common carrier, and messages in the private services, unlike those in common carrier services which are unrestricted, must be restricted to the activity which established eligibility (*e.g.*, messages in the police services must be official police communications and may not be personal). In sum, the Commission examines need in the private services by class of eligibles, and not by licensee.

[50] In this regard it had also been argued by the private land mobile interests that the autonomy they have as licensees in the private services is important. If sharing were removed, they complained, this option would effectively be denied to all but those who found it economically feasible to construct individual private systems.

[51] *See, e.g., Special Emergency Radio Service; Report and Order,* Docket No. 17561, 24 FCC 2d 310 (1970); *In re Joe A. Coleman, d.b.a. Coleman Petroleum Engineering Co., Memorandum Opinion and Order,* 24 FCC 2d 378 (1970); *General Mobile Radio Service,* 12 FCC 1190 (1949).

i.e., that packaged service was a common carrier offering, but rather that in arrangements in which licensees relied on a single third party for associated equipment and dispatching service, there might be a propensity to abdicate to this third-party effective system control.

52. Throughout this proceeding the private interests have opposed this approach; they maintain it is not necessary to our regulatory objective of assuring that licensees control the operation of their systems. *See* 47 CFR 90.403. The carriers, on the other hand, have expressed the view that retention of the prohibition on the offering of packaged service would "aid the Commission in identifying private systems which are functionally equivalent with regulated carriers."[52]

53. After reviewing the record of this proceeding, we affirm our tentative conclusion that the offering of a packaged service, of itself, is not common carriage. However, we are of the view that retention of packaging restrictions for these systems further assures licensee control. Moreover, for the past ten or more years in which we have had the packaging doctrine, there have been no demonstrated adverse effects. Accordingly, we will adopt rules retaining present packaging restrictions.

Cooperative Sharing

54. In our Tentative Decision we delineated three stages in the evolution of cooperative sharing. We also noted that we had limited in the past cooperative arrangements in which the licensee of the cooperative system made equipment or service available to other participants at no cost, or less than cost, but then profited out of the provision of associated equipment or service, *i.e.*, the Stage II cooperative. We also pointed out that in reaction to our limitation of Stage II cooperatives, the Stage III cooperative arose. In this situation no monies for the operation of the system were paid to the licensee. Instead, payments by each participant were made to third parties. In our decision in docket No. 20097 [53] we defined sharing as "a non-profit arrangement in which several users collectively use communications services and facilities * * * with each user paying the communications related costs associated therewith according to its pro rata usage of the communications services and facilities." [54] On reconsideration, we defined sharing "as a non-profit arrangement where several users collectively use, and allocate among themselves the cost of communications services or facilities." [55] Although these decisions were directed towards the sharing of a carrier provided service, we believe the concept can usefully be applied here. If a private land mobile system is to operate under our cooperative sharing rules, then we believe that the costs associated with the system, that is, the services and facilities operated pursuant to the licensee's authorization, should be: (1) prorated by the licensee and apportioned among the participants on a non-profit, equitable basis, *i.e.*, no profit out of any aspect of the sharing arrangement accrues to the licensee or any participant; (2) collected by the licensee; and (3) paid by the licensee to the third party providers, to the extent equipment or service is received from them. This approach is consistent with our conclusions in Docket No. 20097 [56] and promotes consistency in the application of our rules and procedures. We are, therefore, confining cooperative sharing to the Stage I cooperative, because in a Stage I cooperative, all these elements exist.

Prior Approval of Cooperative Sharing Arrangements

55. By and large, the private land mobile interests applaud the proposed elimination of prior approval of cost-sharing arrangements by the Commission. They argue that such deregulation will promote efficiency, and that retention of such a requirement is unnecessary in light of the delineation in our rules of the requirements for cooperative sharing.[57] This view, however, was not shared by the carriers.[58] They felt that the prior filing and approval requirement should be retained to enable "interested parties acting as 'private attorneys general' to investigate questionable practices on their own so that they can bring evidence of rule violations to the Commission's attention." [59]

56. We conclude after considering the various arguments that the rules we are adopting adequately set out the parameters of permissible cost sharing. In consideration of the fact that we are requiring licensees (1) to compile and maintain records reflecting the non-profit nature of the arrangement, and (2) to hold them available for inspection and audit, we conclude this is sufficient for our administrative purposes. We are therefore not requiring the prior submission and approval of cost sharing arrangements.

