raised or new material supplied during the public comment period, EPA may document its response to those matters by adding new materials to the administrative record.

(3) The response to comments shall be available to the public.

(4) The Administrator will notify in writing any Affected State of any refusal to accept recommendations for the permit that the State submitted during the public or Affected State review period.

(k) *Administrative record for final permit.* (1) The Administrator shall base final permit decisions on the administrative record defined in this paragraph (k).

(2) The administrative record for any final permit shall consist of:

(i) All comments received during the public comment period, including any extension or reopening;

(ii) The tape or transcript of any hearing(s) held;

(iii) Any written material submitted at such a hearing;

(iv) The response to comments required by paragraph (j) of this section and any new materials placed in the record under paragraph (j) of this section;

(v) Other documents contained in the supporting file for the permit;

(vi) The final permit;

(vii) The application and any supporting data furnished by the applicant;

(viii) The draft permit or notice of intent to deny the application or to terminate the permit;

(ix) The statement of basis for the draft permit;

(x) All documents cited in the statement of basis; and

(xi) Other documents contained in the supporting file for the draft permit.

(3) The additional documents required under paragraph (k)(2) of this section should be added to the record as soon as possible after their receipt or publication by EPA. The record shall be complete on the date the final permit is issued.

(4) This section applies to all final permits.

(5) Material readily available at the issuing Regional Office, or published materials which are generally available and which are included in the administrative record under the standards of paragraph (j) of this section ("response to comments"), need not be physically included in the same file as the rest of the record as long as it is specifically referred to in the statement of basis or fact sheet or in the response to comments.

(l) *Appeal of permits.* (1) Within 30 days after a final permit decision has been issued, any person who filed comments on the draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision. Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision. The 30-day period within which a person may request review under this subsection begins with the service of notice of the Administrator's action unless a later date is specified in that notice. The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues raised were raised during the public comment period (including any public hearing) to the extent required by these regulations unless the petitioner demonstrates that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period, and, when appropriate, a showing that the condition in question is based on:

(i) A finding of fact or conclusion of law which is clearly erroneous; or

(ii) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

(2) The Board may also decide on its initiative to review any condition of any permit issued under this subpart. The Board must act under this paragraph within 30 days of the service date of notice of the Administrator's action.

(3) Within a reasonable time following the filing of the petition for review, the Board shall issue an order either granting or denying the petition for review. To the extent review is denied, the conditions of the final permit decision become final agency action. Public notice of any grant of review by the Board under paragraph (l) (1) or (2) of this section shall be given as provided in paragraph (d) of this section. Public notice shall set forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief. Notice of denial of review shall be sent only to applicant and to the person(s) requesting review.

(4) A petition to the Board under paragraph (l)(1) of this section is, under 42 U.S.C. 307(b), a prerequisite to the seeking of judicial review of the final agency action.

(5) For purposes of judicial review, final agency action occurs when a final permit is issued or denied by EPA and agency review procedures are exhausted. A final permit decision shall be issued by the Administrator:

(i) When the Board issues notice to the parties that review has been denied;

(ii) When the Board issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or

(iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

(6) Neither the filing of a petition for review of any condition of the permit or permit decision nor the granting of an appeal by the Environmental Appeals Board shall stay the effect of any contested permit or permit condition.

(m) *Computation of time.* (1) Any time period scheduled to begin on the occurrence of an act or event shall begin on the day after the act or event.

(2) Any time period scheduled to begin before the occurrence of an act or event shall be computed so that the period ends on the day before the act or event, except as otherwise provided.

(3) If the final day of any time period falls on a weekend or legal holiday, the time period shall be extended to the next working day.

(4) Whenever a party or interested person has the right or is required to act within a prescribed period after the service of notice or other paper upon him or her by mail, 3 days shall be added to the prescribed time.

[FR Doc. 94–28292 Filed 11–18–94; 8:45 am]

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Care Financing Administration

### 42 CFR Part 417

[OMC–008–F]

RIN 0938–AD79

## Medicare Program; Appeal Rights and Procedures for Beneficiaries Enrolled in Prepaid Health Care Plans

**AGENCY:** Health Care Financing Administration (HCFA), HHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule modifies or establishes administrative review procedures for Medicare beneficiaries enrolled in health maintenance organizations (HMOs), competitive medical plans (CMPs), and health care prepayment plans (HCPPs). Specifically, it requires that an HMO or CMP

complete a reconsideration, requested by a Medicare enrollee for denied services or claims, within 60 days from the date of receipt of the reconsideration request; extends to HMO and CMP enrollees the right to request immediate review by a Utilization and Quality Control Peer Review Organization of an HMO's, CMP's, or hospital's determination that an inpatient hospital stay is no longer necessary; and requires an HCPP to establish administrative review procedures for its Medicare enrollees who are dissatisfied with decisions on denied services or claims.

**DATES:** These regulations are effective December 21, 1994. HMOs and CMPs must comply with the requirements of this final rule beginning February 21, 1995. HCPPs must comply with the requirements of this final rule beginning May 22, 1995.

**FOR FURTHER INFORMATION CONTACT:** Maureen Miller, (202) 619–0129.

**SUPPLEMENTARY INFORMATION:**

## I. General Background

Payment for services provided to Medicare beneficiaries under title XVIII of the Social Security Act (the Act) is generally made on a fee-for-service basis or on a prepayment basis. This rule deals with Medicare services provided to beneficiaries by entities paid on a prepayment basis. We refer to these entities collectively as "prepaid health care organizations." Under the prepayment method, health maintenance organizations (HMOs), competitive medical plans (CMPs), and health care prepayment plans (HCPPs), enter into contracts or agreements with us to provide a range of services to Medicare beneficiaries who voluntarily enroll in these plans.

Section 1876 of the Act provides the authority for us to enter into contracts with HMOs and CMPs to furnish Medicare covered services to beneficiaries and specifies the requirements these organizations must meet. Contracting HMOs and CMPs may be paid on either (1) a risk basis, under which they are paid a prospectively determined per capita monthly payment, or (2) a cost basis under which interim per capita payments are made on the basis of a budget and a retrospective cost settlement occurs to reflect the reasonable costs actually incurred by the HMO or CMP for the covered services it furnishes to enrolled members.

Section 1833 of the Act provides the basis for regulations under which we enter into written agreements with HCPPs to furnish or arrange to have furnished covered Medicare Part B services to a defined population on a prepayment basis.

## II. Additional Background and Provisions of the Proposed Rule

On October 7, 1992, we published a proposed rule (57 FR 46119) in which we proposed to amend the Medicare regulations governing administrative review rights and procedures for Medicare enrollees in prepaid health care organizations to: (1) Impose a 60-calendar-day limit for an HMO or CMP to complete a reconsideration requested by a Medicare enrollee (or authorized representative) for denied services or claims; (2) permit an HMO or CMP enrollee (or authorized representative) to request immediate Utilization and Quality Control Peer Review Organization (PRO) review of an HMO, CMP, or hospital notice of a determination that an inpatient hospital stay is no longer necessary; and (3) require HCPPs to establish administrative review procedures for Medicare enrollees similar to those that we require HMOs and CMPs to establish for Medicare enrollees.

### *A. Time Limit on Reconsiderations*

Section 1876(c)(5)(A) of the Act requires a contracting HMO or CMP to establish procedures for hearing and resolving grievances between the organization and its Medicare enrollees. Section 1876(c)(5)(B) provides specific administrative and judicial review rights to Medicare enrollees who are dissatisfied with determinations by the HMO or CMP regarding services and claims. These rights are similar to those available to beneficiaries in the fee-for-service system, except that, under the existing regulations at 42 CFR 417.614 and 417.620, the initial level of review is by the HMO or CMP rather than by a PRO, intermediary, or carrier. Issues that are subject to the full scope of administrative and judicial review are those in which beneficiaries believe they: (1) Have been denied access to a service to which they are entitled, or (2) are required to pay an amount that is the responsibility of the HMO or CMP. (Other issues are only subject to the HMO's or CMP's internal grievance procedures.)

Regulations at §§ 417.600 through 417.638 describe the administrative and judicial review process. Under the first step of the process, the rules provide that the HMO or CMP must make a timely determination and notify the beneficiary of the reasons for the determination. A determination regarding a request for payment must be made within 60 days of receiving the claim. If the decision is unfavorable (in whole or in part), the beneficiary (or his or her authorized representative) may request that the HMO or CMP reconsider the decision. (The beneficiary must request reconsideration before proceeding to the next step in the review process.) An organization may issue a reconsidered determination on a case only if the reconsidered determination is entirely favorable to the beneficiary. If the organization reaffirms its denial of payment or services, in whole or in part, the organization may not issue a reconsidered decision to the beneficiary Instead, the organization must prepare a written explanation and refer the case to us, along with a justification for its initial denial, so that we may make a new and independent determination concerning coverage of the services at issue. This step is considered part of the reconsideration process. If our reconsideration determination is not fully favorable to the beneficiary, the beneficiary has a right to request a hearing before an administrative law judge (ALJ) of the Social Security Administration if the amount remaining in controversy is $100 or more. If the ALJ hearing does not result in a fully favorable determination, the beneficiary may request Appeals Council review of the ALJ decision. Following the administrative review process, the beneficiary is entitled to judicial review of the final determination if the amount remaining in controversy is $1,000 or more.

Existing regulations do not establish time limits for an HMO or CMP to complete a reconsideration. A beneficiary may not proceed to the next level of administrative review, however, until the HMO or CMP issues its decision or refers the matter to us. Therefore, we proposed to amend § 417.620 ("Responsibility for reconsideration; time limits") to require the following:

- That an HMO or CMP act on the beneficiary's reconsideration request within 60 calendar days from the date of receipt of the request.
- That, if the decision made by the organization is entirely favorable to the beneficiary, the organization so notify the beneficiary within the 60-calendar-day period.
- That, if the organization cannot make a decision that is fully favorable to the beneficiary, the organization must submit the case file to us (or our designated agent) within the 60-calendar-day period described above.

*B. PRO Review of Decisions for Hospital Discharges*

Section 1154(e) of the Act, as amended by section 9351 of the Omnibus Budget Reconciliation Act of 1986 (Public Law 99–509), provides Medicare beneficiaries with the right to an immediate review by a PRO and, in some cases, certain financial protections when a hospital, with the concurrence of the attending physician, determines that the beneficiary no longer requires inpatient hospital care. To exercise the immediate review right, after receiving the hospital's notice of noncoverage, the beneficiary must request (by telephone or in writing) that the PRO review the validity of the hospital's decision. The beneficiary must make the request by noon of the first working day after receipt of the notice. The PRO then must determine within 1 full working day of the request (and receipt of pertinent information and/or records from the hospital) the appropriateness of the hospital's decision that the beneficiary no longer requires inpatient hospital care. The hospital cannot charge the beneficiary for the cost of additional hospital days until noon of the day after receipt of the PRO's determination that the hospital's decision was correct.

Under current law, if the hospital (rather than the HMO or CMP) sends the discharge notice, the beneficiary is entitled to request immediate review by a PRO whether or not he or she is enrolled in an HMO or CMP. However, while a beneficiary enrolled in an HMO or CMP may be protected from being charged by the hospital, he or she is not necessarily protected from potential financial liability. If the PRO upholds the hospital's notice of noncoverage, there is no regulation prohibiting the HMO or CMP from billing the beneficiary for the extra days of care while the PRO is reviewing the case if the extra days result in additional costs to the HMO or CMP. (Depending on the payment arrangement with the hospital, it is possible that the HMO or CMP will not incur any additional costs by virtue of the patient's additional days in the hospital. For example, if there is no contract between the HMO and the hospital, the hospital may not charge more than the amount Medicare would pay. Under the prospective payment system (PPS), that amount remains the same regardless of the length of the hospital stay, unless outlier payment is involved, that is, additional payment for covered services for extended length-of-stay cases. Similarly, a contract between an HMO and a hospital might provide that the hospital is paid on a basis similar to PPS, rather than on a per diem basis.)

If the HMO or CMP, rather than the hospital, makes the determination of noncoverage, the current regulations do not specifically afford an immediate PRO review right to the enrollees. Therefore, we proposed to amend § 417.440 ("Entitlement to health care services from an HMO or CMP"), § 417.454 ("Charges to Medicare enrollees"), and § 417.604 ("General Provisions") and add a new § 417.605 ("Immediate PRO review of a determination of noncoverage of inpatient hospital care") to provide the Medicare HMO or CMP enrollee with the same administrative review rights and financial protection as are available to beneficiaries under the fee-for-service system.

We proposed to require that an HMO or CMP that has not delegated the discharge decision to the hospital and attending physician: (1) Have the concurrence of the attending physician before making a determination that an enrollee no longer needs inpatient hospital care; and (2) give the beneficiary a written notice of noncoverage that specifies the effective date of his or her liability, states why the HMO or CMP believes he or she no longer requires a hospital level of care, and explains immediate review procedures.

We proposed to revise the beneficiary administrative review procedures to offer an immediate review by the PRO with which the hospital has an agreement under § 466.78. We proposed to adopt the same timeframes for immediate PRO reviews for HMO and CMP enrollees that are applicable to fee-for-service beneficiaries. Upon receiving a written notice from the HMO or CMP or a hospital of a determination that an inpatient hospital stay is no longer necessary, the enrollee (or authorized representative) would have until noon of the first working day after receipt of the notice to file (by telephone or in writing) a request for immediate PRO review. The PRO would notify the HMO or CMP that an appeal has been filed and require the HMO or CMP to provide any pertinent records or information by close of business of the first working day immediately following the day the beneficiary made the appeal. Further, in response to a request from the HMO or CMP, the hospital would be required to submit medical records and other pertinent information to the PRO by close of business of the first full working day immediately following the day the HMO or CMP makes its request. The PRO would also solicit the views of the enrollee who requested immediate PRO review (or the enrollee's authorized representative). The PRO would have 1 working day after receipt of the information from the HMO or CMP to make a determination. The HMO or CMP would be financially liable for the costs of the hospital stay until noon of the calendar day following receipt of the PRO determination.

In addition, we also proposed to prohibit the HMO or CMP from billing the Medicare beneficiary for the added cost of hospital days during the immediate review process. An enrollee who requests immediate PRO review would not be entitled to any subsequent review, under the HMO's or CMP's administrative review process, of the issue of whether hospitalization was still needed. However, the PRO determination would be subject to appeal under the administrative and judicial review process set forth in 42 CFR part 473 (that is, PRO reconsiderations and hearings and judicial review of PRO reconsiderations). As under the current fee-for-service system, the beneficiary who requests that a PRO reconsider its determination would not be protected from financial liability.

Under the proposed rule, the hospital would not be required to be a concurring party in a discharge decision if the HMO or CMP issues the notice of noncoverage. However, the hospital could submit the request to the PRO for immediate review on behalf of the HMO or CMP enrollee. We proposed to clarify that, with one exception, the HMO or CMP is financially responsible for the costs of the hospital stay until noon of the calendar day following the day the PRO notifies the enrollee of its review determination. Under the exception, a hospital may not charge the HMO or CMP (or the beneficiary) for the costs of the continued hospital stay during the PRO review process if the hospital files the request for immediate PRO review on behalf of a beneficiary and the PRO upholds the noncoverage determination made by the HMO or CMP.

*C. Providing Administrative Review Rights to HCPP Members*

Section 1833(a)(1)(A) of the Act provides that an organization that furnishes services on a prepayment basis may elect to receive payment for Part B services on a reasonable cost basis rather than a reasonable charge basis. There is no indication that the Congress intended to deny Medicare beneficiaries enrolled in these organizations (referred to in these regulations as health care prepayment plans (HCPPs)) their full administrative review rights under section 1869 of the

Act because they receive services through an organization that chooses this alternate payment option. The regulations at 42 CFR part 417, subpart D, applicable to HCPPs, do not, however, specifically address administrative review rights for Medicare enrollees of HCPPs.

The fact that existing regulations do not specifically provide for administrative review of HCPP decisions is an oversight we proposed to correct by amending § 417.801 ("Agreements between HCFA and health care prepayment plans") and adding new §§ 417.830 through 417.840 to establish administrative review procedures for Medicare enrollees of HCPPs who are dissatisfied with denied services or claims. We proposed to adopt under these sections administrative review procedures for HCPP enrollees that are the same as those for HMO and CMP enrollees.

*D. Technical Changes*

We also proposed to make several clarifying technical changes to the regulations relating to administrative reviews for HMO or CMP enrollees:

- Subpart Q, §§ 417.600, 417.604, 417.606, 417.608, 417.610, 417.612, 417.614, 417.616, 416.618, 416.620, 417.622, and 417.638—We proposed to change the term "initial determination" to "organization determination" to distinguish between a determination made by the HMO or CMP and one made by us. We also proposed to delete references to carriers and intermediaries making determinations on behalf of HMOs and CMPs. Carriers and intermediaries now make only fee-for-service determinations.
- Sections 417.604 and 417.610—We proposed to revise § 417.604(a)(4) to clarify that physicians and other individuals who furnish items or services under arrangements with an organization do not have a right to appeal under the regulations. We proposed to make a conforming change to § 417.610(b).
- Section 417.614—We proposed to clarify the language by making a distinction between an original determination and a revised or reopened determination.
- Section 417.630—We proposed to clarify that the reference to the "amount in controversy" as a condition for a party to request a hearing is the amount "remaining" in controversy, not the amount of the total bill. We also proposed to add a phrase to clarify that if beneficiaries combine bills to meet the amount in controversy requirements, they can use both Part A and Part B bills.

## III. Analysis of and Response to Public Comments

We received timely comments from 16 commenters. The commenters included HMOs, a CMP, national and local professional associations, a State department of health, and consumer advocacy groups.

*A. Time Limits*

*Comment:* While many of the commenters supported the proposed time limit for issuing reconsideration determinations, two commenters expressed concern about the initial organization determination. The concern is that HMOs and CMPs deny (or delay) referrals and other services without providing a written notice and, because there is no record of a denial or a decision date, it is unclear whether and when a request for reconsideration may be filed. One commenter proposed that written notices be given for all services granted or denied.

*Response:* Regulations at § 417.608(c) state that failure by an HMO or CMP to make timely notification of an adverse organization determination constitutes an adverse determination and may be appealed. In addition, no provision of § 417.616 ("Request for reconsideration") prevents or impedes a Medicare enrollee from filing a request for reconsideration if the HMO or CMP failed to provide the enrollee with written notice that a service is denied. Thus, if a Medicare enrollee maintains that he or she is being denied a covered service but is unable to obtain an explicit denial, we believe that the regulations permit the enrollee to move to the next step of the appeals process and file a request for reconsideration.

Written notices for all decisions to grant or deny services, as proposed by the commenter, would require an inestimable amount of additional paperwork, with marginal benefit. This requirement would also eliminate the current flexibility of the regulations which allows enrollees to file for a reconsideration without a written denial.

*Comment:* Two commenters expressed concern that the Medicare appeals process does not recognize the need for expedited determinations in time-sensitive medical situations. One commenter proposed incorporation of an expedited appeals process for denied services, depending on the relative urgency of the perceived need for the service.