(b) Nonprofit Corporations and Associations

57. We proposed requiring nonprofit corporations and associations of users eligible for licensing in several of the private land mobile radio services [60] to comply with the new rules governing cooperative use. Nothing in the record persuades us this is not in the public interest. The rules we are adopting therefore require it.

(c) Sharing Between Parent and Subsidiary Corporations

58. A number of parties expressed concern that the proposed rules would require the subsidiaries of a common parent corporation to follow cost-sharing procedures, *e.g.*, in terms of the records to be kept and the reports to be filed with the Commission. We did not intend this. Where a communication service is provided by a subsidiary to its parent or to a sister subsidiary, cost sharing, as such, is not involved. The revised rules set out in the *Appendix* state this explicitly.

(d) Sharing Among Joint Venturers

59. A similar concern was voiced by TAPS Communication Association, but its focus was on the application of the cooperative use rules to joint ventures. We feel the same policy would apply as in the case of parent and subsidiary, *i.e.*, if the communication service is provided essentially to the same entity or party-in-interest, then cooperative use is not

[52] Comments of Page A Fone Corporation, at 23.

[53] *Resale & Shared Use of Common Services, Report and Order*, Docket No. 20097, 60 FCC 2d 261 (1976).

[54] *Id.* at 263.

[55] *Resale and Shared use of Common Carrier Services Memorandum Opinion and Order*, Docket No. 20097, 62 FCC 2d 588 (1977) at 600, aff'd, *AT&T v. FCC*, 572 F. 2d 17 (2nd Cir. 1978).

[56] *Id.* at fn. 19.

[57] *See e.g.*: "Instead of requiring prior submission and approval of the sharing plan as originally proposed, the revised proposal simply set forth the parameters for cost sharing and requires that records reflecting the nature of the cost sharing arrangement be maintained for possible inspection and audit. In the interest of eliminating unnecessary regulations and easing the Commission's administrative burdens, the Central Committee submits that the adoption of rules reflecting this policy will serve the public interest." Comments of API, at 11.

[58] "Thus, at a minimum, licensees of shared PLMRS facilities should be required to file with the Commission all agreements concerning their use and the sharing of the costs thereof. These records should include all service agreements with individual users. Moreover, shared operations should be required to file a detailed annual report with the Commission—which report should, at minimum, set forth (a) the name, address and business of each shared user; (b) a detailed itemization of all capital and operating expenses applicable to the facility during the subject calendar year; and (c) the prorated contribution made by each user during that year." Comments of Mobile Communications Corporation of America, at 32.

[59] *Id.* at 31–32.

[60] *See* 47 CFR 90.61 and 90.67.

involved. There may be special circumstances where we would not reach this conclusion, but as a general rule this is the policy we will follow.

(e) Control Station and Control Point Authorizations

60. We have mentioned that neither our prior nor our present practice permits participants in cooperative use arrangements to control the licensee's base station facility. In the Tentative Decision, we proposed separate licensing of participants in cooperative sharing arrangements for control points or stations of their own, located on or at their premises, should they so desire, if the base station licensee consents and provided all operation took place under the control of the base station licensee. This approach was generally supported; therefore, our final rules allow it.

(f) Annual Reports

61. We proposed rather detailed record keeping requirements and the filing of detailed annual reports where (under cooperative use) costs are shared, with the licensee reimbursed either in full or in part for his or her capital or operating expenses. PLMRS licensees opposed the new requirements. Some thought them burdensome, and others said they were not at all justified, suggesting that the licensees could keep adequate records at their stations and could make these reports available upon reasonable request for inspection or audit by Commission personnel. Further, it was pointed out, the Commission could always require the licensees to furnish any needed information as to their cost-sharing arrangements; that this was a statutory right of the Commission; and that, in these circumstances, some flexible standard could be devised and still serve the Commission's purpose. As noted above, the carriers opposed this for the reasons previously outlined. We conclude that the submission of annual reports on a routine basis is not necessary. To the extent we wish to examine these reports they must be made available. We believe this satisfies our regulatory requirement to be able to assure our rules are being followed. Our rules therefore do not require the filing of annual reports.

(g) Addition of Participants

62. We also proposed elaborate notification procedures when users were added to cooperative use sharing arrangements. We are looking for ways to simplify administrative procedures and we find we can do so here with no adverse effect. Thus, our modified rule allows licensees to add participants without notification or approval by us.

(h) Mobile Stations in Third-Party Vehicles

63. We had planned to clarify our rules by separating out those arrangements involving cost sharing from those in which none was involved, *e.g.*, where a subsidiary corporation provided radio service to its parent or to another subsidiary of the same parent and where radio service was provided by a licensee to a third party furnishing, under a contract, "non-radio services" to the licensee. In the interim, we developed a new rules structure in consolidating Parts 89, 91, and 93 under the new Part 90. In doing so, we took care of most of the situations mentioned. *See* 47 CFR 90.61, 90.87, and 90. 421. Accordingly, consistent with the Tentative Decision, we will not adopt the separate rules proposed in the original Notice for mobile stations in third party vehicles.

4. Multiple Licensing Arrangements

(a) Unrestricted Transmitter Access

64. Since under multiple licensing arrangements, the base station transmitter is usually at some location remote from the licensees' places of business, we proposed to require a means of unlimited and unconditional access by each licensee to all shared transmitting equipment. While no objection to this proposal was voiced, concern was expressed that in certain cases, such as roof-top locations, site-lessors might be reluctant to permit each licensee to access the transmitter site on demand.

65. While we are mindful of these concerns, we conclude, nonetheless, that each licensee in the private land mobile radio service consistent with his or her status as a licensee must have unlimited and unconditional access to the transmitter for which the licensee is authorized. However, in a fashion analogous to the sharing of an antenna structure for which each licensee has lighting and maintenance responsibility, we will permit the licensees in a multiple licensing arrangement to select one of their number to have primary access responsibility.[61]

(b) Joint and Several Operating Responsibility

66. Our initial plan was to require all persons jointly licensed to use and operate a common facility to be both jointly and severally responsible for the transmitter shared. This was modified in our Tentative Decision. The parties pointed out that joint and several responsibility was an impractical and unfair requirement, that more properly each licensee should be held accountable for his or her individual use and operation of the shared system; and that in the circumstances the rule should not be adopted. After consideration of the arguments before us, we agree. Under multiple licensing each licensee can be held accountable for his or her use and operation of the shared facility, and we think it more equitable that such responsibility be limited as suggested.

(c) Prior Consent for Participation

67. In our original plan, we proposed a rule which would have required all persons sharing a particular facility to consent to the addition of any new participant. The parties thought this unreasonable, since any one participant for any reason could refuse to consent to new users being added. The consequence might well be to drive the costs up to a point at which sharing would not be beneficial. Moreover, the need for the rule was questionable, since any dissatisfied user, as a licensee, could move off the shared facility and establish his or her own station, either at the same site or at some site nearby. Upon further consideration of this matter, we agree with these views. Under multiple licensing, licensees have freedom to modify their licenses and change facilities or to construct their own facilities using the same frequency assignments. Accordingly, we are not adopting final rules on this point.

(d) Payments Among Participants

68. We also proposed in 1970 to forbid payments between persons sharing common transmitting facilities under multiple licensing. This we thought desirable to distinquish multiple licensed sharing arrangements from cooperative use, thereby drawing an absolute and very definitive line between the two. This approach was opposed by several parties. They argued that in many instances persons furnishing service, *e.g.*, equipment companies, have legitimate communication requirements of their own. In such circumstances, the option would be for such equipment companies to build a second facility for their needs, keeping separate ones for use by their customers. Notwithstanding this effect we feel that licensees of community repeaters should not be permitted to profit from the furnishing of equipment or service to other licensees. Therefore, payments among persons sharing

[61] *See* 47 CFR 90.441(b).

common transmitting facilities under multiple licensing will be prohibited.