*Response:* We recognize that there are medical situations in which outcomes are greatly affected by the promptness of treatment. We also recognize that our regulations do not specifically address these situations. In order to establish an expedited process for organization determinations, however, we would need the benefit of proposed rulemaking and public comment. We will consider the need for regulations in this area in the near future. In the interim, we believe that regulations at § 417.608(c), as noted above, permit the Medicare enrollee some flexibility in assuming a service is denied and seeking a timely reconsideration. Medicare enrollees also may obtain denied services outside the plan and use the appeals process to pursue payment, or complain in writing or by telephone to the HCFA regional office for the area. Complaints to the regional office are not intended to, and usually will not, circumvent the appeals process, but introduce Federal followup and tracking of HMO/CMP responses in these situations.

Even in the absence of specific regulatory requirements, we expect Medicare contracting HMOs and CMPs to expedite any initial coverage determination and reconsideration if a delay in the decision, and a subsequent postponement or suspension of treatment, could have serious, adverse consequences on the health status of the beneficiary (for example, cause impairment of any bodily function and/or serious dysfunction of any bodily organ or part).

*Comment:* Two commenters believed that the 60-day time period frequently is not long enough, and that the time limit should apply only to "clean cases" or should begin after all materials are received.

*Response:* The 60-day limit is consistent with the time period allowed in making the initial organization determination, is supported as reasonable by most commenters on the proposed rule, and should be adequate in most circumstances. Nonetheless, while we do not agree with the specific suggestion of the commenters, we are amending § 417.620 (Responsibility for reconsideration; time limits) to allow extensions for "good cause." The "good cause" extension authority will not diminish the new time limit requirement, but will allow for unusual circumstances such as natural disasters or circumstances that make it difficult or impossible for the enrollee to provide necessary information in a timely way. This will benefit both the enrollee and the health plan.

*Comment:* Several commenters believed that a time limit similar to the 60-day limit on reconsiderations that is placed on HMOs/CMPs should be placed on HCFA's reconsiderations. In support of this position, one commenter

cited the stipulated settlement in the case of *Levy* v. *Sullivan* concerning HMO appeal delays.

*Response:* We do not accept this comment. In order to provide meaningful review of the HMO's/CMP's decision, we (or the independent reviewer with which we contract) must have the complete record of the dispute. When the HMO/CMP conducts a reconsideration of its original decision, it presumably has all of the documentation it considered relevant to its initial decision. However, our experience demonstrates that the independent reviewer must often request that additional material be submitted. Our current policy allows the HMO time to obtain the additional information. If the information is not received, the contractor will make its decision based on the record available. Since legitimate delays may occur, however, we believe it would be to the parties' advantage to have a flexible deadline for the independent review.

We are, on the other hand, concerned that beneficiaries not suffer undue financial hardship during an appeal. We monitor the activities of the contractor and the status of reconsiderations as part of our overall monitoring of compliance with program requirements. Our contract with the independent reviewer also contains a 30-day timeliness standard for clean claims, as stipulated in *Levy* v. *Sullivan*, Civ. No. 88–3271 DT (TX) (S.D. Cal., filed March 13, 1989). That agreement, however, did not require that this be incorporated into regulations and does not preclude us from revising the contract to reflect intervening circumstances.

*Comment:* One commenter suggested that the 60-day period begin with the date of receipt of the request by the health plan.

*Response:* Section 417.620(c) specifies that the HMO must act within 60 calendar days "from the date of receipt of the request for reconsideration."

*Comment:* One commenter suggested that the appeals regulations explain the consequences of failure to meet the 60-day time limit or to issue written determinations. One commenter urged a system of intermediate sanctions for HMOs/CMPs that fail to make timely organization or reconsideration determinations.

*Response:* We agree with the commenter that there should be consequences for failure to provide determinations in a timely manner and within established time standards. As explained in an earlier response to a comment, we believe that the regulations at § 417.608(c) permit a Medicare enrollee to move to the reconsideration process if timely notification of an adverse organization determination is not made. To ensure that the 60-day limit serves as a time ceiling for this stage of the appeals process, we are adding a provision to § 417.620. This provision clarifies that failure to complete the reconsideration within the time allowed, or to obtain a "good cause" extension from us, constitutes an adverse determination and the appeals file must be submitted to us.

Regulations were published on July 15, 1994 (59 FR 36072) that allow us to impose intermediate sanctions and civil money penalties for a number of performance violations on the part of HMOs and CMPs. Though the sanction and penalty authorities are untested at this time, we will be assessing how information from the appeals process may be used to improve plan performance or initiate a sanctions process in response to suspected violations such as a substantial failure to provide required medically necessary services and the failure adversely affects the enrollee.

*B. Requests for Immediate PRO Review of Decisions for Hospital Discharges*

*Comment:* While many of the commenters supported the proposed provision, several commenters opposed it on several accounts, including that it would have an adverse economic impact on HMOs/CMPs, that adequate enrollee protections already exist, and that it would interfere with the patient-physician relationship.

*Response:* We are aware that the right to immediate PRO review may add to the costs of caring for Medicare enrollees. It is difficult to assess the degree to which this will affect HMOs and CMPs, because many Medicare-contracting plans delegate the discharge decision to the physician and hospital. In these circumstances, PRO review has already been in effect and no additional financial impact is anticipated. In addition, some HMOs/CMPs pay hospitals on a diagnosis-related group basis and hospital payments may not be affected. In circumstances where the HMO/CMP makes the discharge decision in conjunction with its affiliated physicians and pays the hospital on a per diem basis and thus faces additional hospital charges, we do not concur with the commenters' position, that is, that the HMO/CMP not be held financially accountable for the additional hospital days. For risk-contracting HMOs/CMPs, the Medicare payment rate is based on fee-for-service costs, and the costs of extra hospital days during the PRO review process are incorporated into these calculations. Therefore, the average cost for hospital inpatient days during the PRO review period in the HMO's/CMP's area are already included in the adjusted average per capita cost rate. Since all cost-contracting HMOs/CMPs currently choose to have the hospital seek payment directly from the fiscal intermediary, there should be no additional costs to the health plan.

While we do not have evidence of early discharge complaints against HMOs and CMPs, it is possible that some Medicare enrollees are dissatisfied but have no mechanism for expressing it. Moreover, in the interests of due process, we believe it is important to provide beneficiaries comparable rights whether they do or do not enroll in an HMO/CMP, and whether or not they have the need to take advantage of those rights. Moreover, if there really are no complaints, then this will not be a burdensome requirement on HMOs and CMPs.

Lastly, in response to concern about the patient-physician relationship, there has been no problem of this type arising out of the right to immediate PRO review under the fee-for-service program. Also, HMOs/CMPs, because they coordinate their enrollees' total health care needs, generally have a strong relationship between their Medicare enrollees and physicians (as well as other health plan staff). We believe that HMOs/CMPs that maintain positive communications and relationships with their Medicare enrollees will not experience any difficulty in this area.

*Comment:* One commenter was concerned about frivolous claims and the potential incentives to appeal to the PRO for review. This commenter suggested that either the Medicare program or the enrollee be responsible for the expense of extra hospital days if the noncoverage decision is upheld.

*Response:* Our experience with immediate PRO review of hospital discharge (noncoverage) decisions does not support a concern about frivolous claims. Relative to the number of discharges under the Medicare fee-for-service program, the number of appeals to the PRO is extremely small. We expect that HMOs/CMPs, because they are more involved in the health care of their enrollees, would have a similar experience, and may even experience fewer PRO appeals if they communicate effectively with their enrollees and have adequate safeguards against premature discharges.

With respect to financial liability for extra hospital days, the adjusted average per capita cost calculation includes

these costs. We would be overpaying if a separate payment was made to plans for these charges.

We will not shift these costs to the Medicare enrollee because fee-for-service beneficiaries are already protected, and we believe that beneficiaries should be treated similarly whether they choose managed care or fee-for-service. We do not believe this difference in protections should have to be a factor in the beneficiaries' choice. Further, we believe that financial responsibility for extra hospital days related to an appeal would be a strong disincentive to any beneficiary who questions the appropriateness of a discharge decision. Such a requirement would undermine the intent of an appeals process.

*Comment:* One commenter stated that we mischaracterized the HMO's and CMP's responsibility for discharge decisions in the preamble of the proposed rule. The commenter stated that the final authority for discharge rests with the physician and that HMOs/CMPs cannot discharge enrollees from a hospital.

*Response:* We agree that the preamble should have referred to "noncoverage" decisions by the HMO/CMP rather than "discharge" decisions. The right to immediate PRO review affects *noncoverage* decisions in cases in which the HMO/CMP and its affiliated physicians agree that a Medicare enrollee no longer requires hospitalization and the hospital does not make the noncoverage decision. We also believe that the use of the term "attending physician" in proposed §§ 417.440 (f)(2) and (f)(4) (which require concurrence of a physician in the discharge decision) does not clearly express the relationship between the HMO/CMP and its affiliated physician providers. Therefore, in the final rule we have removed the term "attending physician" and inserted "its affiliated physician responsible for the hospital care of the enrollee, or other physician as authorized by the HMO or CMP" in its place.

*Comment:* One commenter stated that the attending physician should be allowed to represent his or her patients and request PRO review of noncoverage decisions.

*Response:* Usually, the HMO/CMP-affiliated physician makes the decision that a Medicare enrollee is ready for discharge. Some HMOs/CMPs make use of an extended treatment team, such as case managers, discharge coordinators, or utilization review coordinators, and a member of this team may believe an enrollee is ready for discharge when the physician does not. In these situations, the health plan's internal procedures will provide guidance for making the discharge decision. HMO/CMP physicians have legal arrangements or contracts with their health plans, and must abide by the plan's procedures. We support the HMO/CMP structure for the delivery of health care, and we would not support a policy that undermines the nature of managed care operations.

In cases in which the physician caring for a hospitalized enrollee is not under contract or bound by the terms of an arrangement with an HMO/CMP, the physician could represent the patient.

*Comment:* One commenter believed that the time period (1 working day) for the HMO/CMP to submit information to the PRO is unreasonable and is concerned that PROs may take longer than 1 day to complete their review.

*Response:* We do not agree with the commenter. Under the fee-for-service Medicare program, hospitals have their charts ready to submit to the PRO at the same time that the notice of noncoverage is given. This, in effect, gives the PRO another working day to review the medical chart. We believe HMOs/CMPs can adopt the same efficiencies and that it is in the financial interest of the HMO/CMP to ensure that all records are submitted as soon as possible. In regard to PRO timeliness, the PROs have an excellent record for completing these reviews in the time allotted and, in many cases, earlier.

*Comment:* Two commenters believed that the proposed appeals process should be available to Medicare enrollees in nursing homes and those receiving home health services.

*Response:* We will consider this comment for regulatory action at a later date. This modification is significant enough to require issuance of a second proposed rule, and we believe that this final rule should not be delayed.

*Comment:* One commenter asked that § 417.440(f)(3) be revised to add the date of discharge to the list of information the notice of noncoverage will include.

*Response:* We believe that HMOs and CMPs should have the flexibility either to use the Medicare hospital notice of noncoverage or to develop their own. In our interactions with PROs and hospitals on this matter, the inclusion or absence of the discharge date on the notice has not been identified as a problem or a concern. Therefore we have not modified this provision in the final rule.

*Comment:* Several provisions of § 417.454 appear to have been dropped as part of the proposed rule.

*Response:* The revision to § 417.454 as published in the proposed rule does remove existing paragraphs (a)(1) through (a)(3). This was done in error and is corrected in the final rule. In the final rule, a paragraph heading is added to existing paragraph (a); the new provision that limits charges for inpatient hospital stays is added as a new paragraph (b); and a paragraph heading is added to existing paragraph (b), and the paragraph redesignated as paragraph (c). No modification is made to other existing text in section § 417.454.

*C. Administrative Review Requirements for HCPPs*

*Comment:* Two commenters expressed concern about our regulations extending the section 1876 managed care administrative review requirements to HCPPs and disagreed with our interpretation of the intent of the Congress in this regard. It was the opinion of both commenters that the Congress should expressly legislate these requirements.

*Response:* As noted previously, section 1833 of the Act simply permits entities that provide Part B services on a prepayment basis to be paid reasonable costs rather than reasonable charges. There is no indication that the Congress intended to deprive enrolled beneficiaries of meaningful appeal rights. Our regulations governing HCPPs were designed to establish a workable mechanism for reimbursing them, in light of the fact that the way they do business is more comparable to HMOs and CMPs than it is to physicians, suppliers, and providers who are paid under Part B.

As certain aspects of the Medicare program have been improved over the years, such as the addition of beneficiary protections, we have not revised HCPP regulations to reflect these changes. Recently, we have embarked on an effort to identify actions that are within our authority, to ensure that the HCPP program is administered prudently and that Medicare beneficiaries enrolled in these plans have rights and benefits comparable to those that beneficiaries have in the fee-for-service system and in HMOs/CMPs. We believe that we have administrative authority to ensure that these beneficiaries are given appropriate appeal rights.

*Comment:* One commenter was concerned that, since HCPPs are not required to provide all Part B services, the administrative review process be limited to those Medicare covered services provided by the health plan under its agreement with us.

*Response:* Paragraph (b)(2) of § 417.838 ("Organization determinations") of the regulation

addresses this concern by specifying that a determination regarding services that are not covered under the HCPP's agreement with HCFA is not an organization determination.

*Comment:* One commenter stated that disputes over the level or manner in which a service is provided, such as model variations of durable medical equipment, should not be subject to the appeals process.

*Response:* The appeal rights of Medicare enrollees of an HCPP pertain to disputes involving an organization determination. We believe that § 417.838(a), which identifies actions that are organization determinations, responds to this concern. Section 417.838(a) limits the applicability of the appeals process to a refusal, on the grounds that the services are not covered by Medicare, to furnish or arrange for services or pay for services furnished to the beneficiary.

*Comment:* One commenter sought clarification on whether an HCPP's refusal to pay coinsurance on services obtained out-of-plan (and paid for by the carrier) would be subject to the appeals process.

*Response:* The HCPP's obligation to pay coinsurance amounts, where the plan's Medicare premium covers such amounts, would depend on the circumstances. If an enrollee is denied a service by the HCPP, then obtains the service out-of-plan, and subsequently the service is determined to be a covered service and paid for by the carrier under Medicare principles of reimbursement, the enrollee can request that the health plan pay the coinsurance amount. Then, if the HCPP makes an organization determination that is adverse to the enrollee, or fails to complete its review in 60 days, the matter would be referred to us for reconsideration.

*Comment:* One commenter suggested allowing HCPP enrollees to retain existing appeal rights through Medicare carriers if the HCPP review process proves futile or ineffective.

*Response:* We disagree. One intent of this rule is to ensure that HCPP enrollees have the same appeal rights as other beneficiaries in Medicare managed care. A back-up system does not exist for other Medicare beneficiaries and cannot be justified on either a cost or programmatic basis. When this rule takes effect, HCPP performance in operating an effective administrative review process will be added to our contractor monitoring process.

*Comment:* One commenter stated that the estimate for additional paperwork burden on HCPPs related to these new requirements is grossly underestimated.

*Response:* Health plans that contract with us as HCPPs vary in their administrative systems and capability to adapt to the new requirements. While we agree that the estimate may underrepresent the additional burden on some health plans, it may not for others. We attempted to estimate an "average" additional workload, given that most HCPPs have a grievance system for commercial enrollees on which to build an appeals system for Medicare enrollees.

*Comment:* One commenter stated that they opposed a change to § 417.630 ("Right to a hearing") regarding "amounts remaining in controversy" to qualify for a hearing.

*Response:* Addition of this phrase is a clarification of existing practice, not a substantive change. Beneficiary appeals made to Medicare managed care organizations may be denied in full or in part. Once a service or a claim has been covered by an HMO/CMP, even if the service is only one part of the appeal, § 417.604(a)(2) specifies that the service or claim is no longer subject to appeal. Only those services that continue to be denied may be moved through the process of reconsideration to hearing.

*Comment:* One commenter opposed the change in terminology from "initial determination" to "organization determination." The commenter is concerned that policy issues may be mislabeled as "organization issues" and be misdirected to the appeals process.

*Response:* The concern of the commenter, we believe, is that communications to an HMO or CMP questioning the plan's coverage policies will be misinterpreted and directed to the plan's appeal process. We believe that HMOs and CMPs can distinguish between challenges to the plan's coverage policies, in general, and appeals of coverage decisions for specifically requested services, if clearly communicated. We do not believe that the commenter's rationale warrants a change from using the terminology "organization determination" as proposed.

*D. Other Comments*

*Comment:* One commenter suggested that HMOs be granted formal appeal rights.

*Response:* We have considered this suggestion. However, because the commenter is suggesting a significant change that was not addressed in the proposed rule, we cannot address this issue at this time. The issue of HMO and CMP appeal rights, as well as other appeals process issues, will be evaluated and considered for development as a separate regulation.

*Comment:* One commenter questioned allowing HMOs/CMPs to request a reopening of a determination and another commenter recommended that an HMO/CMP request for a reopening should not delay implementation of the reconsideration determination.

*Response:* With regard to the first comment, the regulations impose no limitation on who may request a reopening, although the decision whether to reopen is discretionary with the decisionmaker. In response to the second comment, § 417.626 provides that a reconsidered determination is "final and binding" on all parties unless a hearing request is filed, or the determination "is revised" in accordance with a reopening decision. Therefore, if an HMO's or CMP's denial of a service or claim is overturned upon reconsideration, the plan must abide by the determination unless and until the termination is overturned as the result of the reopening.

We will consider the need for intermediate sanction authority for HMOs and CMPs failing to abide by reconsidered determinations in a forthcoming rulemaking initiative.

*Comment:* Two commenters recommended that we require HMOs/CMPs to prominently post information about the appeals process and send out a national notice communicating information about appeal rights.

*Response:* Existing § 417.604(c) ("Written description of appeals procedure") requires HMOs/CMPs to provide enrollees with written materials on appeal procedures. We believe that this is a better method for ensuring that all enrollees are informed. Further, this approach makes the information readily available in the enrollee's own home. With regard to the need for a national communication, we agree that beneficiaries should be made aware of the new appeal rights and procedures. We will modify the Medicare Handbook and other booklets and pamphlets routinely distributed by us to incorporate the policies of this final regulation.

*Comment:* One commenter suggested that we require HMOs/CMPs to notify enrollees, in writing, of the changes adopted in the final rule and to submit a plan for educating enrollees about the new rights and procedures.

*Response:* While we disagree that a special education program is needed, we agree that HMOs/CMPs must inform Medicare enrollees of these new protections. HMOs/CMPs have various means of communicating with enrollees, including written material (for example,

newsletters), and use of these means for informing Medicare beneficiaries of these new appeal rights is acceptable to us. The requirement at § 417.604, discussed above, is adequate for this purpose and another regulatory requirement is unnecessary. HMOs, CMPs, and HCPPs must notify their enrollees of the changes/additions to the appeal rights and when they are effective.

*Comment:* Two commenters recommended that these appeal rights be extended to Medicaid recipients in prepaid health plans.

*Response:* Appeal rights for Medicaid beneficiaries is not part of the scope of this rulemaking effort. These comments, however, have merit and have been brought to the attention of appropriate persons within our Office of Managed Care.

*Comment:* One commenter stated that we changed § 417.801(4) without addressing it in the preamble.

*Response:* We assume that the commenter is referring to § 418.801(b)(4). In the amendatory language of the proposed rule, we stated that "In § 417.801, the introductory language of paragraph (b) is republished, paragraph (b)(4) is revised, paragraph (b)(5) is redesignated as paragraph (b)(6), and a new paragraph (b)(5) is added to read as follows:". That amendatory language contained technical errors. Paragraph (b)(4) was not revised; the language published in the proposed rule is the same as existing paragraph (b)(4). Additionally, existing paragraph (b)(5) should not have been redesignated; existing paragraph (b)(6) should have been redesignated as paragraph (b)(7) and a new paragraph (b)(6) added. These errors have been corrected in the final rule.