(e) System Designators

69. To better identify multiple licensed facilities and to account for the number of persons being accommodated through them, we proposed assigning a "system designator" to each shared repeater or shared base mobile system. Since that time, we have found other ways to identify such facilities, including the licensees sharing them and the number of mobile units serviced. In these circumstances, we no longer have a need for the "system designator," and we are not adopting final rules on this point.

(f) Termination of Use

70. It had been our plan to require licensees to notify us of termination of use of a particular facility, and to submit their licenses for cancellation within a specified time. While we are mindful of the comments of those who urge adoption of this rule, citing the benefit of improved frequency coordination, we conclude [62] this proposal is far too restrictive. It does not take into account those situations in which licensees might want to continue to use their assigned channels, perhaps at different sites. As we have already noted, a licensee's authorization does not run to a particular facility. Thus, notification of termination of use of a particular station and a cancellation requirement are not appropriate.

(g) Miscellaneous Matters

1. Public Notice Proposal

71. The radio common carriers requested that public notice be given for all applications proposing cooperative use or multiple licensing and that interested persons be afforded an opportunity to protest. *See* Section 309 of the Communications Act of 1934, as amended, as implemented at § 1.962 of the rules. This was not an area in which we requested comments. We have concluded earlier that such procedures were not necessary. *See Multiple Licensing—Safety and Special Radio Services, supra,* at 515.

72. Nevertheless, TNA and others again requested such procedures, arguing that the dangers of non-compliance with the rules by applicants for cooperative use and multiple licensed facilities were such as to require the services of "private attorney generals," *i.e.,* carriers who would review pending applications and, where appropriate, file petitions to deny.

73. TNA and others with this view presented no new information to support their conclusion. Further, it is apparent that such petitions could be used by carriers as a dilatory tactic to postpone commencement of private service. This would not be in the public interest. Policy issues as to licensing that are raised repetitively are appropriate subjects for rule making and should be handled as such rather than on an *ad hoc* basis. Further, we have administered cooperative use and multiple licensing arrangements for many years, and we have found no evidence to support the contention that there is a need for "private attorney generals" to review applications for such arrangements. Our rules will define the types of sharing we will allow and the conditions under which these arrangements will be authorized. Eligibility standards formulated through rule making, as stated earlier in this proceeding, are preferable to case-by-case determinations. Moreover, the procedures sought by the carriers would have an adverse impact on our ability to process the large volume of land mobile applications which we receive each day. See *Multiple Licensing—Safety and Special Radio Services, supra,* at 515. Based on our experience, this disruptive effect would not be offset by any significant benefits to be gained from these procedures. Therefore, we affirm our earlier decisions not to extend the Section 309 notice procedures to land mobile applications, except to the extent they presently apply. [63]

2. Rule Consolidation

74. As we noted earlier, Parts 89, 91, and 93 of our rules have been consolidated into a single Part 90. We therefore proposed to consolidate our rules governing multiple licensing and cooperative use into the rule provisions under this new Part 90.

3. Procedural Issues

75. Both TNA and MCCA state that they have been given an insufficient amount of time to prepare their comments in response to the Tentative Decision and Notice of Inquiry and Proposed Rule Making. MCCA questions the validity of the proposal to adopt final rules which, it says, are a radical departure from the direction of the original proposal. TNA believes the Tentative Decision is not a reasonable foundation document for many reasons, including lack of an evidentiary hearing, lack of formal finding of fact, and lack of rulings upon disputed issues of fact. We find all of these arguments without merit as a predicate for our inability to issue a final decision in these matters.