## IV. Provisions of This Final Rule

We have adopted the provisions of the October 7, 1992, proposed rule, with the following changes, which have been discussed above:

- We have revised proposed § 417.440(f) ("Notice of noncoverage of inpatient hospital care"). This proposed section required that, before giving notice of noncoverage, the HMO or CMP must obtain the concurrence of the attending physician. We have revised "attending physician" to "its affiliated physician responsible for the hospital care of the enrollee, or other physician as authorized by the HMO or CMP".
- Proposed § 417.454 ("Charges to Medicare enrollees") is revised to restore existing provisions that were erroneously removed in the proposed rule.
- We have revised paragraph (c) of proposed § 417.620 ("Responsibility for reconsiderations; time limits) to require that the HMO or CMP issue the reconsidered determination to the enrollee, or submit an explanation and file to us, within 60 days from the date of receipt of the request for reconsideration.
- We have revised proposed § 417.838(b) ("Actions that are not organization determinations") by adding a new paragraph (3). New paragraph (3) specifies that a determination regarding services that are covered under the HCPP's agreement with us that the enrollee obtained from unaffiliated providers or physicians, in violation of the HCPP's enrollment agreement, is not an organization determination for purposes of administrative review procedures.

In addition to the above changes, in a number of sections, we made a nomenclature change by substituting "HMO or CMP" and its plural and possessive forms for the words "organization", "organizations" and "organization's", respectively. This change was made to use consistent terminology throughout part 417.

We also have made technical changes and minor editorial changes that do not affect the substance of the provisions.

## V. Paperwork Burden

Sections 417.440(f), 417.605, 417.620, and 417.836 of this rule contain additional requirements that are subject to review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35). HMOs and CMPs are required to notify beneficiaries if the HMO or CMP refers a request for reconsideration to HCFA. We estimate that this reporting burden will be approximately 5 minutes per case. Also, before a hospital discharge, HMOs and CMPs are required to provide Medicare enrollees with a written notice of a determination that an enrollee's inpatient hospital stay is no longer necessary. We estimate that the reporting burden for an HMO or CMP that has not delegated the discharge decision to the hospital to provide the written notice of noncoverage to be approximately 10 minutes per notice; for a Medicare enrollee of an HMO or CMP to complete a request for immediate PRO review of a notice of a determination that an inpatient hospital stay is no longer necessary to be approximately 10 minutes per request; for the HMO or CMP to submit requested medical information to the PRO, to be approximately ½ hour per response. HCPPs are required to develop appeal procedures and inform Medicare enrollees of appeal rights. We estimate that it will take an HCPP 40 hours to develop these appeal procedures and 1 hour to process each appeal. A notice will be published in the **Federal Register** when OMB approval is obtained.

## VI. Regulatory Impact Statement

Consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612), we prepare a regulatory flexibility analysis unless the Secretary certifies that a rule will not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, we consider all HMOs, CMPs, and HCPPs to be small entities.

Also, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 50 beds.

This final rule provides the Medicare HMO or CMP enrollee with the same administrative review rights and financial protections as are available to beneficiaries in the fee-for-service system. To the extent that current Medicare membership in HMOs, CMPs, and HCPPs to which this rule will apply is low (approximately 7 percent of the total Medicare population), we do not expect any significant increased costs or savings as a result of this final rule.

We are not preparing analyses for either the RFA or section 1102(b) of the Act because we have determined, and the Secretary certifies, that this final rule will not have a significant economic impact on a substantial number of small entities or a significant impact on the operations of a substantial number of small rural hospitals.

In accordance with the provisions of Executive Order 12866, this regulation was not reviewed by the Office of Management and Budget.

## Lists of Subjects in 42 CFR Part 417

Administrative practice and procedure, Health maintenance organization (HMO), Medicare, Reporting and recordkeeping requirements.

42 CFR part 417 is amended as follows:

## PART 417—HEALTH MAINTENANCE ORGANIZATIONS, COMPETITIVE MEDICAL PLANS, AND HEALTH CARE PREPAYMENT PLANS

1. The authority citation for Part 417 is revised to read as follows:

**Authority:** Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh), secs. 1301, 1306, and 1310 of the Public Health Service Act (42 U.S.C. 300e, 300e–5, and 300e–9); and 31 U.S.C. 9701.

2. In § 417.440, a new paragraph (f) is added, to read as follows:

**§ 417.440 Entitlement to health care services from an HMO or CMP.**

* * * * *

(f) *Notice of noncoverage of inpatient hospital care.* (1) If an enrollee is an inpatient of a hospital, entitlement to inpatient hospital care continues until he or she receives notice of noncoverage of that care.

(2) Before giving notice of noncoverage, the HMO or CMP must obtain the concurrence of its affiliated physician responsible for the hospital care of the enrollee, or other physician as authorized by the HMO or CMP.

(3) The HMO or CMP must give the enrollee written notice that includes the following:

(i) The reason why inpatient hospital care is no longer needed.

(ii) The effective date of the enrollee's liability for continued inpatient care.

(iii) The enrollee's appeal rights.

(4) If the HMO or CMP delegates to the hospital the determination of noncoverage of inpatient care, the hospital obtains the concurrence of the HMO- or CMP-affiliated physician responsible for the hospital care of the enrollee, or other physician as authorized by the HMO or CMP, and sends notice, following the procedures set forth in § 412.42(c)(3) of this chapter.

3. Section 417.454 is amended by adding a paragraph heading to paragraph (a), redesignating paragraph (b) as paragraph (c) and adding a paragraph heading, and adding a new paragraph (b), to read as follows:

**§ 417.454 Charges to Medicare enrollees.**

(a) *Charges that are permitted.* * * *

(b) *Limit on charges for inpatient hospital care.* If a Medicare enrollee who is an inpatient of a hospital requests immediate PRO review (as provided in § 417.605) of any determination by the hospital furnishing services or the HMO or CMP that the inpatient hospital services will no longer be covered, the HMO or CMP may not charge the enrollee for any inpatient care costs incurred before noon of the first working day after the PRO issues its review decision.

(c) *Reporting requirements.* * * *

**§§ 417.600, 417.612, 417.622 [Amended]**

4. Nomenclature change: In the following sections of subpart Q, the term "initial determination" or "initial determinations" is revised to read "organization determination" or "organization determinations", respectively, wherever it appears:

a. § 417.600.

b. § 417.612, section title and text.

c. § 417.622(b).

5. Section 417.604 is amended by revising paragraphs (a) and (b) to read as follows:

**§ 417.604 General provisions.**

(a) *Applicability.* The appeals procedures set forth in this subpart apply to organization determinations as defined in § 417.606, with the following exceptions:

(1) If an enrollee requests immediate PRO review (as provided in § 417.605) of a determination of noncoverage of inpatient hospital care—

(i) The enrollee is not entitled to subsequent review of that issue under this subpart; and

(ii) The PRO review decision is subject to the appeals procedures set forth in part 473 of this chapter.

(2) Any determination regarding services that were furnished by the HMO or CMP, either directly or under arrangement, for which the enrollee has no further liability for payment are not subject to appeal.

(3) Services included in an optional supplemental plan (see § 417.440(b)(2)) are subject only to a grievance procedure under § 417.436(a)(2).

(4) Physicians and other individuals who furnish items or services under arrangement with an HMO or CMP have no right of appeal under this subpart.

(5) The provisions of subpart R of 20 CFR part 404 dealing with representation of parties under title II of the Act are, unless otherwise provided in this subpart, also applicable to appeals under this subpart.

(b) *Responsibility for establishing appeals procedures.* The HMO or CMP is responsible for establishing and maintaining the appeals procedures that are specified in §§ 417.604 through 417.638.

* * * * *

6. A new § 417.605 is added to read as follows:

**§ 417.605 Immediate PRO review of a determination of noncoverage of inpatient hospital care.**

(a) *Right to review.* A Medicare enrollee who disagrees with a determination made by an HMO, CMP, or a hospital that inpatient care is no longer necessary may remain in the hospital and may (directly or through his or her authorized representative) request immediate PRO review of the determination.

(b) *Procedures.* For the immediate PRO review process, the following rules apply:

(1) The enrollee or authorized representative must submit the request for immediate review—

(i) To the PRO that has an agreement with the hospital under § 466.78 of this chapter;

(ii) In writing or by telephone; and

(iii) By noon of the first working day after receipt of the written notice of the determination that the hospital stay is no longer necessary.

(2) On the date it receives the enrollee's request, the PRO must notify the HMO or CMP that a request for immediate review has been filed.

(3) The HMO or CMP must supply any information that the PRO requires to conduct its review and must make it available, by phone or in writing, by the close of business of the first full working day immediately following the day the enrollee submits the request for review.

(4) In response to a request from the HMO or CMP, the hospital must submit medical records and other pertinent information to the PRO by close of business of the first full working day immediately following the day the HMO or CMP makes its request.

(5) The PRO must solicit the views of the enrollee who requested the immediate PRO review (or the enrollee's representative).

(6) The PRO must make a determination and notify the enrollee, the hospital, and the HMO or CMP by close of business of the first working day after it receives the information from the hospital, or the HMO or CMP, or both.

(c) *Financial responsibility*—(1) *General rule.* Except as provided in paragraph (c)(2) of this section, the HMO or CMP continues to be financially responsible for the costs of the hospital stay until noon of the calendar day following the day the PRO notifies the enrollee of its review determination.

(2) *Exception.* The hospital may not charge the HMO or CMP (or the enrollee) if—

(i) It was the hospital (acting on behalf of the enrollee) that filed the request for immediate PRO review; and

(ii) The PRO upholds the noncoverage determination made by the HMO or CMP.

7. Section 417.606 is revised to read as follows:

**§ 417.606 Organization determinations.**

(a) *Actions that are organization determinations.* An organization determination is any determination made by an HMO or CMP with respect to any of the following:

(1) Payment for emergency or urgently needed services.

(2) Any other health services furnished by a provider or supplier other than the HMO or CMP that the enrollee believes—

(i) Are covered under Medicare; and

(ii) Should have been furnished, arranged for, or reimbursed by the HMO or CMP.

(3) The HMO's or CMP's refusal to provide services that the enrollee believes should be furnished or arranged for by the HMO or CMP and the enrollee has not received the services outside the HMO or CMP.

(b) *Actions that are not organization determinations.* The following are not organization determinations for purposes of this subpart:

(1) A determination regarding services that were furnished by the HMO or CMP, either directly or under arrangement, for which the enrollee has no further obligation for payment.

(2) A determination regarding services included in an optional supplemental plan (see § 417.440(b)(2)).

(c) *Relation to grievances.* A determination that is not an organization determination is subject only to a grievance procedure under § 417.436(a)(2).

8. Section 417.608 is amended by revising the section heading and paragraphs (a) and (c) to read as follows:

**§ 417.608 Notice of adverse organization determination.**

(a) If an HMO or CMP makes an organization determination that is partially or fully adverse to the enrollee, it must notify the enrollee of the determination within 60 days of receiving the enrollee's request for payment for services.

* * * * *

(c) The failure to provide the enrollee with timely notification of an adverse organization determination constitutes an adverse organization determination and may be appealed.

9. In § 417.610, the section heading is revised, the undesignated introductory text is revised, and paragraph (b) is revised, to read as follows:

**§ 417.610 Parties to the organization determination.**

The parties to the organization determination are—

* * * * *

(b) An assignee of the enrollee (that is, a physician or other supplier who has provided a service to the enrollee and formally agrees to waive any right to payment from the enrollee for that service);

* * * * *

10. Section 417.614 is revised to read as follows:

**§ 417.614 Right to reconsideration.**

Any party who is dissatisfied with an organization determination or with one that has been reopened and revised may request reconsideration of the determination in accordance with the procedures of § 417.616.

11. In § 417.616, the introductory text of paragraph (a) is republished, and paragraphs (a)(1), (b), (c)(1), and (c)(2) introductory text are revised, to read as follows:

**§ 417.616 Request for reconsideration.**

(a) *Method and place for filing a request.* A request for reconsideration must be made in writing and filed with—(1) The HMO or CMP that made the organization determination;

* * * * *

(b) *Time for filing a request.* Except as provided in paragraph (c) of this section, the request for reconsideration must be filed within 60 days from the date of the notice of the organization determination.

(c) *Extension of time to file a request*—(1) *Rule.* If good cause is shown, the HMO or CMP that made the organization determination may extend the time for filing the request for reconsideration.

(2) *Method of requesting an extension.* If the time limit in paragraph (b) of this section has expired, a party to the organization determination may file a request for reconsideration with the HMO or CMP, HCFA, SSA, or, in the case of a qualified railroad retirement beneficiary, an RRB office. The request to extend the time limit must—

* * * * *

**§ 417.618 [Amended]**

12. In § 417.618, ", carrier, or intermediary" is removed.

13. Section 417.620 is revised to read as follows:

**§ 417.620 Responsibility for reconsiderations; time limits.**

(a) If the HMO or CMP can make a reconsidered determination that is completely favorable to the enrollee, the HMO or CMP issues the reconsidered determination.

(b) If the HMO or CMP recommends partial or complete affirmation of its adverse determination, the HMO or CMP must prepare a written explanation and send the entire case to HCFA. HCFA makes the reconsidered determination.

(c) The HMO or CMP must issue the reconsidered determination to the enrollee, or submit the explanation and file to HCFA, within 60 calendar days from the date of receipt of the request for reconsideration.

(d) For good cause shown, HCFA may allow exceptions to the time limit set forth in paragraph (c) of this section.

(e) Failure by the HMO or CMP to provide the enrollee with a reconsidered determination within the 60-day limit described in paragraph (c) of this section or to obtain a good cause extension described in paragraph (d) of this section constitutes an adverse determination, and the HMO or CMP must submit the file to HCFA.

(f) If the HMO or CMP refers the matter to HCFA, it must concurrently notify the beneficiary of that action.

14. In § 417.622, the introductory text is republished, and paragraph (a) is revised to read as follows. [For a nomenclature change in paragraph (b), see amendatory item 4.]

**§ 417.622 Reconsidered determination.**

A reconsidered determination is a new determination that—

(a) Is based on a review of the organization determination, the evidence and findings upon which it was based, and any other evidence submitted by the parties or obtained by HCFA or the HMO or CMP; and

* * * * *

15. Section 417.630 is revised to read as follows:

**§ 417.630 Right to a hearing.**

If the amount remaining in controversy is $100 or more, any party to the reconsideration who is dissatisfied with the reconsidered determination has a right to a hearing. (The amount remaining in controversy, which can include any combination of Part A and Part B services, is computed in accordance with § 405.740 of this chapter for Part A services and § 405.820(b) of this chapter for Part B services. If the basis for the appeal is the refusal of services, the projected value of those services is used in computing the amount remaining in controversy.)

16. Section 417.638 is revised to read as follows:

**§ 417.638 Reopening determinations and decisions.**

An organization, reconsidered, or revised determination made by an HMO, CMP, or HCFA, or a decision or revised decision of an ALJ or the Appeals Council, may be reopened in accordance with the provisions of § 405.750 of this chapter.

17. In § 417.801, the introductory language of paragraph (b) is republished, paragraph (b)(6) is redesignated and republished as paragraph (b)(7), and a new paragraph (b)(6) is added to read as follows:

**§ 417.801 Agreements between HCFA and health care prepayment plans.**

* * * * *

(b) *Terms.* The agreement must provide that the HCPP agrees to—

* * * * *

(6) Establish administrative review procedures in accordance with §§ 417.830 through 417.840 for Medicare enrollees who are dissatisfied with denied services or claims; and

(7) Consider any additional requirements that HCFA finds necessary or desirable for efficient and effective program administration.

* * * * *

18. New §§ 417.830, 417.832, 417.834, 417.836, 417.838, and 417.840 are added under subpart U to read as follows:

**§ 417.830 Scope of regulations on beneficiary appeals.**

Sections 417.832 through 417.840 establish procedures for the presentation and resolution of organization determinations, reconsiderations, hearings, Appeals Council review, court reviews, and finality of decisions that are applicable to Medicare enrollees of an HCPP.

**§ 417.832 Applicability of requirements and procedures.**

(a) The administrative review rights and procedures specified in §§ 417.834 through 417.840 pertain to disputes involving an organization determination, as defined in § 417.838, with which the enrollee is dissatisfied.

(b) Physicians and other individuals who furnish items or services under arrangements with an HCPP have no right of administrative review under §§ 417.834 through 417.840.

(c) The provisions of subpart R of 20 CFR part 404 dealing with representation of parties under title II of the Act are, unless otherwise provided, also applicable.

**§ 417.834 Responsibility for establishing administrative review procedures.**

The HCPP is responsible for establishing and maintaining the administrative review procedures that are specified in §§ 417.830 through 417.840.

**§ 417.836 Written description of administrative review procedures.**

Each HCPP is responsible for ensuring that all Medicare enrollees are informed in writing of the administrative review procedures that are available to them.

**§ 417.838 Organization determinations.**

(a) *Actions that are organization determinations.* For purposes of §§ 417.830 through 417.840, an organization determination is a refusal to furnish or arrange for services, or reimburse the party for services provided to the beneficiary, on the grounds that the services are not covered by Medicare.

(b) *Actions that are not organization determinations.* The following are not organization determinations for purposes of §§ 417.830 through 417.840:

(1) A determination regarding services that were furnished by the HCPP, either directly or under arrangement, for which the enrollee has no further obligation for payment.

(2) A determination regarding services that are not covered under the HCPP's agreement with HCFA.

**§ 417.840 Administrative review procedures.**

The HCPP must apply §§ 417.608 through 417.638 to organization determinations that affect its Medicare enrollees, and to reconsideration, hearings, Appeals Council review, and judicial review of those organization determinations.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance.)

Dated: May 20, 1994.

**Bruce C. Vladeck,**

*Administrator, Health Care Financing Administration.*

Dated: November 4, 1994.

**Donna E. Shalala,**

*Secretary.*

[FR Doc. 94–28399 Filed 11–18–94; 8:45 am]

BILLING CODE 4120–01–P

## FEDERAL EMERGENCY MANAGEMENT AGENCY

### 44 CFR Part 64

**[Docket No. FEMA–7605]**

### List of Communities Eligible for the Sale of Flood Insurance

**AGENCY:** Federal Emergency Management Agency (FEMA).

**ACTION:** Final rule.

**SUMMARY:** This rule identifies communities participating in the National Flood Insurance Program (NFIP). These communities have applied to the program and have agreed to enact certain floodplain management measures. The communities' participation in the program authorizes the sale of flood insurance to owners of property located in the communities listed.

**EFFECTIVE DATES:** The dates listed in the third column of the table.

**ADDRESSES:** Flood insurance policies for property located in the communities listed can be obtained from any licensed property insurance agent or broker serving the eligible community, or from the NFIP at: Post Office Box 6464, Rockville, MD 20849, (800) 638–6620.

**FOR FURTHER INFORMATION CONTACT:** Robert F. Shea, Jr., Division Director, Program Implementation Division, Mitigation Directorate, 500 C Street SW., room 417, Washington, DC 20472, (202) 646–3619.

**SUPPLEMENTARY INFORMATION:** The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Since the communities on the attached list have recently entered the NFIP, subsidized flood insurance is now available for property in the community.

In addition, the Director of the Federal Emergency Management Agency has identified the special flood hazard areas in some of these communities by publishing a Flood Hazard Boundary Map (FHBM) or Flood Insurance Rate Map (FIRM). The date of the flood map, if one has been published, is indicated in the fourth column of the table. In the communities listed where a flood map has been published, Section 102 of the Flood Disaster Protection Act of 1973, as amended, 42 U.S.C. 4012(a), requires the purchase of flood insurance as a condition of Federal or federally related financial assistance for acquisition or construction of buildings in the special flood hazard areas shown on the map.

The Director finds that the delayed effective dates would be contrary to the public interest. The Director also finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary.

### National Environmental Policy Act

This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Considerations. No environmental impact assessment has been prepared.

### Regulatory Flexibility Act

The Associate Director certifies that this rule will not have a significant economic impact on a substantial number of small entities in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., because the rule creates no additional burden, but lists those communities eligible for the sale of flood insurance.

### Regulatory Classification

This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

### Paperwork Reduction Act

This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

### Executive Order 12612, Federalism

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, October 26, 1987, 3 CFR, 1987 Comp., p. 252.

### Executive Order 12778, Civil Justice Reform

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778, October 25, 1991, 56 FR 55195, 3 CFR, 1991 Comp., p. 309.

### List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

Accordingly, 44 CFR part 64 is amended as follows:

## PART 64—[AMENDED]

1. The authority citation for Part 64 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*, Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

### § 64.6 [Amended]

2. The tables published under the authority of § 64.6 are amended as follows:

| State/Location | Community No. | Effective date of authorization/cancellation of sale of flood insurance in community | Current effective map date |
|---|---|---|---|
| **New Eligibles—Emergency Program** | | | |
| Georgia: | | | |
| Monticello, city of, Jasper County | 130510 | Oct. 3, 1994 | |
| Montgomery County, Unincorporated Areas | 130139 | .....do | 3–19–76. |
| Oklahoma: | | | |
| Greer County, Unincorporated Areas | 400544 | .....do | |
| Georgia: | | | |
| Wheeler County, Unincorporated Areas | 130190 | .....do | 4–30–76. |
| Pike County, Unincorporated Areas | 130511 | Oct. 11, 1994 | |
| Danville, town of, Twiggs and Wilkinson Counties | 130512 | Oct. 17, 1994 | |
| Grady County, Unincorporated Areas | 130096 | Oct. 20, 1994 | 6–17–77. |
| Massachusetts: | | | |
| New Ashford, town of, Berkshire County | 250032 | Oct. 24, 1994 | 11–22–74. |
| Georgia: | | | |
| Ellaville, city of, Schley County | 130513 | Oct. 31, 1994 | |
| **New Eligibles—Regular Program** | | | |
| Illinois: | | | |
| Wayne, village of, Dupage and Kane Counties | 170865 | Oct. 3, 1994 | 12–1–81. |
| Ohio: | | | |
| New Knoxville, village of, Auglaize County | 390848 | .....do | 9–6–89. |
| Creston, village of, Wayne County | 390575 | Oct. 17, 1994 | 5–3–93. |
| **Reinstatements—Regular Program** | | | |
| Mississippi: | | | |
| Batesville, city of, Panola County | 280126 | Apr. 2, 1974, Emerg; Sept. 15, 1989, Reg; Sept. 15, 1989, Susp; Sept. 21, 1994, Rein. | 9–15–89. |
| Georgia: | | | |
| Springfield, city of, Effingham County | 130427 | Jan. 16, 1976, Emerg; Mar. 18, 1987, Reg; Mar. 18, 1987, Susp; Oct. 5, 1994, Rein. | 3–18–87. |
| Illinois: | | | |
| Lakewood, village of, McHenry County | 170805 | Mar. 25, 1974, Emerg; Sept. 4, 1985, Reg; Sept. 4, 1985. Susp; Oct. 24, 1994, Rein. | 9–4–85. |
| **Regular Program Conversions** | | | |
| **Region II** | | | |
| New York: | | | |
| Hamburg, town of, Erie County | 360244 | Oct. 4, 1994 suspension withdrawn | 10–4–94. |
| **Region V** | | | |
| Indiana: | | | |
| Ellettsville, town of, Monroe County | 180170 | .....do | Do. |
| Jasper, city of, DuBois County | 180055 | Oct. 18, 1994 suspension withdrawn | 10–18–94. |
| Minnesota: | | | |
| Argyle, city of, Marshall County | 270268 | .....do | Do. |
| Ohio: | | | |
| South Lebanon, village of Warren County | 390563 | .....do | Do. |
| **Region X** | | | |
| Idaho: | | | |
| Gooding, city of Gooding County | 160064 | .....do | Do. |

Code for reading third column:
Emerg.—Emergency; Reg.—Regular; Susp.—Suspension, Rein.—Reinstatement.

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Issued: November 15, 1994.

Frank H. Thomas,

*Deputy Associate Director, Mitigation Directorate.*

[FR Doc. 94–28668 Filed 11–18–94; 8:45 am]

BILLING CODE 6718–21–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 1, 20, 22, 24, and 90

[GN Docket No. 93–252, PR Docket Numbers 93–144 and 89–553; FCC 94–212]

### Implementation of Sections 3(n) and 332 of the Communications Act—Regulatory Treatment of Mobile Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this rulemaking proceeding, the Commission completes the initial implementation of sections 3(n) and 332 of the Communications Act of 1934 ("Communications Act" or "Act"), as amended by section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (Budget Act). As required by Congress, the Commission adopts changes to our technical, operational, and licensing rules for common carrier and private mobile radio services that are necessary to implement the statute and to establish regulatory symmetry among similar mobile services. The establishment of this regulatory framework also sets the stage for the future evolution of mobile services. In this respect, these rules changes mark an important step in the Commission's continuing effort to enhance competition among mobile services providers, promote the development of new and technologically innovative service offerings, and ensure that consumer demand, not regulatory decree, dictates the course of the mobile services marketplace.

EFFECTIVE DATE: January 2, 1995.

FOR FURTHER INFORMATION CONTACT: Nancy Boocker (202) 418–1300 or David Furth (202) 634–2443.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Third Report and Order in GN Docket No. 93–252, adopted August 9, 1994 and released September 23, 1994. The full text of Commission decisions are available for inspection and copying during normal business hours in the FCC Docket Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, NW., Washington, DC 20037.

**Paperwork Reduction**

Public reporting burden for the collections of information is estimated as follows:

| Section/forms | Estimated average hours per response | Estimated annual responses |
|---|---|---|
| 20.6(e) | .67 | 30 |
| 22.313 | 1 | 100 |
| 22.313(c)(1)[1] | .5 | 500 |
| 90.119 | 1 | 100 |
| 90.145 | 1 | 100 |
| 90.153 | 1 | 100 |
| 90.161 | 2 | 20 |
| 90.162 | 2 | 20 |
| 90.163 | 10 | 10 |
| 90.166 | 1 | 10 |
| 90.167 | 1 | 20 |
| 90.168(a)–(e) | 2 | 100 |
| 90.168(f)[1] | 52 | 100 |
| 90.425 | 1 | 100 |
| 90.449 | 1 | 100 |
| 90.607 | 2.5 | 144 |
| 90.631 | 1.5 | 45 |
| 90.633 | 1 | 15 |

[1] Recordkeeping.

Total Annual Burden: 6923.

Frequency of Response: On occasion, annually.

These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Records Management Branch, Paperwork Reduction Project, Washington, DC 20554 and to the Office of Management and Budget Paperwork Reduction Project, Washington, DC 20503.

**Final Regulatory Flexibility Analysis**

Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. section 604, a final regulatory flexibility analysis has been prepared and is presented below. It is available for public viewing as part of the full text of the decision, which may be obtained from the Commission or its copy contractor.

Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. section 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Further Notice of Proposed Rule Making* in GN Docket No. 93–252. Written comments on the proposals in the Further Notice, including the IRFA, were requested.

*A. Need for and Purpose of Rules*

This rule making proceeding was initiated to implement Sections 3(n) and 332 of the Communications Act of 1934, as amended. The policies adopted herein will carry out Congressional intent to establish a consistent regulatory framework for all commercial mobile radio service (CMRS) providers. Specifically, this Order ensures that CMRS providers who compete with one another will be subject to comparable technical, operational, and licensing rules.

*B. Issues Raised by the Public in Response to the Initial Analysis*

No comments were submitted specifically in response to the Initial Regulatory Flexibility Analysis.

*C. Significant Alternatives Considered*

The *Further Notice of Proposed Rule Making* in this proceeding offered numerous proposals. The commenters supported the major tenets of the proposed changes, and some commenters suggested changes to some of the Commission's proposals. The regulatory burdens we have retained for all CMRS licenses, including small entities, are necessary to carry out our duties under the Communications Act of 1934, as amended. For example, we have extended section 309 notice and comment procedures to all CMRS applicants. We also minimized regulatory burdens, where possible, for all CMRS licensees. For example, we adopt a unitary application form for all mobile services applicants and eliminate most end user eligibility requirements and restrictions on permissible uses of CMRS systems. In addition, our proposal to impose a cap on the amount of CMRS spectrum that licensees may aggregate in a given geographic area was discussed by many commenters. We conclude that the spectrum cap as proposed should not be adopted but, rather, that a more specific cap on aggregation of PCS, cellular and SMR spectrum should be adopted. A copy of the Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

**Synopsis of the Third Report and Order**

Last year, in the Budget Act, Congress created the CMRS regulatory classification and mandated that similar commercial mobile radio services be accorded similar regulatory treatment under the Commission's Rules. The

broad goal of this action is to ensure that economic forces—not disparate regulatory burdens—shape the development of the CMRS marketplace.

The Budget Act directs the Commission to take certain steps toward that goal not later than August 9, 1994. These steps include revising our rules to ensure the services reclassified as CMRS by the Budget Act are "subjected to technical [and operational] requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services." The Commission also must adopt rules for licensing CMRS, including reclassified services, pursuant to the radio common carrier licensing provisions of the Act. Finally, the Budget Act mandates that the Commission take appropriate steps to ensure an orderly transition to the new CMRS regulatory structure.

On April 20, 1994, the Commission adopted a Further Notice of Proposed Rule Making (Further Notice) 59 FR 28042 (May 31, 1994) to address pending issues relating to the implementation of the statute. In particular, the Commission sought to address the impact of the amended statute on our technical, operational, and licensing rules for all mobile services, and particularly on the rules affecting those Part 90 services that were reclassified as CMRS by the CMRS Second Report and Order, 59 FR 18493 (April 19, 1994). As required by section 6002(d)(3) of the Budget Act, the Commission proposed to amend these rules to the extent necessary to ensure that competing mobile services would be subject to comparable regulatory requirements, and that inconsistencies in our regulation of substantially similar services would be eliminated to the extent practical. The *Further Notice* indicated that the Commission would act on its proposals not later than the August 9, 1994, deadline established by Congress for adoption of rules implementing the statute. On May 19, 1994, the Commission revised the *Further Notice* on its own motion to seek comment on the additional issue of whether the amount of spectrum that CMRS licensees may aggregate in a given geographic area should be limited. The Commission received 61 comments and 70 reply comments in response to the Further Notice.

In this Order the Commission takes four steps to implement both the broad goal of the Budget Act and the more narrowly focused requirements generated by its August 9, 1994, transition deadline. First, the Order determines which reclassified services are "substantially similar" to existing common carrier services in order to implement the Budget Act requirement that such services be subject to "comparable" regulation. Second, the Order revises part 90 and part 22 technical and operational rules governing those services to ensure that the rules are, indeed, "comparable."

Third, to effectuate the broad congressional goal of ensuring that competition shapes the development of the CMRS market, the Order adopts rules that cap at 45 MHz the total amount of combined broadband personal communications services (PCS), cellular, and Specialized Mobile Radio (SMR) spectrum in which an entity may have an attributable interest in any geographic area.

Fourth, to carry out Budget Act requirements concerning the licensing of CMRS services, the Order adopts uniform rules for licensing CMRS services, including reclassified services. The Commission is also modifying its licensing rules for part 22 CMRS and part 90 commercial services, where appropriate, to adopt filing windows for the filing of competing initial applications and conclude that competitive bidding procedures should be used to select from among mutually exclusive applications. Moreover, as the Further Notice tentatively concluded the Commission is taking the additional step of adopting a single, uniform application form for use by all CMRS and PMRS applicants in all terrestrial mobile services.

Summarized in the following section are the principal decisions the Commission is adopting in connection with each of the four actions taken in this Order. Before doing so, it is important to note that while all the rules adopted in this Order become effective on January 2, 1995, some of those rules do not apply immediately to the reclassified CMRS entities that will continue to be treated as private carriers under the grandfathering provisions of the Budget Act. Specifically, until the grandfathered period ends on August 9, 1996, with regard to existing licensees, such entities will not be subject to technical, operational, or licensing rule changes made in this Order that apply exclusively to CMRS. Instead, they will be subject to regulation as private carriers under part 90 of our rules. Grandfathered carriers should note, however, that they are governed by modifications to rules the Commission makes in this Order that are applicable to private carriers.

*1. Substantially Similar Services*

This Order establishes the framework for implementing the mandate of the Budget Act that the Commission revise its rules to the extent necessary and practical to ensure that providers of reclassified CMRS services are subjected to technical and operational rules comparable to those that apply to providers of substantially similar common carrier services. To that end, the Commission's initial task was to identify reclassified CMRS services that are "substantially similar" to common carrier services.

The goals of the Budget Act serve as the Commission's guidepost for this task: (1) To create a level regulatory playing field for CMRS; (2) to establish an appropriate level of regulation for the administration of CMRS; (3) to resolve "substantial similarity" issues with a view toward ensuring that unwarranted regulatory burdens are not imposed on reclassified CMRS providers; and (4) to promote the economic goals discussed in the CMRS Second Report and Order, including fostering economic growth, promoting investment in mobile telecommunications infrastructure, and enabling access to the national information superhighway.

Based on these goals, the Order concludes that the appropriate analytical framework for determining whether services are substantially similar is to assess whether licensees in those services actually or potentially compete to meet the needs and demands of consumers. The Order concludes that all reclassified private mobile radio services actually compete, or have the potential to compete within a reasonable time period, with existing commercial mobile radio services. In other words, the Commission concludes that all CMRS—including one-way messaging and data, and two-way voice, messaging, and data—are competing services or have the reasonable potential to become competing services in the CMRS marketplace. Thus, on the basis of this competitive analysis, the Order finds that all reclassified private services are substantially similar to existing commercial services, for purposes of section 332 of the Communications Act.

This broad reading of the term "substantially similar" furthers the statutory purposes of promoting uniformity in CMRS regulation and, thereby, minimizes the potentially distorting effects of asymmetrical regulation. This reasoning also comports with the Commission's analysis of current and likely future competition in the CMRS marketplace. Actual

competition among certain CMRS services exists already and, more importantly, the potential for competition among all CMRS services appears likely to increase over time due to expanding consumer demand and technological innovation. Such conditions argue for defining the class of "substantially similar" services expansively, at least for the limited purpose of establishing baseline technical and operational rules.

It is worth emphasizing the determinative relationship between the forward-looking policy goals embodied in the rule comparability requirement of the Budget Act and the Commission's assessment of competitive trends in the CMRS marketplace. Thus, this Order begins with the conclusion that mobile services will be treated as substantially similar if they compete against each other. Next, the Commission has chosen to take an expansive view of the present condition of competition among services in the CMRS marketplace, and of the potential for competition among these services in the future, because such a view maximizes the range of services that can be considered to be substantially similar. This in turn leads the Commission to conclude that, to the extent practical, technical and operational rules should be comparable for virtually all existing and reclassified CMRS services. This conclusion furthers the Commission's policy objective of ensuring a level regulatory playing field for CMRS. The Order notes, however, that an analysis performed in the context of a different set of policy goals, or application of the same policy goals to different circumstances, may result in different conclusions regarding the extent of competition.

*2. Comparable Technical and Operational Rules*

The determination that actual and potential competition among CMRS services makes them "substantially similar" for purposes of Budget Act analysis carries over into the assessment of technical and operational rules. The Order concludes that differences between rules governing actually or potentially competitive services should be conformed if the Commission determines that the differences distort competition by placing unequal regulatory burdens on different classes of CMRS providers. Such conformity between rules will not be imposed, however, if the Commission determines that, although the relative burdens imposed by the rules may not be identical, the cost of conforming the rules outweighs the benefit that might be gained thereby. Pursuant to this analytical framework, the principal determinations are as follows:

a. Service Area and Channel Assignment Rules

800 MHz SMR: The Order adopts the principle that 800 MHz SMR systems should be licensed on a Major Trading Area (MTA) basis to the extent feasible, but defers for further comment the specifics of licensing such systems to ensure that the interests of both existing licensees and potential entrants are taken into account. The Commission will shortly issue a further notice of proposed rule making in our 800 MHz docket (PR Docket No. 93–144) regarding: (1) Designating 200 contiguous SMR channels for MTA licensing based on 50-channel blocks; (2) continuing to license the remaining 80 SMR channels under existing rules; and (3) allowing incumbents to continue operating on existing channels. The Order declines to adopt a proposal by Nextel that certain 800 MHz incumbents be subject to mandatory returning to new frequencies, but the Commission will seek further comment on this issue. The Order further concludes that both existing SMR licensees and new entrants will be eligible for MTA licenses, with licensees to be selected by auctionin the event of mutually exclusive applications. Finally, the Order concludes that in light of the fundamental changes to be implemented in 800 MHz licensing, the Commission is suspending the acceptance of all new 800 MHz SMR applications, as of August 9, 1994.

900 MHz SMR: The Order adopts MTA-based licensing of all 200 channels in blocks of 10 channels. The Order concludes that eligibility for MTA licenses will be open to existing licensees and new entrants, with competitive bidding to be used in the event of mutually exclusive applications. Incumbent licensees who do not obtain MTA licenses will be entitled to continue operating under existing authorizations.

220 MHz Commercial Service: The Order concludes that service area definitions and channel assignment rules applicable to licensing of 220 MHz systems should not be changed at this time. The Commission will address such issues in a separate, future rule making proceeding.

Private Carrier Paging: The Order adopts no conformance changes to existing part 90 and part 22 paging rules in this docket. The Commission will defer further action until it examines the question of wide-area licensing and whether further conforming of Commission rules is feasible.

b. Other Technical and Operational Rules

The Order concludes that no fundamental changes should be made to existing rules regulating co-channel interference, adjacent channel interference, or antenna height and transmitter power.

The Order concludes that all CMRS and PMRS mobiles and portables shall be subject to the 1992 ANSI/IEEE Radio Frequency (RF) exposure guidelines. The Order further concludes that this decision will be implemented in the proceeding in which the Commission is conducting a complete review of RF exposure guidelines, ET Docket No. 93–62.

The Order concludes that new interoperability requirements will not be adopted for CMRS equipment at this time, but the Commission will be retaining the existing interoperability rule applicable with regard to cellular service. The Commission intends to explore the question of interoperability requirements for CMRS equipment in a future inquiry.