76. TNA also claims that the comments filed by John D. Pellegrin, Esquire, in this proceeding are improper and must be stricken from the record because Mr. Pellegrin is not an "interested person" within the meaning of 5 U.S.C. 553(c) or under 47 CFR 1.415(1). TNA's Motion to Strike is denied. [64] The term "interested person" in rule making proceedings is broad, and we feel clearly encompasses, in this context, Mr. Pellegrin. TNA also purports to "invoke" 47 CFR 1.22, to require Mr. Pellegrin to show his authority to act in a representative capacity. We are constrained to point out that it is the Commission, not TNA, which has the authority to invoke this rule section. Given that Mr. Pellegrin is an "interested person" separate and apart from any agency or representation, and given his statement that he represents various clients who are "participants in cooperative/shared use arrangements," the Commission sees no need to invoke 47 CFR 1.22.

Regulatory Flexibility Statement

Statement in Compliance With Regulatory Flexibility Act

77. This Report and Order adopts rules required to codify and regulate cooperative use and multiple licensing operating practices that have evolved with the advent of new technology and advanced marketing practices.

78. In our Initial Regulatory Flexibility Analysis, we determined that the availability of a wide range of alternatives in this docket resulted in the possibility that actions taken in this proceeding could have an economic impact on both the licensees and users of private radio systems and on public common carrier systems, many of which, in each case, are small business entities. No comments, however, were raised in direct response to the Initial Regulatory Flexibility Analysis.

79. The major economic concern of private radio system licensees and users was the possibility that we would eliminate cooperative sharing and multiple licensing in the private services entirely. This *Report and Order* affirms

[62] In many instances, whether a licensee is an individual system operator or is part of a shared system, he forsakes the use of his radio system, although his license term will not expire for years. Absent receipt of the licensee's authorization for cancellation, the Commission does not expunge that licensee from its records.

[63] *See* 47 CFR 1.962.

[64] TNA's Motion to Strike was made in its Reply Comments to the Further Notice. Mr. Pellegrin submitted a response to TNA's Reply Comments together with a request to accept the additional response. Mr. Pellegrin's request to Accept Additional Response is granted.

the permissibility of cooperative sharing and multiple licensing. While private radio system licensees also expressed concern about the "packaging doctrine," which, they maintain, prevented them from freedom of choice in the marketplace and increased their costs, we have retained the doctrine as a method of assuring appropriate licensee control. The packaged service prohibition has been in effect for over a decade and we conclude it has no serious demonstrable adverse affect on licensees. Nothing we are doing here imposes additional burdens or hardships on small entities.

80. The major economic concern of public common carrier systems was their inability to maximize profits because of the available option of private user systems. Nonetheless, we found that the public interest is served by allowing small entities eligible in the private services a variety of means of satisfying their communication requirements. We also concluded that most of the practices we are finalizing have been in existence for many years, and the record demonstrates no harm to carrier operations.

81. In sum, we conclude these rules do not have a significant additional economic impact on a substantial number of small entities. They also impose no additional record keeping requirements and eliminate some restrictions that have heretofore been required.

IV. Ordering Clauses

82. Accordingly, it is ordered, effective May 20, 1982, that 47 CFR Part 90 is amended as shown in the Appendix attached hereto. The authority for this action is found in sections 4(i) and 303 of the Communications Act of 1934, as amended. 47 U.S.C. 4(i) and 303. All existing systems must bring themselves into compliance with these rules by September 1, 1982.

83. It is further ordered that this proceeding is terminated.

84. For further information concerning this document, you may contact John Borkowski, (202) 632–7597.

(Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Federal Communications Commission.

William J. Tricarico,

Secretary.

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

Appendix

Part 90 of the Commission's rules is amended as set forth below.

1. Section 90.35(a)(6) is revised to read as follows:

§ 90.35 Medical services.

(a) * * *

(6) Physicians, schools of medicine, oral surgeons, and associations of physicians or oral surgeons. Associations are subject to the provisions of § 90.179 governing the cooperative use of radio stations.

* * * * *

2. Section 90.61 is revised to read as follows:

§ 90.61 General eligibility.