The Order adopts a uniform 12-month construction requirement for all CMRS licensees, except in instances in which the rules specify a longer period for systems of greater size or complexity. The Order eliminates loading requirements for CMRS, except that incumbent 900 MHz SMR licensees must meet current requirements for retaining channels at renewal. In addition, the Order adopts rules allowing a multi-station CMRS system to use a single call sign for station identification purposes.

The Order eliminates existing user eligibility restrictions that prevent SMR, private carrier paging, Business Radio, and commercial 2209 MHz licensees from providing service to foreign governments and their representatives. The Commission also eliminates eligibility restrictions that prevent Business Radio licensees from providing service to individuals. The Order also eliminates the part 90 restriction on common carrier communications for reclassified CMRS services. Finally, the Order applies existing Equal Employment Opportunity requirements to all CMRS licensees.

*3. Spectrum Aggregation Limit*

This Order addresses the issue of imposing a cap on the amount of CMRS spectrum a licensee may aggregate in a given geographic area as a means of preventing potentially anticompetitive aggregation of CMRS spectrum. The Commission concludes that to preserve competitive opportunities in the CMRS

marketplace, it is unnecessary to establish, in addition to existing CMRS spectrum aggregations limitations, the broad CMRS spectrum cap proposed in the Further Notice. Rather, the Order concludes that the Commission's goals will be achieved by capping at 45 MHz the total amount of PCS, cellular, and SMR spectrum in which an entity may have an attributable interest in any geographic area. The Order adopts this cap as a minimally intrusive means of ensuring that the mobile communications marketplace remains competitive and retains incentives for efficiency and innovation.

The Order also reaches the following determinations with regard to implementation of the spectrum cap. First, the Order concludes that various encumbrances on SMR spectrum *vis-à-vis* cellular or broadband PCS should be accounted for when measuring SMR spectrum for purposes of the cap. Therefore, the Commission will attribute to an entity a maximum of 10 MHz of SMR spectrum, including both 800 and 900 MHz spectrum for purposes of determining compliance.

Second, the Order adopts a 20 percent cross ownership attribution rules for licensees other than designated entities. Thus, when an entity other than a designated entity has a 20 percent or greater ownership interest in an SMR, cellular, or PCS license in a particular geographic area, the entire amount of spectrum associated with that license will be attributed to that entity for spectrum cap purposes. For designated entities, the attribution level will be a 40 percent or greater ownership interest.

Third, to compute an SMR spectrum total in a given market, the licensee must identify all attributable 800 MHs and 900 MHz SMR base stations located inside the MTA or BTA. All 800 MHz and 900 MHz channels located on at least one of those base stations count as 50 kHz and 25 kHz, respectively. This total can be reduced using a 10 percent population overlap test similar to that used for the current cellular-PCS spectrum cap.

*4. Licensing Rules and Procedures*

Section 332 of the Act, as amended by the Budget Act, provides that CMRS providers are to be "treated as common carriers for purposes of (the) Act." The Order concludes that this means, among other things, that all CMRS applications must comply with common carrier licensing procedures enumerated in Title III of the Act. Thus, the Order adopts rules that implement those procedures with regard to existing licensees and future applicants on SMR, Business Radio, 220 MHz, and Part 90 paging frequencies who provide or propose to provide service that meets the CMRS definition.

In particular, the following presents a partial list of measures the Commission is adopting to ensure that CMRS applications under part 90 comply with the statutory requirements for licensing of common carriers under Title III of the Act, as well as to streamline and unify processing of all CMRS and PMRS applications.

Application Forms and Procedures—The Order adopts a single unified application form (Form 600) for all CMRS and PMRS applicants in all terrestrial services. Form 600 will also be used to determine the regulatory classification of an applicant.

Qualifying Information—All parties to a CMRS application will be required to comply with the alien ownership restrictions of section 310(b) of the Act and must also disclose whether: (1) Any party has had a Commission license or permit revoked; (2) any party has been found by a court to have monopolized radio communication; or (3) any party has been convicted of a felony.

Application Fees and Regulatory Fees—Currently, application fees can only be changed by Congress. Therefore, the existing application fee schedule will continue to govern fee requirements. If, however, Congress acts to extend to the Commission authority to modify the fee schedules, we will address the question of altering our regulatory fees at that time.

Public Notice and Petition To Deny Procedures—The Order adopts rules that apply the public notice and petition to deny procedures currently contained in part 22 to all CMRS applicants. In addition to applications for initial licenses, these procedures will extend to applications for major modifications and for assignments and transfers of part 90 CMRS licenses.

Mutually Exclusive Applications and Competitive Bidding—The Order Adopts rule changes that will generally result in using 30-day notice and cut-off procedures and competitive bidding to select among mutually exclusive initial CMRS applications in part 22 services (except for Phase I cellular unserved area applications), 900 MHz SMR service, and 800 MHz SMR service. For Phase I cellular applications the Order adopts a one-day filing window, concluding that such a window is sufficient because there is a date certain on which applications for unserved areas are permitted to be filed. The Order adopts no changes to application procedures for 929–930 MHz paging in Part 90, but notes that some procedural changes are likely to be considered in the future.

Amendment of Applications and License Modification—The Order adopts rule changes that conform part 22 and part 90 definitions for initial applications and major and minor amendments and modifications, to the extent practicable. Modification applications will be accepted for filing on a first-come, first-served basis.

Conditional and Special Temporary Authority—The Order concludes that the waiting period for pre-grant construction for part 22 CMRS should be reduced from 90 to 35 days, and we establish a 35-day waiting period for all CMRS. The Order also determines that section 309(f) of the Act prohibits pre-grant operation under special temporary authority (STA) except in those cases in which the applicant establishes that there are "extraordinary circumstances" where a delay in operations would seriously prejudice the public interest.

**Ordering Clauses**

Accordingly, it is ordered that the rule changes made, as specified below, will become effective January 2, 1995, pursuant to sections 4(i), 4(j), 7(a), 302, 303(c), 303(f), 303(g), 303(r), 332(c), and 332(d) of the Communications Act of 1934 as amended, 47 U.S.C. 154(i), 154(j), 157(a), 302, 303(c), 303(f), 303(g), 303(r), 332(c), and 332(d).

It is further ordered that the acceptance of 800 MHz applications on the 280 SMR category channels is suspended, effective August 9, 1994, except that applications for transfer or assignment of existing SMR facilities will continue to be accepted.

It is further ordered that authority is delegated to the Chief, Common Carrier Bureau, as specified herein, to develop a new form or modify existing forms for licenses or applicants to certify and/or provide information showing that they are in compliance with the spectrum aggregation limit adopted in this Order.

It is further ordered that the Secretary shall send a copy of this Report and Order to the Chief Counsel for Advocacy of the Small Business Administration.

It is further ordered that the motion to accept late-filed comments filed by E.F. Johnson Company is granted.

It is further ordered that the Request for Declaratory Ruling and Request for Rule Waiver filed by SunCom Mobile & Data is denied.

It is further ordered that the Petition for Rule Making filed by the American Mobile Telecommunications Association, RM–8387, is dismissed as moot.

It is further ordered that the Emergency Petition to Dismiss

Comments and Reply Comments of the American Mobile Telecommunications Association, filed by Range Corporation d/b/a Range Telecommunications, is denied.

**List of Subjects**

*47 CFR Part 1*

Administrative practice and procedure.

*47 CFR Part 20*

Commercial mobile radio services.

*47 CFR Part 22*

Public mobile services, Radio.

*47 CFR Part 24*

Personal communications services.

*47 CFR Part 90*

Private land mobile services, Radio.

Federal Communications Commission.

**William F. Caton,**

*Acting Secretary.*

**Rule Amendments**

47 CFR parts 1, 20, 22, 24, and 90 are amended as follows:

## PART 1—PRACTICE AND PROCEDURE

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

**Authority:** 47 U.S.C. 154, 303, 503(b)(5); 5 U.S.C. 552; 31 U.S.C. 853a, unless otherwise noted.

**§ 1.823 [Amended]**

2. Section 1.823 is amended by removing and reserving paragraph (b)(2).

3. Section 1.901 is revised to read as follows:

**§ 1.901 Scope.**

In the case of any conflict between the rules set forth in this subpart and the rules set forth in part 13 of this chapter or the rules set forth for specific services in parts 80 through 97 of this chapter (other than rules relating to Commercial Mobile Radio Services contained in part 90 of this chapter), the rules in this subpart shall govern. In the case of any conflict between the rules set forth in this subpart and the rules relating to Commercial Mobile Radio Services set forth in part 20 of this chapter or in part 90 of this chapter, the rules in part 20 or part 90 of this chapter shall govern.

4. Section 1.922 is revised to read as follows:

**§ 1.922 Forms to be used.**

| FCC form | Title |
|---|---|
| 175 | Application To Participate in an FCC Auction. |
| 175–S | Supplemental Application To Participate in an FCC Auction. |
| 402 | Application for Microwave Station Authorization in the Safety and Special Radio Services. |
| 402–10 | Instructions for Completion of FCC Form 402. |
| 402–A | Annual Report of Licensees of Microwave and Other Fixed Stations When Such Facilities Are Used Cooperatively With Other Persons. |
| 402–R | Renewal Notice and Certification in the Private Operational-Fixed Microwave Radio Services. |
| 404 | Application for Aircraft Radio Station License. |
| 404–A | Temporary Aircraft Radio Station Operating Authority. |
| 405–A | Application for Renewal of Station License. |
| 405–B | License Expiration Notice and/or Renewal Application. |
| 406 | Application for Ground Station Authorization in the Aviation Services. |
| 410 | Registration of Canadian Radio Station Licensee and Application for Permit to Operate. |
| 410–B | Application for Permit To Operate a Canadian General Radio Station in the United States. |
| 452–R | Application for Renewal of Coast and Ground Services. |
| 480 | Application for Civil Air Patrol Radio Station Authorization. |
| 490 | Application for Assignment or Transfer of Control. |
| 503 | Application for Land Radio Station License in the Maritime Services. |
| 506 | Application for Ship Radio Station License. |
| 506–A | Temporary Operating Authority, Ship Radio Station License and Restricted Radiotelephone Operator Permit. |
| 525 | Application for Disaster Communications Radio Station Construction Permit and License. |
| 572 | Temporary Permit To Operate a Business Radio Station. |
| 572C | Conditional Temporary Authorization To Operate a part 90 Radio Station. |
| 574 | Application for Radio Station Authorization in the General Mobile Radio Services. |
| 574–R | Application for Renewal of Radio Station License. |
| 574–T | Temporary Permit To Operate a General Mobile Radio Service System. |
| 577 | Temporary Permit To Operate a Part 90 Radio Station. |
| 600 | Application for Mobile Radio Service Authorization. |
| 610 | Application for Amateur Radio Station and/or Operator License. |
| 610–A | Application for Alien Amateur Radio Licensee for Permit To Operate in the United States. |
| 610–B | Application for Amateur Club, Military Recreation, or Radio Amateur Civil Emergency Service Station License. |
| 660–B | Interim Amateur Permit. |
| 602 | Application for Consent to Assignment of Radio Station Construction Permit or License (For Stations in Services Other Than Broadcast). |
| 703 | Application for Consent To Transfer of Control of Corporation Holding Construction Permit or Station License (For Station in Services Other Than Broadcast). |
| 714 | Supplement to Application for New or Modified Radio Station Authorization (Concerning Antenna Structure Notification to FAA). |
| 820 | Application for Exemption from Ship Radio Station Requirements. |
| 845 | Amateur Code Credit Certificate. |
| 1046 | Assignment of Authorization. |

5. Section 1.924 is amended by revising the heading in paragraph (b)(2)(i) and paragraph (b)(2)(vi) and by adding a new paragraph (b)(2)(vii) to read as follows:

**§ 1.924 Assignment or transfer of control; voluntary or involuntary.**

* * * * *

(b) * * *

(2) * * *

(i) *FCC Form 600.* * * *

(vi) *FCC Form 703.* For consent to transfer control of a corporation holding any type of part 90 license except a license to provide commercial mobile radio service.

(vii) *FCC Form 490.* For consent to transfer control of a corporation holding a part 90 license to provide commercial mobile radio service.

* * * * *

6. Section 1.925 is amended by revising the first sentence of paragraph (g) and (h) to read as follows:

**§ 1.925 Application for special temporary authorization, temporary permit, or temporary operating authority.**

* * * * *

(g) An applicant for a Business Radio Station license (other than an applicant who seeks to provide commercial mobile radio service as defined in part 20 of this chapter) utilizing an already authorized facility may operate the station for a period of 180 days, under a temporary permit, evidenced by a properly executed certification made on FCC Form 572, after the mailing of a formal application for station license

together with evidence of frequency coordination, if required, to the Commission. * * *

(h) An applicant for a radio station license under part 90, subpart S, of this chapter (other than an applicant who seeks to provide commercial mobile radio service as defined in part 20 of this chapter) to utilize an already existing Specialized Mobile Radio System (SMRS) facility or to utilize an already licensed transmitter may operate the radio station for a period of up to 180 days, under a temporary permit, evidenced by a properly executed certification of FCC Form 572 after the mailing of a formal application for station license, provided that the antenna employed by the control station is a maximum of 20 feet (6.1 meters) above a man-made structure (other than an antenna tower) to which it is affixed.

* * * * *

**§ 1.1105 [Amended]**

7. Section 1.1105 is amended by revising the entries in the table from 2. through 5.n. to read as follows:

| Action | FCC form No. | Fee amount | Fee type code | Address |
|---|---|---|---|---|
| . . . . . | | | | |
| 2. Domestic Public Land Mobile Stations [Paging and Radiotelephone Service, Air-ground Radiotelephone Service]: | | | | |
| a. Application for new or additional facility (per transmitter). | FCC 600 | 265.00 | CMD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| b. Application for major modification of an existing facility (per transmitter). | FCC 600 | 265.00 | CMD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| c. Notification of additional transmitter (per transmitter). | FCC 489 | 265.00 | CMD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| d. Major amendment of a pending application (per transmitter). | FCC 600 | 265.00 | CMD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| e. Application for assignment of authorization or consent to transfer of control: | | | | |
| (i) First call sign | FCC 490 | 265.00 | CMD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| (ii) Each additional call sign | FCC 490 | 45.00 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| f. Application for partial assignment of authorization (per call sign). | FCC 600 & FCC 490 | 265.00 | CMD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| g. Application for renewal (per call sign) | FCC 405 & FCC 159 | 45.00 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| h. Minor modification (per transmitter): | | | | |
| (i) Notification of minor modification | FCC 489 | 45.00 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| (ii) Application for minor modification | FCC 600 | 45.00 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| i. Request for special temporary authority (per channel/per location). | Written request & FCC 159. | 230.00 | CLD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| j. Application for extension of construction period (per authorization). | FCC 600 | 45.00 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| k. Notification of commencement of service to subscribers (per notification). | FCC 489 | 45.00 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| l. Application for new or modified auxiliary test transmitter (per transmitter). | FCC 600 | 230.00 | CLD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| m. Application for authority to provide commercial mobile service using broadcast station subcarriers (per application). | FCC 600 | 115.00 | CFD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| n. Application for reinstatement [no longer available]. | | | | |
| o. Application to combine separate authorizations (per call sign). | FCC 600 | 230.00 | CLD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |

| Action | FCC form No. | Fee amount | Fee type code | Address |
|---|---|---|---|---|
| p. Application for new or modified standby transmitter (per transmitter/per location). | FCC 600 | 230.00 | CLD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| q. 931 MHz nationwide paging renewal [see 2g]. | | | | |
| r. Application for new, modified or renewal general aviation air-ground mobile license (per application). | FCC 409 & FCC 159 | 45.00 | CAD | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| s. Application for 932–932.5/941–941.5 MHz point-to-multipoint channels (per transmitter). | FCC 600 | 265.00 | CMP | Federal Communications Commission, 932/941 MHz Point-to-Multipoint Channels, Common Carrier Bureau, P.O. Box 358924, Pittsburgh, PA 15261–5924. |
| 3. Cellular Systems [Cellular Radiotelephone Service]: | | | | |
| a. Initial application for new cellular system. | FCC 600 | 265.00 | CMC | Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251–5135. |
| b. Application for major modification | FCC 600 | 265.00 | CMC | Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251–5135. |
| c. Minor modifications. | | | | |
| (i) Application for minor modification | FCC 600 | 70.00 | CDC | Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251–5135. |
| (ii) Notification of minor modification or commencement of service to subscribers (per notification). | FCC 489 | 70.00 | CDC | Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251–5135. |
| d. Application for full or partial assignment of authorization or consent to transfer of control. | FCC 490 | 265.00 | CMC | Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251–5135. |
| e. Application for renewal | FCC 405 & FCC 159 | 45.00 | CAC | Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251–5135. |
| f. Application for extension of construction period. | FCC 600 | 45.00 | CAC | Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251–5135. |
| g. Request for special temporary authority. | Written request & FCC 159. | 230.00 | CLC | Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251–5135. |
| h. Request to combine cellular geographic service areas (per system). | Written request & FCC 159. | 60.00 | CBC | Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251–5135. |
| 4. Rural Radio [Rural Radiotelephone Service]: | | | | |
| a. Application for new or additional facility (per transmitter). | FCC 600 | 125.00 | CGR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| b. Application for major modification of an existing facility (per transmitter). | FCC 600 | 125.00 | CGR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| c. Major amendment of a pending application (per transmitter). | FCC 600 | 125.00 | CGR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| d. Minor modifications: | | | | |
| (i) Notification of minor modification (per transmitter). | FCC 489 | 45.00 | CAR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| (ii) Application for minor modification (per transmitter). | FCC 600 | 45.00 | CAR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| e. Application for assignment of authorization or consent to transfer of control: | | | | |
| (i) First call sign | FCC 490 | 125.00 | CGR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| (ii) Each additional call sign | FCC 490 | 45.00 | CAR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| (iii) Partial assignment of authorization (per call sign). | FCC 490 & FCC 600 | 125.00 | CGF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |

| Action | FCC form No. | Fee amount | Fee type code | Address |
|---|---|---|---|---|
| f. Application for renewal (per call sign) . | FCC 405 & FCC 159 . | 45.00 | CAR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| g. Application for extension of construction period (per application). | FCC 600 ..... | 45.00 | CAR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| h. Notification of commencement of service to subscribers (per notification). | FCC 489 ..... | 45.00 | CAR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| i. Request for special temporary authority (per channel/per location). | Written request & FCC 159. | 230.00 | CLR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| j. Application for reinstatement [no longer available]. | | | | |
| k. Application to combine separate authorizations (per call sign). | FCC 600 ..... | 230.00 | CLR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| l. Application for new or modified auxiliary test transmitter (per transmitter). | FCC 600 ..... | 230.00 | CLR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| m. Application for new or modified standby transmitter (per transmitter). | FCC 600 ..... | 230.00 | CLR | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| 5. Offshore Radiotelephone Service: | | | | |
| a. Application for new or additional facility (per transmitter). | FCC 600 ..... | 125.00 | CGF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| b. Application for major modification of an existing facility (per transmitter). | FCC 600 ..... | 125.00 | CGF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| c. Fill-in transmitters [not available]. | | | | |
| d. Major amendment of a pending application (per transmitter). | FCC 600 ..... | 125.00 | CGF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| e. Minor modifications: | | | | |
| (i) Notification of minor modification (per transmitter). | FCC 489 ..... | 45.00 | CAF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| (ii) Application for minor modification (per transmitter). | FCC 600 ..... | 45.00 | CAF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| f. Application for assignment of authorization or consent to transfer of control: | | | | |
| (i) First call sign ..... | FCC 490 ..... | 125.00 | CGF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| (ii) Each additional call sign ..... | FCC 490 ..... | 45.00 | CAF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| (iii) Partial assignment of authorization (per call sign). | FCC 490 & FCC 600 . | 125.00 | CGF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| g. Application for renewal (per call sign) | FCC 405 & FCC 159 . | 45.00 | CAF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| h. Application for extension of construction period (per application). | FCC 600 ..... | 45.00 | CAF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| i. Application for reinstatement [no longer available] | | | | |
| j. Notification of commencement of service to subscribers (per notification). | FCC 489 ..... | 45.00 | CAF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| k. Request for special temporary authority (per channel/per location). | Written request & FCC 159. | 230.00 | CLF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| l. Application to combine separate authorizations (per call sign). | FCC 600 ..... | 230.00 | CLF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |

| Action | FCC form No. | Fee amount | Fee type code | Address |
|---|---|---|---|---|
| m. Application for new or modified auxiliary test transmitter (per transmitter). | FCC 600 | 230.00 | CLF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| n. Application for new or modified standby transmitter (per transmitter). | FCC 600 | 230.00 | CLF | Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251–5130. |
| . . | . | . | . | . . |

## PART 20—COMMERCIAL MOBILE RADIO SERVICES

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

Authority: Secs. 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. New § 20.6 is added to read as follows:

### § 20.6 CMRS spectrum aggregation limit.

(a) *45 MHz limitation.* No licensee in the broadband PCS, cellular, or SMR services (including all parties under common control) regulated as CMRS (see § 20.9) shall have an attributable interest in a total of more than 45 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any geographic area.

(b) *SMR spectrum.* To calculate the amount of attributable SMR spectrum for purposes of paragraph (a) of this section, an entity must count all 800 MHz channels and 900 MHz channels located at any SMR base station inside the geographic area (MTA or BTA) where there is significant overlap. All 800 MHz channels located on at least one of those identified base stations count as 50 kHz (25 kHz paired), and all 900 MHz channels located on at least one of those identified base stations count as 25 kHz (12.5 kHz paired), except that no more than 10 MHz of SMR spectrum in the 800 MHz SMR service will be attributed to an entity when determining compliance with the cap.

(c) *Significant overlap.* (1) For purposes of paragraph (a) of this section, significant overlap of a PCS licensed service area and CGSA(s) (as defined in § 22.911 of this chapter) or SMR service area(s) occurs when at least 10 percent of the population of the PCS licensed service area, as determined by the 1990 census figures for the counties contained therein, is within the CGSA(s) and/or SMR service area(s).

(2) The Commission shall presume that an SMR service area covers less than 10 percent of the population of a PCS service area if none of the base stations of the SMR licensee is located within the PCS service area. For an SMR licensee's base stations that are located within a PCS service area, the channels licensed at those sites will be presumed to cover 10 percent of the population of the PCS service area, unless the licensee shows that its protected service contour for all of its base stations covers less than 10 percent of the population of the PCS service area.

(d) *Ownership attribution.* For purposes of paragraph (a) of this section, ownership and other interests in broadband PCS licensees, cellular licensees, or SMR licensees will be attributed to their holders pursuant to the following criteria:

(1) Controlling interest shall be attributable. Controlling interest means majority voting equity ownership, any general partnership interest, or any means of actual working control (including negative control) over the operation of the licensee, in whatever manner exercised.

(2) Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS, cellular, or SMR licensee shall be attributed, except that ownership will not be attributed unless the partnership and other ownership interests and any stock interest amount to at least 40 percent of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS, cellular, or SMR licensee if the ownership interest is held by a small business, a rural telephone company, or a business owned by minorities and/or women, as these terms are defined in § 1.2110 of this chapter or other related provisions of the Commission's rules, or if the ownership interest is held by an entity with a non-controlling equity interest in a broadband PCS licensee or applicant that is a business owned by minorities and/or women.

(3) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock to any person who has the sole power to sell such stock, and, in the case of stock held in trust, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(4) Non-voting stock shall be attributed as an interest in the issuing entity if in excess of the amounts set forth in paragraph (d)(2) of this section.

(5) Debt and instruments such as warrants, convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests shall not be attributed unless and until conversion is effected, except that this provision does not apply in determining whether an entity is a small business, a rural telephone company, or a business owned by minorities and/or women, as these terms are defined in § 1.2110 of this chapter or other related provisions of the Commission's rules.

(6) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(7) Officers and directors of a broadband PCS licensee or applicant, cellular licensee, or SMR licensee shall be considered to have an attributable interest in the entity with which they are so associated. The officers and directors of an entity that controls a broadband PCS licensee or applicant, a cellular licensee, or an SMR licensee shall be considered to have an attributable interest in the broadband PCS licensee or applicant, cellular licensee, or SMR licensee.

(8) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain

exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(e) *Divestiture.* Any party holding controlling or attributable ownership interests in SMR licensees accounting for more than 5 MHz of SMR spectrum may be a party to a broadband PCS application (*i.e.*, have a controlling or attributable interest in a broadband PCS applicant), and such PCS applicant will be eligible for PCS licenses amounting to 40 MHz of broadband PCS spectrum in a geographical area, pursuant to the divestiture procedures set forth in paragraphs (e)(1) through (e)(3) of this section.

(1) The Broadband PCS applicant shall certify on its bidder application that it and all parties to the application will come into compliance with the limitations on spectrum aggregation set forth in this section.

(2) If such an applicant is a successful bidder, it must submit with its long-form application a signed statement describing its efforts to date and future plans to come into compliance with the limitations on spectrum aggregation set forth in this section.

(3) If such an applicant is otherwise qualified, its application will be granted subject to a condition that the licensee shall come into compliance with the limitations on spectrum aggregation set forth in this section within ninety (90) days of final grant.

(i) Parties holding controlling interests in SMR licensees that conflict with the attribution threshold or geographic overlap limitations set forth in this section will be considered to have come into compliance if they have submitted to the Commission an application for assignment of license or transfer of control of the SMR licensee (see § 90.158 of this chapter) by which, if granted, such parties no longer would have an attributable interest in the SMR license. If no such assignment or transfer application is tendered to the Commission within ninety (90) days of final grant, the Commission may consider the short-form certification and the long-form divestiture statement to be material, bad faith misrepresentations and shall invoke the condition on the PCS license, cancelling it automatically, shall retain all monies paid to the Commission, and, based on the facts presented, shall take any other action it may deem appropriate. Divestiture may be to an interim trustee if a buyer has not been secured in the required period of time, as long as the applicant has no interest in or control of the trustee, and the trustee may dispose of the license as it sees fit.

(ii) Where parties to broadband PCS applications hold less than controlling (but still attributable) interests in SMR licensee(s), they shall submit, within ninety (90) days of final grant, a certification that the applicant and all parties to the application have come into compliance with the limitations on spectrum aggregation set forth in this section.

**Note 1 to § 20.6:** For purposes of the ownership attribution limit, all ownership interests in operations that serve at least 10 percent of the population of the PCS service area should be included in determining the extent of a PCS applicant's cellular or SMR ownership.

**Note 2 to § 20.6:** When a party owns an attributable interest in more than one cellular or SMR system that overlaps a PCS service area, the total population in the overlap area will apply on a cumulative basis.

## PART 22—PUBLIC MOBILE RADIO SERVICE

1. The authority citation for Part 22 is revised to read as follows:

**Authority:** 47 U.S.C. 154, 303, and 332, unless otherwise noted.

**§ 22.105 [Amended.]**

2. In § 22.105, Table B–1 is amended by removing the number 401 in the "Form Number" column and, in its place, adding the number 600 in the "Form Number".

3. The following sections of part 22 are amended by removing the term "FCC Form 401" and adding, in its place, the term "FCC Form 600":

(a) 22.115(a)(2);
(b) 22.137(c)(1)(ii);
(c) 22.142(c), introductory text, and (d) introductory text;
(d) 22.357, introductory text;
(e) 22.411(d)(1);
(f) 22.413(b)(1);
(g) 22.415(b)(1);
(h) 22.417(b)(1);
(i) 22.507;
(j) 22.529(a), introductory text and (b) introductory text;
(k) 22.531(c);
(l) 22.709(b), introductory text;
(m) 22.803(a), introductory text, and (b) introductory text;
(n) 22.911(b), introductory text;
(o) 22.929(a), introductory text, and (b), introductory text;
(p) 22.941(c);
(q) 22.947(b), introductory text; and
(r) 22.953(a)(2)(iii).

4. Section 22.131 is revised to read as follows:

**§ 22.131 Procedures for mutually exclusive applications.**

Two or more pending applications are mutually exclusive if the grant of one application would effectively preclude the grant of one or more of the others under Commission rules governing the Public Mobile Services involved. The Commission uses the general procedures in this section for processing mutually exclusive applications in the Public Mobile Services. Additional specific procedures are prescribed in the subparts of this part governing the individual Public Mobile Services (see §§ 22.509, 22.717, and 22.949) and in part 1 of this chapter.

(a) *Separate applications.* Any applicant that files an application knowing that it will be mutually exclusive with one or more applications should not include in the mutually exclusive application a request for other channels or facilities that would not, by themselves, render the application mutually exclusive with those other applications. Instead, the request for such other channels or facilities should be filed in a separate application.

(b) *Filing groups.* Pending mutually exclusive applications are processed in filing groups. Mutually exclusive applications in a filing group are given concurrent consideration. The Commission may dismiss as defective (pursuant to § 22.128) any mutually exclusive application(s) whose filing date is outside of the date range for inclusion in the filing group. The types of filing groups used in day-to-day application processing are specified in paragraph (c)(3) of this section. A filing group is one of the following types:

(1) *Renewal filing group.* A renewal filing group comprises a timely-filed application for renewal of an authorization and all timely-filed mutually exclusive competing applications (see § 22.145).

(2) *Same-day filing group.* A same-day filing group comprises all mutually exclusive applications whose filing date is the same day, which is normally the filing date of the first-filed application(s).

(3) *Thirty-day notice and cut-off filing group.* A 30-day notice and cut-off filing group comprises mutually exclusive applications whose filing date is no later than thirty (30) days after the date of the Public Notice listing the first-filed application(s) (according to the filing dates) as acceptable for filing.

(4) *Window filing group.* A window filing group comprises mutually exclusive applications whose filing date is within an announced filing window. An announced filing window is a period of time between and including two specific dates, which are the first and last dates on which applications (or amendments) for a particular purpose may be accepted for filing. In the case

of a one-day window, the two dates are the same. The dates are made known to the public in advance.

(c) *Procedures.* Generally, the Commission may grant one application in a filing group of mutually exclusive applications and dismiss the other application(s) in the filing group that are excluded by that grant, pursuant to § 22.128.

(1) *Selection methods.* In selecting the application to grant, the Commission may use competitive bidding, random selection, or comparative hearings, depending upon the type of applications involved.

(2) *Dismissal of applications.* The Commission may dismiss any application in a filing group that is defective or otherwise subject to dismissal under § 22.128, either before or after employing selection procedures.

(3) *Type of filing group used.* Except as otherwise provided in this part, the type of filing group used in the processing of two or more mutually exclusive applications depends upon the purpose(s) of the applications.

(i) If one of the mutually exclusive applications is a timely-filed application for renewal of an authorization, a renewal filing group is used.

(ii) If any mutually exclusive application filed on the earliest filing date is an application for modification and none of the mutually exclusive applications is a timely-filed application for renewal, a same-day filing group is used.

(iii) If all of the mutually exclusive applications filed on the earliest filing date are applications for initial authorization, a 30-day notice and cut-off filing group is used, except that, for Phase I unserved area applications in the Cellular Radiotelephone Service, a one-day window filing group is used (see § 22.949).

(4) *Disposition.* If there is only one application in any type of filing group, the Commission may grant that application and dismiss without prejudice any mutually exclusive applications not in the filing group. If there is more than one mutually exclusive application in a filing group, the Commission disposes of these applications as follows:

(i) *Applications in a renewal filing group.* All mutually exclusive applications in a renewal filing group are designated for comparative consideration in a hearing.

(ii) *Applications in a 30-day notice and cut-off filing group.*

(A) If all of the mutually exclusive applications in a 30-day notice and cut-off filing group are applications for initial authorization, and none is an application for facilities in the Rural Radiotelephone Service, the Commission shall administer competitive bidding procedures in accordance with subpart Q of part 1 of this chapter. After such procedures, the application of the successful bidder may be granted and the other applications may be dismissed without prejudice.

(B) If any of the mutually exclusive applications in a 30-day notice and cut-off filing group is an application for modification or an application for facilities in the Rural Radiotelephone Service, the Commission may attempt to resolve the mutual exclusivity by facilitating a settlement between the applicants. If a settlement is not reached within a reasonable time, the Commission may designate all applications in the filing group for comparative consideration in a hearing. In this event, the result of the hearing disposes of all the applications in the filing group.

(iii) *Applications in a same-day filing group.* If there are two or more mutually exclusive applications in a same-day filing group, the Commission may attempt to resolve the mutual exclusivity by facilitating a settlement between the applicants. If a settlement is not reached within a reasonable time, the Commission may designate all applications in the filing group for comparative consideration in a hearing. In this event, the result of the hearing disposes of all of the applications in the filing group.

(iv) *Applications in a window filing group.* Applications in a window filing group are processed in accordance with the procedures for a 30-day notice and cut-off filing group in paragraph (c)(4)(ii) of this section.

(d) *Terminology.* For the purposes of this section, terms have the following meanings:

(1) The *filing date* of an application is the date on which that application was received in a condition acceptable for filing or the date on which the most recently filed major amendment to that application was received, whichever is later, excluding major amendments in the following circumstances:

(i) The major amendment reflects only a change in ownership or control found by the Commission to be in the public interest;

(ii) The major amendment as received is defective or otherwise found unacceptable for filing; or

(iii) The application being amended has been designated for hearing and the Commission or the presiding officer accepts the major amendment.

(2) An *application for initial authorization* is:

(i) Any application requesting an authorization for a new system or station;

(ii) Any application requesting authorization for an existing station to operate on an additional channel, unless the additional channel is for paired two-way radiotelephone operation, is in the same frequency range as the existing channel(s), and will be operationally integrated with the existing channel(s) such as by trunking;

(iii) Any application requesting authorization for a new transmitter at a location more than 2 kilometers (1.2 miles) from any existing transmitters of the applicant licensee on the requested channel or channel block; or

(iv) Any application to expand the CGSA of a cellular system (as defined in § 22.911), except during the five-year build-out period.

(3) An *application for modification* is any application other than an application for initial authorization or renewal.

5. Section 22.301 is revised to read as follows:

**§ 22.301 Station inspection.**

Upon reasonable request, the licensee of any station authorized in the Public Mobile Services must make the station and station records available for inspection by authorized representatives of the Commission at any reasonable hour.

6. Section 22.313 is amended by revising paragraph (a)(4), adding a new paragraph (a)(5), and revising paragraphs (b) and (c) to read as follows:

**§ 22.313 Station identification.**

* * * * *

(a) * * *

(4) Rural subscriber stations using Basic Exchange Telephone Radio Systems in the Rural Radiotelephone Service; or

(5) Nationwide network paging stations operating on 931 MHz channels.

(b) For all other stations in the Public Mobile Services, station identification must be transmitted each hour within five minutes of the hour, or upon completion of the first transmission after the hour. Transmission of station identification may be temporarily delayed to avoid interrupting the continuity of any public communication in progress, provided that station identification is transmitted at the conclusion of that public communication.

(c) Station identification must be transmitted by telephony using the English language or by telegraphy using the international Morse code, and in a

form that can be received using equipment appropriate for the modulation type employed, and understood without the use of unscrambling devices, except that, alternatively, station identification may be transmitted digitally, provided that the licensee provides the Commission with information sufficient to decode the digital transmission to ascertain the call sign. Station identification comprises transmission of the call sign assigned by the Commission to the station, however, the following may be used in lieu of the call sign.

(1) For transmission from subscriber operated transmitters, the telephone number or other designation assigned by the carrier, provided that a written record of such designations is maintained by the carrier;

(2) For general aviation airborne mobile stations in the Air-Ground Radiotelephone Service, the official FAA registration number of the aircraft;

(3) For stations in the Paging and Radiotelephone Service, a call sign assigned to another station within the same system.

7. Section 22.357 is revised to read as follows:

**§ 22.357 Emission types.**

Any authorized station in the Public Mobile Services may transmit any emission type provided that the resulting emission complies with the appropriate emission mask. See §§ 22.359 and 22.917.

8. A new § 22.509 is added to read as follows:

**§ 22.509 Procedures for mutually exclusive applications in the Paging and Radiotelephone Service.**

Mutually exclusive applications in the Paging and Radiotelephone Service, including those that are mutually exclusive with applications in the Rural Radiotelephone Service, are processed in accordance with § 22.131 and with this section.

(a) Applications in the Paging and Radiotelephone Service may be mutually exclusive with applications in the Rural Radiotelephone Service if they seek authorization to operate facilities on the same channel in the same area, or the technical proposals are otherwise in conflict. See § 22.567.

(b) A modification application in either service filed on the earliest filing date may cause all later-filed mutually exclusive applications of any type in either service to be "cut off" (excluded from a same-day filing group) and dismissed, pursuant to § 22.131(c)(3)(ii) and § 22.131(c)(4).

(c) Competitive bidding will not be used as a selection procedure for any filing group that contains one or more applications for facilities in the Rural Radio Service. If a settlement between the applicants cannot be reached in a reasonable time, the applications may be designated for comparative consideration in a hearing. See § 22.13(c)(4)(ii).

**§ 22.541 [Removed]**

9. Section 22.541 is removed.

10. Section 22.717 is revised to read as follows:

**§ 22.717 Procedure for mutually exclusive applications in the Rural Radiotelephone Service.**

Mutually exclusive applications in the Rural Radiotelephone Service, including those that are mutually exclusive with applications in the Paging and Radiotelephone Service, are processed in accordance with § 22.131 and with this section. (a) Applications in the Rural Radiotelephone Service may be mutually exclusive with applications in the Paging and Radiotelephone Service if they seek authorization to operate facilities on the same channel in the same area, or the technical proposals are otherwise in conflict. See § 22.567.

(b) A modification application in either service filed on the earliest filing date may cause all later-filed mutually exclusive applications of any type in either service to be "cut off" (excluded from a same-day filing group) and dismissed, pursuant to § 22.131(c)(3)(ii) and § 22.131(c)(4).

(c) Competitive bidding will not be used as a selection procedure for any filing group that contains one or more applications for facilities in the Rural Radio Service. if a settlement between the applicants cannot be reached in a reasonable time, the applications may be designated for comparative consideration in a hearing. See § 22.131(c)(4)(ii).

11. Section 22.949 is amended by revising paragraph (a)(2), adding a NOTE following paragraph (a)(2), revising the introductory text of paragraph (b), and revising paragraphs (b)(2), (c), (d)(1) and (d)(3), to read as follows:

**§ 22.949 Unserved area licensing process.**

* * * * *

(a) * * *

(2) Only one Phase I initial application is granted on each channel block in each market. Consequently, whenever two or more acceptable Phase I initial applications are timely filed in the same market on the same channel block, such Phase I initial applications are mutually exclusive, regardless of any other considerations such as the technical proposals. In order to determine which of such mutually exclusive Phase I initial applications to grant, the Commission administers competitive bidding procedures in accordance with subpart Q of part 1 of this chapter. After such procedures, the application of the winning bidder may be granted and the applications excluded by that grant may be dismissed without prejudice.