(a) In addition to the eligibility shown in each Industrial Radio Service, eligibility is also provided for any corporation proposing to furnish nonprofit radiocommunication service to its parent corporation, to another subsidiary of the same parent, or to its own subsidiary provided the party served is regularly engaged in any of the eligibility activities set forth in the particular service involved. This corporate eligibility is not subject to the cooperative use provisions of § 90.179.

(b) Eligibility is also provided for a nonprofit corporation or association that is organized for the purpose of furnishing a radio communications service to persons actually engaged in any of the eligibility activities set forth in the particular service involved. Such use is subject to the cooperative use provisions of § 90.179.

3. Section 90.87 is revised to read as follows:

§ 90.87 General eligibility.

(a) In addition to the eligibility shown in each Land Transportation Radio Service, eligibility is also provided for any corporation proposing to furnish non-profit radiocommunication service to its parent corporation, to another subsidiary of the same parent, or to its own subsidiary provided the party served is regularly engaged in any of the eligibility activities set forth in the particular service involved. This corporate eligibility is not subject to the cooperative use provisions of § 90.179.

(b) Eligibility is also provided for a non-profit corporation or association that is organized for the purpose of furnishing a radiocommunication service to persons actually engaged in any of the eligibility activities set forth in the particular service involved. Such use is subject to the cooperative use provisions of § 90.179.

4. Section 90.179 is revised to read as follows:

§ 90.179 Cooperative use of radio stations in the mobile and fixed services.

(a) Licensees of radio stations authorized under this part may share the use of their facilities with other eligible persons, subject to the following conditions and limitations.

(1) Sharing of radio facilities may occur only on frequencies for which all participants would be separately eligible for assignment.

(2) All facilities to be shared must be individually owned by the licensee, jointly owned by the participants and the licensee, leased individually by the licensee, or leased jointly by the participants and the licensee.

(3) The licensee must maintain access to and control over all facilities authorized under its license.

(4) Facilities may be shared only: (i) Without charge; or (ii) on a non-profit basis, with contributions to capital and operating expenses including the cost of mobile stations and paging receivers operated pursuant to the licensee's authorization prorated equitably among all participants; or (iii) on a reciprocal basis, *i.e.*, use of one licensee's facilities for the use of another licensee's facilities without charge for either capital or operating expense.

(5) All sharing arrangements must be conducted pursuant to a written agreement to be kept as part of the station records. The arrangement for shared use must be made directly between the licensee and the participants. Where the facilities are shared on a cost-sharing, non-profit basis, the agreement between the parties shall set forth the method(s) employed for determining the capital and operating expenses of the shared facilities and for allocating these costs among the participants on a prorated basis. If the arrangement involves no cost-sharing, or if the sharing is on a reciprocal basis, the agreeement between the parties must so state and must provide sufficient details to show that this is the arrangement.

(6) No person providing any radio equipment, or maintenance and repair, or dispatching, or telephone answering services for profit for use in or in connection with a shared system, and no employee or agent of such person, may be an officer, director, partner, or employee of the licensee of that system or own or control the licensee of that system.

(7) The licensee or participants in a shared system may not provide any of the equipment used in the system, nor dispatch, telephone answering, or maintenance and repair services to any person sharing the system, except

pursuant to the terms of the cost sharing agreement.

(8) A person who furnishes or has furnished through sale, lease arrangements, or otherwise any of the radio equipment used to operate a cooperatively shared radio station may not provide dispatch service to the licensee of the radio station or to any person cooperatively sharing operation of the licensee's radio station.

(b) Participants in the shared arrangements may obtain a license for their own mobile units (including control points and/or control stations for control of the shared facility). If mobile stations are licensed to participants, the licensee of the shared facilities must maintain a means of isolating and deactivating, or disconnecting from the system any such mobile station, control station or control or dispatch point, or should that not be feasible, deactivating the base station transmitter(s) or repeater(s).

(c) When costs are shared, the licensee must keep records of the following:

(1) Identity of each participant.