**Note:** Notwithstanding the provisions of § 22.949(a)(2), mutually exclusive Phase I initial applications that were filed between March 10, 1993 and July 25, 1993, inclusive, are to be included in a random selection process, following which the selected application may be granted and the applications excluded by that grant may be dismissed without prejudice.

* * * * *

(b) *Phase II.* Phase II is an on-going filing process that allows eligible parties to apply for any unserved areas that may remain in a market after the Phase I process is complete.

* * * * *

(2) There is no limit to the number of Phase II applications that may be granted on each channel block in each market. Consequently, Phase II applications are mutually exclusive only if the proposed CGSAs would overlap. Mutually exclusive applications are processed using the general procedures in § 22.131.

* * * * *

(c) *Settlements among mutually exclusive applicants.* Settlements among some, but not all, applicants with mutually exclusive applications for unserved areas (partial settlements) are prohibited. Settlements among all applicants with mutually exclusive applications (full settlements) are allowed and must be filed no later than fifteen (15) business days before the competitive bidding procedure is scheduled to take place.

(d) * * *

(1) The Commission will not accept amendments (of any type) to mutually exclusive Phase I applications prior to the conclusion of the competitive bidding process.

* * * * *

(3) Minor amendments required by § 1.65 of this chapter must be filed no later than thirty (30) days after public notice announcing the results of the competitive bidding process.

## PART 24—PERSONAL COMMUNICATIONS SERVICES

1. The authority citation for part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309, and 332, unless otherwise noted.

2. The following sections of part 24 are amended by removing the term "FCC Form 401" and adding, in its place, the term "FCC Form 600":

(a) 24.307;
(b) 24.406(b);
(c) 24.409(b);
(d) 24.413(a), introductory text;
(e) 24.426(a);
(f) 24.427(b);
(g) 24.707;
(h) 24.806(b);
(i) 24.809(b);
(j) 24.813(a), introductory text;
(k) 24.826(a); and
(l) 24.827(b).

## PART 90—PRIVATE LAND MOBILE RADIO SERVICES

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

Authority: Sections 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. Section 90.5 is amended by redesignating paragraphs (h) through (k) as paragraphs (i) through (l) and adding a new paragraph (h) to read as follows:

### § 90.5 Other applicable rule parts.

* * * * *

(h) Part 20 of this chapter contains rules relating to commercial mobile radio services.

* * * * *

3. Section 90.75 is amended by revising paragraph (a), introductory text, and the third sentence of paragraph (c)(10) to read as follows:

### § 90.75 Business Radio Service.

(a) *Eligibility.* Persons primarily engaged in any of the following activities are eligible to hold authorizations in the Business Radio Service to provide commercial mobile radio service as defined in part 20 of this chapter or to operate stations for transmission of communications necessary to such activities of the licensee:

* * * * *

(c) * * *

(10) * * * Licensees may provide one-way paging communications on this frequency to individuals, persons eligible for licensing under subpart B, C, D, or E of this part, to representatives of Federal Government agencies, and foreign governments and their representatives.

* * * * *

4. Section 90.115 is revised to read as follows:

### § 90.115 Foreign government and alien eligibility.

(a) No station authorization in the radio services governed by this part shall be granted to or held by a foreign government or its representative.

(b) No station authorization in the radio services governed by this part shall be granted to or held by an entity providing or seeking to provide commercial mobile radio services (except such entities meeting the requirements of § 20.9(c) of this chapter) if such entity is:

(1) An alien or the representative of any alien;

(2) A corporation organized under the laws of any foreign government;

(3) A corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

(4) A corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

5. Section 90.119 is revised to read as follows:

### § 90.119 Application forms.

The following application forms shall be used—

(a) Form 600 shall be used to apply:

(1) For new base, fixed, or mobile station authorizations governed by this part.

(2) For system authorizations, where the system meets the requirements of § 90.117.

(i) Application for a radio system may be submitted on a single Form 600.

(ii) If the control station(s) will operate on the same frequency as the mobile station, and if the height of the control station(s) antenna(s) will not exceed 6.1 meters (20 feet) above ground or an existing man-made structure (other than an antenna structure), there is no limit on the number of such stations which may be authorized. Appropriate items on Form 600 shall be completed showing the frequency, the station class, the total number of control stations, the emission, and the output power of the highest powered control station. Applicants for all control stations in the 470–512 MHz band must furnish the information requested in the relevant items in Form 600.

(3) For modification or for modification and renewal of an existing authorization. See § 90.135.

(4) For the Commission's consent to the assignment of an authorization to another person or entity, except for authorization to provide commercial mobile radio service. In addition, the application shall be accompanied by a letter from the assignor setting forth his or her desire to assign all right, title, and interest in and to such authorization, stating the call sign and location of the station, and stating that the assignor will submit his or her current station authorization for cancellation upon completion of the assignment. Form 1046 may be used in lieu of this letter.

(5) For reinstatement of an expired license. See also paragraphs (b)(1) and (e) of this section.

(b) Form 405–A shall be used to:

(1) Apply for license reinstatement or renewal if the reinstatement or renewal does not involve the modification of the station or system license.

(2) Notify the Commission of a change in the licensee's name or mailing address that occurs during the license term. See § 90.135(b).

(3) Notify the Commission that the licensee has discontinued station operation and wishes to cancel the license. See § 90.157.

(c) Form 490 shall be used whenever it is proposed that a licensee for a commercial mobile radio service in this part change, as by transfer of stock ownership, the control of a corporate licensee or for the Commission's consent to an assignment of an authorization to another person or entity.

(d) Form 572, Temporary Permit to Operate a Part 90 Radio Station, should be properly executed if the applicant is eligible and desires to operate his or her station pending the processing of his or her formal application. See also §§ 90.159, and 90.657.

(e) Form 574–R shall be used to apply for renewal of an existing authorization and may be used to apply for reinstatement of an expired license, if the renewal or reinstatement does not involve the modification of the station or system license. (Form 574–R is generated by the Commission and mailed to the licensee prior to the expiration of the license term.)

6. Section 90.131 is amended by adding introductory text before paragraph (a) to read as follows:

**§ 90.131 Amendment or dismissal of applications.**

This rule governs all applications relating to radio services in this part, including applications filed by entities meeting the requirements of § 20.9(c) of this chapter, except applications concerning facilities used to provide commercial mobile radio services, which are governed by § 90.161.

* * * * *

7. Section 90.135 is amended by revising paragraph (c) to read as follows:

**§ 90.135 Modification of license.**

* * * * *

(c) Unless specifically exempted in § 90.175, requests for modifications listed in paragraph (a) of this section must be submitted on Form 600 to the applicable frequency coordinator.

* * * * *

8. Section 90.145 is amended by revising the first sentence of paragraph (c) and adding paragraphs (d) and (e) to read as follows:

**§ 90.145 Special temporary authority.**

* * * * *

(c) Requests for special temporary authority to operate as a private mobile radio service provider for periods exceeding 180 days require evidence of frequency coordination.* * *

(d) A request for special temporary authority to operate a commercial mobile radio facility under this part may be granted without being listed in a Public Notice, or prior to thirty (30) days after such listing, if:

(1) The STA is to be valid for thirty (30) days or less and the applicant does not plan to file an application for regular authorization of the subject operation;

(2) The STA is to be valid for sixty (60) days or less, pending the filing of an application for regular authorization of the subject operation;

(3) The STA is to allow interim operation to facilitate completion of authorized construction or to provide substantially the same service as previously authorized; or

(4) The STA is made upon a finding that there are extraordinary circumstances requiring operation in the public interest and that delay in the institution of such service would seriously prejudice the public interest.

(e) The Commission may grant STAs to operate a commercial mobile radio facility for a period not to exceed one hundred eighty (180) days under the provisions of Section 309(f) of the Communications Act of 1934, as amended, 47 U.S.C. 309(f), if extraordinary circumstances so require, and pending the filing of an application for regular operation. The Commission may grant extensions for an additional period of up to one hundred eighty (180) days, but the applicant must show that extraordinary circumstances warrant such an extension.

9. Section 90.149 is amended by revising paragraph (a) to read as follows:

**§ 90.149 License term.**

(a) Licenses for stations authorized under this part will be issued for a term not to exceed five (5) years from the date of the original issuance, modification, or renewal, except that the license term for stations licensed as commercial mobile radio service on 220–222 MHz, 929–930 MHz paging, Business Radio, and SMR frequencies shall be ten (10) years. Licensees shall have an additional thirty (30) days after the expiration of the license term to apply for reinstatement of expired licenses.

* * * * *

10. Section 90.153 is amended by adding a last sentence to the existing paragraph, and adding paragraphs (a), (b), (c) and (d) to read as follows:

**§ 90.153 Transfer or assignment of station authorization.**

* * * The assignee is responsible for ascertaining that the station facilities are and will remain in compliance with the terms and conditions of the authorization to be assigned.

(a) *Application required.* The assignor or transferor of a commercial mobile radio license under this part must file an application for approval of assignment or transfer of control (Commission Form 490). In the case of involuntary assignment, such application must be filed no later than thirty (30) days after the event causing the assignment. The assignee or transferee must file a report qualifying it as a commercial mobile radio provider (Commission Form 430) unless a current report is already on file with the Commission.

(b) *Notification of completion.* Assignments and transfers of control of commercial mobile radio licenses must be completed within sixty (60) days of Commission approval. The assignee or transferee must notify the Commission by letter of the date of completion of the assignment or transfer of control. If an assignment or transfer of control is not completed within this time, the assignor or transferor must so notify the Commission by letter, and the assignee or transferee must submit the authorization(s) to the Commission for cancellation or request an extension of time to complete the assignment or transfer of control. If the assignment or transfer of control is not completed, the authorization(s) remain with the assignor or transferor.

(c) *Partial assignment of authorization.* If the authorization for some, but not all, of the facilities of a commercial mobile radio station is assigned to another party, voluntarily or involuntarily, such action is a partial assignment of authorization.

(1) To request Commission approval of a partial assignment of authorization, the following must be filed in addition to the forms required by paragraph (a) of this section:

(i) The assignor must notify the Commission (Commission Form 600) of the facilities to be deleted from its authorization upon completion of the assignment.

(ii) The assignee must apply for authority (Commission Form 600) to operate a new station including the facilities for which authorization is assigned, or to modify the assignee's existing station to include the facilities for which authorization was assigned.

(2) Partial assignments must be completed within sixty (60) days of Commission approval. If an approved partial assignment is not completed within this time, the assignor must notify the Commission (Commission Form 600), and the assignee must submit the authorization(s) to the Commission for cancellation or request an extension of time to complete the assignment. If the assignment is not completed, the authorization(s) remain with the assignor.

(d) *Limitations.* The Commission may deny applications for assignment of authorization or consent to transfer of control of a commercial mobile radio license if:

(1) The Commission is unable to make the public interest determinations required under the Communications Act with respect to both parties to the assignment or transfer; or

(2) The authorization was obtained for the principal purpose of speculation or profitable resale, rather than provision of commercial mobile radio services to the public.

11. Section 90.155 is amended by revising paragraph (a) to read as follows:

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

(a) All stations authorized under this part, except stations authorized in the 220–222 MHz, 929–930 MHz paging, Business Radio, and SMR services, and except as provided in paragraph (b) of this section and in §§ 90.629 and

90.631(f), must be placed in operation within eight (8) months from the date of grant or the authorization cancels automatically and must be returned to the Commission. For stations authorized to 220–222 MHz, 929–930 MHz paging, Business Radio, and SMR licensees, see § 90.167.

* * * * *

12. Section 90.159 is amended by revising the first sentence in paragraphs (a), (b), and (c) to read as follows:

**§ 90.159 Temporary and conditional permits.**

(a) An applicant for a license under this part (other than a commercial mobile radio license) utilizing an already licensed facility may operate the radio station(s) for a period of up to one hundred eighty (180) days under a temporary permit evidenced by a properly executed temporary license certificate (Form 572) after submitting or filing a formal application for station license in accordance with § 90.127, provided that all the antennas employed by control stations are 6.1 meters (20 feet) or less above ground or 6.1 meters (20 feet) or less above a man-made structure other than an antenna tower to which it is affixed. * * *

(b) An applicant proposing to operate a new land mobile station or modify an existing station below 470 MHz or in the one-way paging 929–930 MHz band (other than a commercial mobile radio service applicant or licensee on these bands) that is required to submit a frequency recommendation pursuant to paragraphs (a) through (e) of § 90.175 may operate the proposed station during the pendency of its application for a period of up to one hundred eighty (180) days under a conditional permit upon the filing of a properly completed formal application that complies with § 90.127 if the application is accompanied by evidence of frequency coordination in accordance with §§ 90.175 and 90.176, and provided that the following conditions are satisfied: * * *

(c) An applicant proposing to operate an itinerant station or an applicant seeking the assignment of authorization or transfer of control of a license for an existing station below 470 MHz or in the 929–930 MHz band (other than a commercial mobile radio service applicant or licensee on these bands) may operate the proposed station during the pendency of the application for a period not to exceed one hundred eighty (180) days under a conditional permit upon the filing of a properly completed formal application that complies with § 90.127. * * *

* * * * *

13. Part 90 is amended by adding a center heading and a note after § 90.159 to read as follows:

**Special Rules Governing Facilities Used To Provide Commercial Mobile Radio Services**

**Note:** The following rules (§ 90.160 through § 90.169) govern applications, licensing, and operation of radio facilities in the 220–222 MHz (subpart T), Business Radio (Subpart D), 929–930 MHz Paging (subpart P), and Specialized Mobile Radio (Subpart S) services that are used to provide commercial mobile radio services (see §§ 20.3 and 20.9 of this chapter). Compliance with the rules relating to applications and licensing of facilities on paging-only channels in the Business Radio Service (see § 90.75(c)(10)) and 929–930 MHz paging channels (see § 90.494(a),(b)) is not required prior to August 10, 1996. Compliance with Section 90.168 is also not required prior to August 10, 1996 for reclassified commercial mobile radio service providers who are to be regulated as private carriers until August 10, 1996 as provided in the Second Report and Order in GN Docket No. 93–252, 9 FCC Rcd 2348 (1994), paras. 280–284. The licensing and operation of radio facilities in the 220–222 MHz (Subpart T), Business Radio (Subpart D), 929–930 MHz Paging (Subpart P), and Specialized Mobile Radio (Subpart S) services that are used to provide commercial mobile radio services are also subject to rules elsewhere in this part that apply generally to Private Land Mobile Radio Services. In the case of any conflict between rules set forth in §§ 90.160 through 90.169 and other rules in this part, §§ 90.160 through 90.169 apply.

14–23. New §§ 90.160 through 90.169 are added to subpart G to read as follows:

**§ 90.160 Public notice.**

Periodically, the Commission will issue Public Notices listing major filings and other information of public significance concerning commercial mobile radio services licensed under this part. Categories of Public Notice listings are as follows:

(a) *Accepted for filing.* Acceptance for filing of all applications and major amendments thereto.

(b) *Actions.* Commission actions on pending applications previously listed as accepted for filing.

(c) *Informative listings.* Information that the Commission, in its discretion, believes to be of public significance. Such listings do not create any rights to file oppositions or other pleadings.

**§ 90.161 Amendment or dismissal of applications.**

(a) *Amendment.* Pending applications concerning facilities for providing commercial mobile radio services may be amended as a matter of right if such applications have not been designated for hearing or listed in a Public Notice for a random selection or competitive bidding process, except as provided in paragraphs (a)(1) and (a)(2) of this section. If a petition to deny or other formal objection has been filed, a copy of any amendment (or other filing) must be served on the petitioner. If the Commission has issued a Public Notice stating that the application appears to be mutually exclusive with another application (or applications), a copy of any amendment (or other filing) must be served on any such mutually exclusive applicant (or applicants).

(1) Amendments to applications that resolve mutual exclusivity may be filed at any time, subject to the requirements of § 90.162.

(2) Amendments to applications designated for hearing may be allowed by the presiding officer and amendments to applications selected in a random selection process may be allowed by the Commission for good cause shown. In such instances, a written petition demonstrating good cause must be submitted and served upon the parties of record.

(b) *Dismissal.* The Commission may dismiss any application for authorization, assignment of authorization, or consent to transfer of control of a commercial mobile radio facility.

(1) Upon request by the applicant; Any applicant may request that its application be returned or dismissed. A request for the return of an application after it has been listed on Public Notice as tentatively accepted for filing is considered to be a request for dismissal of that application without prejudice.

(i) If the applicant requests dismissal of its application with prejudice, the Commission will dismiss the application with prejudice.

(ii) If the applicant requests dismissal of its application without prejudice, the Commission will dismiss that application without prejudice, unless

(A) The application has been designated for comparative hearing;

(B) It has been selected in a random selection process; or

(C) It is an application for which the applicant submitted the winning bid in a competitive bidding process. If the applicant requests dismissal of its application for which it submitted the winning bid in a competitive bidding process, the Commission will dismiss that application with prejudice. If the applicant requests dismissal of its application after that application has been designated for comparative hearing or selected in a random selection process, it may submit a written petition requesting that the dismissal be without prejudice. Such petition must demonstrate good cause, comply with § 90.162 of this part, and be served upon

all parties of record. The Commission may grant such petition and dismiss the application without prejudice or deny the petition and dismiss the application with prejudice.

(2) If the application is untimely filed; The Commission may dismiss without prejudice any application that is prematurely or filed late, including any application filed prior to the opening date or after the closing date of a filing window, or after the cut-off date for a mutually exclusive application filing group.

(3) If the application is mutually exclusive with another application that is selected or granted in accordance with the rules in this part; The Commission may dismiss any mutually exclusive application:

(i) For which the applicant did not submit the winning bid in a competitive bidding process;

(ii) That is included in a random selection process but is not granted; or

(iii) That receives comparative consideration in a hearing but is not granted by order of the presiding officer.

(4) For failure to prosecute; The Commission may dismiss applications for failure of the applicant to prosecute or for failure of the applicant to respond substantially within a specified time period to official correspondence or requests for additional information. Such dismissal will generally be without prejudice if the failure to prosecute or respond occurred prior to designation of the application for comparative hearing or prior to selection of the application in a random selection process, but may be with prejudice in cases of non-compliance with § 90.162. Dismissal will generally be with prejudice if the failure to prosecute or respond occurred after designation of the application for comparative hearing or after selection of the application in a random selection process. The Commission may dismiss applications with prejudice for failure of the applicant to comply with requirements related to a competitive bidding process.

(5) If the requested spectrum is not available; The Commission may dismiss any application that requests spectrum which is unavailable because:

(i) It was previously assigned to another licensee on an exclusive basis or cannot be assigned to the applicant without causing interference; or

(ii) Reasonable efforts have been made to coordinate the proposed facility with foreign administrations under applicable international agreements, and an unfavorable response (harmful interference anticipated) has been received.

(6) If the application is found to be defective. Such dismissal may be "without prejudice," meaning that the Commission may accept from the applicant another application for the same purpose at any later time, or "with prejudice," meaning that the Commission will not accept from the applicant another application for the same purpose for a period of one year following the date of the dismissal action taken by the Commission. Unless otherwise provided in this part, a dismissed application will not be returned to the applicant. The Commission may dismiss without prejudice applications that it finds to be defective. An application for authorization or assignment of authorization is defective if:

(i) It is unsigned or incomplete with respect to required answers to questions, informational showings, or other matters of a formal character; or

(ii) It requests an authorization that would not comply with the Commission's Rules and does not contain a request for waiver of these rule(s), or in the event that the Commission denies such a waiver request, does not contain an alternative proposal that fully complies with the rules.