(2) Date each participant commenced use.

(3) Date each participant terminated use.

(4) All capital and operating costs incurred for the system.

(5) All charges to each participant and all payments received from each participant, separately stated.

(6) The method of calculation of costs to participants.

Such records must be kept current and must be made available upon request for inspection by the Commission.

(d) When costs are shared, costs must be distributed at least once a year. A report of the cost distribution must be prepared by the licensee, placed in the station records, retained for three years, and be made available to participants in the sharing and the Commission upon request.

§ 90.181 [Reserved]

5. Section 90.181 is removed and reserved.

§ 90.183 [Reserved]

6. Section 90.183 is removed and reserved.

7. Section 90.185 is revised to read:

§ 90.185 Multiple licensing of radio transmitting equipment in the mobile radio service.

Two or more persons eligible for licensing under this rule part may use the same transmitting equipment under the following terms and conditions:

(a) Each licensee complies with the general operating requirements set out in § 90.403 of the rules.

(b) Each licensee is eligible for the frequency(ies) on which the licensee operates.

(c) Each licensee must have unlimited and unconditional access to the transmitter for which the licensee is authorized.

(d) No consideration shall be paid, either directly or indirectly, by any participant to any other participant for, or in connection with, the use of the jointly licensed facilities.

(e) No participant shall furnish to any other participant with or without charge, any equipment or service, or facility of any kind, for use in connection with the facility.

(f) A person who furnishes or has furnished through sale, lease arrangements, or otherwise any of the radio equipment used to operate a multiple licensed system may not provide dispatch service to the licensee of any radio station authorized to operate the multiple licensed system.

§ 90.391 [Amended]

8. Section 90.391 is amended by removing paragraph (b), redesignating paragraphs (c) through (h) as (b) through (g), and revising the new paragraph (d) to read as follows:

* * * * *

(d) Licensees furnishing service to eligible persons on a not-for-profit, cost-shared basis shall comply with the provisions of § 90.179 of the rules, and shall, within 30 days of the close of the first full calendar year of operation, and each year thereafter, submit a report setting forth the current total number of mobile units operated by each user and a statement showing whether these units are of the vehicular or portable type.

9. Section 90.421 is amended by revising paragraph (j) to read as follows:

§ 90.421 Operation of mobile units in vehicles not under the control of the licensee.

* * * * *

(j) Mobile units licensed to an eligible in the Railroad Radio Service may be installed in vehicles operated by organizations providing, under contract, facilities or service in connection with railroad operation or maintenance including pickup, delivery, or transfer between stations of property shipped, continued in, or destined for shipment by railroad common carrier. Parties to the contract must comply with the provisions of § 90.179.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Determination of Spiranthes parksii (Navasota ladies'-tresses) to be an Endangered Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service determines a plant, *Spiranthes parksii* (Navasota ladies'-tresses), to be an Endangered Species under the authority contained in the Endangered Species Act. This plant occurs in Texas and is primarily threatened due to extremely low numbers, urbanization, and possible over-utilization. This determination of *Spiranthes parksii* to be an Endangered Species implements the protection provided by the Endangered Species Act of 1973, as amended.

DATES: This rule becomes effective on June 7, 1982.

ADDRESSES: Questions concerning this action may be addressed to the Director (FWS/OES), U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: Mr. John L. Spinks, Jr., Chief, Office of Endangered Species, U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240, 703/235-1975.

SUPPLEMENTARY INFORMATION: *Spiranthes parksii* (Navsota ladies'-tresses) is endemic to Brazos County, Texas. It was first collected by Dr. H. B. Parks along the Navasota River in Brazos County, Texas, in 1945. Correll described the species in 1947 based upon the Parks collection. Subsequent efforts to relocate the species in the late forties and fifties were unsuccessful and it was thought to have become extinct. However, in 1978, P. M. Catling rediscovered the species in Brazos County near College Station. Recent searches have resulted in relocation of a second population near the type locality. In 1978, a total of 20 plants were observed at these two stations. In 1979, nine plants were observed at these two stations.