**§ 90.162 Agreements to dismiss applications, amendments, or pleadings.**

(a) Parties that have filed an application concerning facilities used to provide commercial mobile radio services that is mutually exclusive with one or more other applications, and then enter into an agreement to resolve the mutual exclusivity by withdrawing or requesting dismissal of the application or an amendment thereto, must obtain the approval of the Commission. Parties that have filed or threatened to file a petition to deny, informal objection, or other pleading against a pending application, and then seek to withdraw or request dismissal of, or refrain from filing, the petition, either unilaterally or in exchange for a financial consideration, must obtain the approval of the Commission.

(b) The party withdrawing or requesting dismissal of its application, petition to deny, informal objection, or other pleading, or refraining from filing a pleading, must submit to the Commission a request for approval of the withdrawal or dismissal, a copy of any written agreement related to the withdrawal or dismissal, and an affidavit setting forth:

(1) A certification that neither the party nor its principals has received or will receive any money or other consideration in excess of the legitimate and prudent expenses incurred in preparing and prosecuting the application, petition to deny, informal objection, or other pleading in exchange for the withdrawal or dismissal of the application, petition to deny, informal objection, or other pleading, or threat to file a pleading, except that this provision does not apply to dismissal or withdrawal of applications pursuant to bona fide merger agreements:

(2) The exact nature and amount of any consideration received or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement; and

(4) The terms of any oral agreement related to the withdrawal or dismissal of the application, petition to deny, informal objection, or other pleading or threat to file a pleading.

(c) In addition, within five (5) days of the filing date of the applicant's or petitioner's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(1) A certification that neither the applicant nor its principals has paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the petitioner in exchange for withdrawing or dismissing the application, petition to deny, informal objection, or other pleading; and

(2) The terms of any oral agreement relating to the withdrawal or dismissal of the application, petition to deny, informal objection, or other pleading.

(d) No person shall make or receive any payments in exchange for withdrawing a threat to file or refraining from filing a petition against an application. For purposes of this section, reimbursement by an applicant of the legitimate and prudent expenses of a potential petitioner or objector, incurred reasonably and directly in preparing to file a petition to deny, will not be considered to be payment for refraining from filing a petition to deny or an informal objection. Payments made directly to a potential petitioner or objector, or a person related to a potential petitioner or objector, to implement non-financial promises are prohibited unless specifically approved by the Commission.

(e) For purposes of this section:

(1) Affidavits filed pursuant to this section must be executed by the filing party, if an individual, a partner having personal knowledge of the facts, if a partnership, or an officer having personal knowledge of the facts, if a corporation or association.

(2) Applications, petitions to deny, informal objections, and other pleadings are deemed to be pending before the

Commission from the time the application or petition to deny is filed with the Commission until such time as an order of the Commission granting, denying, or dismissing the application, petition to deny, informal objection, or other pleading is no longer subject to reconsideration by the Commission or to review by any court.

(3) "Legitimate and prudent expenses" are those expenses reasonably incurred by a party in preparing to file, filing, prosecuting and/or settling its application, petition to deny, informal objection, or other pleading for which reimbursement is sought.

(4) "Other consideration" consists of financial concessions, including, but not limited to, the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

**§ 90.163 Petitions to deny, responsive pleadings.**

Petitions to deny any major filing concerning facilities used to provide commercial mobile radio services may be filed by parties able to demonstrate standing to file such petitions. Responsive pleadings to such petitions may be filed in accordance with the provisions of this section.

(a) *Content and requirements.* Petitions to deny and responsive pleadings must:

(1) Clearly identify the pertinent major filing(s);

(2) Comply with all applicable requirements of §§ 1.41 through 1.52 of this chapter;

(3) Contain specific allegations of fact which, except for facts of which official notice may be taken, are supported by affidavit of a person or persons with personal knowledge thereof, and which are sufficient to demonstrate that the petitioner (or respondent) is a party in interest and that a grant or other Commission action regarding the major filing would be inconsistent with the public interest;

(4) Be filed within 30 days after the date of the Public Notice listing the major filing; and

(5) Contain a certificate of service showing that a copy has been mailed to the applicant no later than the date of filing with the Commission.

(b) *Expansion.* Petitions to deny a major amendment to an application may raise only matters directly related to the major amendment that could not have been raised in connection with the application as originally filed. This paragraph does not apply to petitioners who gain standing because of the major amendment.

(c) *Dismissal.* The Commission may, by letter, dismiss any petition to deny a major filing if the petition does not comply with the requirements of this section or § 90.161. The reason(s) for the dismissal must be stated in the letter. When a petition to deny is dismissed, any related responsive pleadings also are dismissed.

**§ 90.164 Classification of filings as major or minor.**

Applications and amendments to applications are classified as major or minor when such filings concern facilities used to provide commercial mobile radio services. Categories of major and minor filings are listed in section 309 of the Communications Act of 1934, as amended (47 U.S.C. 309). In general, a major filing is a request for a Commission action that has the potential to affect parties other than the applicant. The following are major filings:

(a) *Initial station authorization.* Filings for an initial authorization as defined in § 90.165(d)(2) are major.

(b) *Ownership or control change.* Filings are major if they specify a substantial change in beneficial ownership or control (de jure or de facto), unless such change is involuntary or if the filing merely amends an application to reflect a change in ownership or control that has already been approved by the Commission.

(c) *Renewal.* Applications for renewal of authorizations are major.

(d) *Environmental.* Filings are major if they request authorization for a facility that would have a significant environmental effect, as defined by §§ 1.1301 through 1.1319 of this chapter.

(e) In the Specialized Mobile Radio Service, in addition to filings listed in paragraphs (a) through (d) of this section, filings are major if they:

(1) Request a change in frequency;

(2) Request an authorization that would increase the effective radiated power or antenna height above average terrain in any azimuth from an existing transmitter authorized to the filer;

(3) Request an authorization that would relocate an existing fixed transmitter;

(4) Amend a pending application to change a requested frequency;

(5) Amend a pending application in a way that would increase the proposed effective radiated power or antenna height above average terrain in any azimuth from an existing transmitter authorized to the filer;

(6) Amend a pending application to change the location of a fixed transmitter from that previously proposed in the application; or

(7) Amend a pending application for which pre-filing coordination was required to change the technical proposal substantially from that which was coordinated with other users.

**§ 90.165 Procedures for mutually exclusive applications.**

Mutually exclusive commercial mobile radio service applications are processed in accordance with the rules in this section, except for mutually exclusive applications for licenses in the 220–220 MHz service and the 929–930 MHz Paging service, which are processed in accordance with the rules in subpart P and subpart T of this part.

Two or more pending applications are mutually exclusive if the grant of one application would effectively preclude the grant of one or more of the others under Commission rules governing the services involved.

(a) *Separate applications.* Any applicant that files an application knowing that it will be mutually exclusive with one or more applications should not include in the mutually exclusive application a request for other channels or facilities that would not, by themselves, render the application mutually exclusive with those other applications. Instead, the request for such other channels or facilities should be filed in a separate application.

(b) *Filing groups.* Pending mutually exclusive applications are processed in filing groups. Mutually exclusive applications in a filing group are given concurrent consideration. The Commission may dismiss as defective (pursuant to § 90.162) any mutually exclusive applications(s) whose filing date is outside of the date range for inclusion in the filing group. The types of filing groups used in day-to-day application processing are specified in paragraph (c)(3) of this section. A filing group is one of the following types:

(1) *Renewal filing group.* A renewal filing group comprises a timely-filed application for renewal of an authorization and all timely-filed mutually exclusive competing applications.

(2) *Same-day filing group.* A same-day filing group comprises all mutually exclusive applications whose filing date is the same day, which is normally the filing date of the first-filed applications(s).

(3) *Thirty-day notice and cut-off filing group.* A 30-day notice and cut-off filing group comprises mutually exclusive applications whose filing date is no later

than thirty (30) days after the date of the Public Notice listing the first-filed application(s) (according to the filing dates) as acceptable for filing.

(4) *Window filing group.* A window filing group comprises mutually exclusive applications whose filing date is within an announced filing window. An announced filing window is a period of time between and including two specific dates, which are the first and last dates on which applications (or amendments) for a particular purpose may be accepted for filing. In the case of a one-day filing window, the two dates are the same. The dates are made known to the public in advance.

(c) *Procedures.* Generally, the Commission may grant one application in a filing group of mutually exclusive applications and dismiss the other application(s) in the filing group that are excluded by the grant, pursuant to § 90.162.

(1) *Selection methods.* In selecting the application to grant, the Commission may use competitive bidding, random selection, or comparative hearings, depending on the type of applications involved.

(2) *Dismissal of applications.* The Commission may dismiss any application in a filing group that is defective or otherwise subject to dismissal under § 90.162, either before or after employing selection procedures.

(3) *Type of filing group used.* Except as otherwise provided in this part, the type of filing group used in processing of two or more mutually exclusive applications depends on the purpose(s) of the applications.

(i) If one of the mutually exclusive applications is a timely-filed application for renewal of an authorization, a renewal filing group is used.

(ii) If any mutually exclusive application filed on the earliest filing date is an application for modification and none of the mutually exclusive applications is a timely-filed application for renewal, a same-day filing group is used.

(iii) If all of the mutually exclusive applications filed on the earliest filing date are applications for initial authorization, a 30-day notice and cut-off filing group is used.

(4) *Disposition.* If there is only one application in any type of filing group, the Commission may grant that application and dismiss without prejudice any mutually exclusive applications not in the filing group. If there is more than one mutually exclusive application in a filing group, the Commission disposes of these applications as follows:

(i) Applications in a renewal filing group. All mutually exclusive applications in a renewal filing group are designated for comparative consideration in a hearing.

(ii) Applications in a 30-day notice and cut-off filing group.

(A) If all of the mutually exclusive applications in a 30-day notice and cut-off filing group are applications for initial authorization, the Commission administers competitive bidding procedures in accordance with subpart Q of part 1 of this chapter. After such procedures, the application of the successful bidder may be granted and the other applications may be dismissed without prejudice.

(B) If any of the mutually exclusive applications in a 30-day notice and cut-off filing group is an application for modification or an application for facilities, the Commission may attempt to resolve the mutual exclusivity by facilitating a settlement between the applicants. If a settlement is not reached within a reasonable time, the Commission may designate all applications in the filing group for comparative consideration in a hearing. In this event, the result of the hearing disposes all of the applications in the filing group.

(iii) Applications in a same-day filing group. If there are two or more mutually exclusive applications in a same-day filing group, the Commission may attempt to resolve the mutual exclusivity by facilitating a settlement between the applicants. If a settlement is not reached within a reasonable time, the Commission may designate all applications in the filing group for comparative consideration in a hearing. In this event, the result of the hearing disposes all of the applications in the filing group.

(iv) Applications in a window filing group. Applications in a window filing group are processed in accordance with the procedures for a 30-day notice and cut-off filing group in paragraph (c)(4)(ii) of this section.

(d) *Terminology.* For the purposes of this section, terms have the following meanings:

(1) The "filing date" of an application is the date on which that application was received in a condition acceptable for filing or the date on which the most recently filed major amendment to that application was received, whichever is later, excluding major amendments in the following circumstances:

(i) The major amendment reflects only a change in ownership or control found by the Commission to be in the public interest;

(ii) The major amendment as received is defective or otherwise found unacceptable for filing; or

(iii) The application being amended has been designated for hearing and the Commission or the presiding officer accepts the major amendment.

(2) An "application for initial authorization" is:

(i) Any application requesting an authorization for a new system or station;

(ii) Any application requesting authorization for an existing station to operate on an additional channel, unless the additional channel is for paired two-way radiotelephone operation, is in the same frequency range as the existing channel(s), and will be operationally integrated with the existing channel(s) such as by trunking; or

(iii) any application requesting authorization for a new transmitter at a location more than 2 kilometers (1.2 miles) from any existing transmitters of the applicant licensee on the requested channel or channel block.

(3) An "application for modification" is any application other than an application for initial authorization or renewal.

**§ 90.166 Grants of applications.**

Applications for a commercial mobile radio service authorization under this part may be granted thirty (30) days after the issuance date of a Pubic Notice listing an application or the latest filed major amendment thereto as acceptable for filing.

(a) *Criteria for grants.* The Commission grants applications without a hearing if, after examination of the application and consideration of any petitions or other pleadings and of such other matters as it may officially notice, the Commission finds that:

(1) A grant will serve the public interest, convenience, and necessity;

(2) There are no substantial and material questions of fact presented;

(3) The applicant is eligible and qualified under applicable Commission regulations and policies;

(4) The application is acceptable for filing, and complies with the Commission rules and other applicable requirements;

(5) The application has not been designated for a hearing after being selected in a random selection process;

(6) There are no applications entitled to comparative consideration with the application being granted; and

(7) Operation of the proposed station would not cause interference to any authorized station(s).

(b) *Grant of petitioned applications.* The Commission may grant, without a

formal hearing, applications against which petitions to deny have been filed. If any petition(s) to deny are pending (*i.e.*, have not been dismissed pursuant to § 90.161 or withdrawn by the petitioner) when an application is granted, the Commission shall deny the petition(s) and issue a concise statement of the reason(s) for the denial, disposing of all substantive issues raised in the petitions.

(c) *Partial and conditional grants.* The Commission may grant applications in part, and/or subject to conditions other than those normally applied to authorizations of the same type. When the Commission does this, it will inform the applicant of the reasons therefor. Such partial or conditional grants are final unless the Commission revises its action in response to a petition for reconsideration. Such petitions for reconsideration must be filed by the applicant within thirty days after the date of the letter or order stating the reasons for the partial or conditional grant, and must reject the partial or conditional grant and return the instrument of authorization.

(d) *Designation for hearing.* The Commission may designate applications for a hearing, specifying with particularity the matters in issue, if, after consideration of the application, any petitions or other pleadings, and other matters which it may officially notice, the Commission is unable to make one or more of the findings listed in paragraph (a) of this section. The Commission may grant, deny, or take other action with respect to applications designated for a hearing.

**§ 90.167 Time in which a station must commence service.**

(a) Unless otherwise specified in this part, all 220–222 MHz, private carrier paging, Business Radio, and SMR licensees must commence service within twelve (12) months from the date of grant or the authorization cancels automatically and must be returned to the Commission.

(b) For purposes of this section, a station licensed to provide commercial mobile radio service is not considered to have commenced service unless it provides service to at least one unaffiliated party.

(c) Application for extension of time to commence service may be made on Commission Form 600. Extensions of time must be filed prior to the expiration of the construction period. Extensions will be granted only if the licensee shows that the failure to commence service is due to causes beyond his or her control. No extensions will be granted for delays caused by lack of financing, lack of site availability, for the assignment or transfer of control of an authorization, or for failure to timely order equipment. If the licensee orders equipment within 90 days of the license grant, a presumption of due diligence is created.

(d) An application for modification of an authorization (under construction) at the existing location does not extend the initial construction period. If additional time to commence service is required, a request for such additional time must be submitted on Commission Form 600, either separately or in conjunction with the submission of the Commission Form 600 requesting modification.

**§ 90.168 Equal employment opportunities.**

Commercial Mobile Radio Services licensees shall afford equal opportunity in employment to all qualified persons, and personnel must not be discriminated against in employment because of sex, race, color, religion, or national origin.

(a) *Equal employment opportunity program.* Each licensee shall establish, maintain, and carry out a positive continuing program of specific practices designed to assure equal opportunity in every aspect of employment policy and practice.

(1) Under the terms of its program, each licensee shall:

(i) Define the responsibility of each level of management to insure a positive application and vigorous enforcement of the policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance.

(ii) Inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and enlist their cooperation.

(iii) Communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to sex, race, color, religion or national origin, and solicit their recruitment assistance on a continuing basis.

(iv) Conduct a continuing campaign to exclude every form of prejudice or discrimination based upon sex, race, color, religion, or national origin, from the licensee's personnel policies and practices and working conditions.

(v) Conduct a continuing review of job structure and employment practices and adopt positive recruitment, training, job design and other measures needed in order to insure genuine equality of opportunity to participate fully in all organizational units, occupations and levels of responsibility.

(2) The program must reasonably address specific concerns through policies and actions as set forth in this paragraph, to the extent that they are appropriate in consideration of licensee size, location and other factors.

(i) To assure nondiscrimination in recruiting.

(A) Posting notices in the licensee's offices informing applicants for employment of their equal employment rights and their right to notify the Equal Employment Opportunity Commission (EEOC), the Federal Communications Commission (Commission), or other appropriate agency. Where a substantial number of applicants are Spanish-surnamed Americans, such notice should be posted in both Spanish and English.

(B) Placing a notice in bold type on the employment application informing prospective employees that discrimination because of sex, race, color, religion, or national origin is prohibited, and that they may notify the EEOC, the Commission, or other appropriate agency if they believe they have been discriminated against.

(C) Placing employment advertisements in media which have significant circulation among minority groups in the recruiting area.

(D) Recruiting through schools and colleges with significant minority group enrollments.

(E) Maintaining systematic contacts with minority and human relations organizations, leaders and spokespersons to encourage referral of qualified minority or female applicants.

(F) Encouraging present employees to refer minority or female applicants.

(G) Making known to the appropriate recruitment sources in the employer's immediate area that qualified minority members are being sought for consideration whenever the licensee hires.

(ii) To assure nondiscrimination in selection and hiring.

(A) Instructing employees of the licensee who make hiring decisions that all applicants for all jobs are to be considered without discrimination.

(B) Where union agreements exist, cooperating with the union or unions in the development of programs to assure qualified minority persons or females of equal opportunity for employment, and including an effective nondiscrimination clause in new or renegotiated union agreements.

(C) Avoiding use of selection techniques or tests that have the effect of discriminating against minority groups or females.

(iii) To assure nondiscriminatory placement and promotion.

(A) Instructing employees of the licensee who make decisions on placement and promotion that minority employees and females are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed to determine whether this results from discrimination.

(B) Giving minority groups and female employees equal opportunity for positions which lead to higher positions. Inquiring as to the interest and skills of all lower-paid employees with respect to any of the higher-paid positions, followed by assistance, counseling, and effective measures to enable employees with interest and potential to qualify themselves for such positions.

(C) Reviewing seniority practices to insure that such practices are nondiscriminatory and do not have a discriminatory effect.

(D) Avoiding use of selection techniques or tests that have the effect of discriminating against minority groups or females.

(iv) to assure nondiscrimination in other areas of employment practices.

(A) Examining rates of pay and fringe benefits for present employees with equivalent duties and adjusting any inequities found.

(B) Providing opportunity to perform overtime work on a basis that does not discriminate against qualified minority groups or female employees.

(b) *EEO statement.* Each licensee having sixteen (16) or more full-time employees shall file with the Commission, no later than May 31st following the grant of that licensee's first Commercial Mobile Radio Services authorization, a statement describing fully its current equal employment opportunity program, indicating specific practices to be followed in order to assure equal employment opportunity on the basis of sex, race, color, religion, or national origin in such aspects of employment practices as regards recruitment, selection, training, placement, promotion, pay, working conditions, demotion, layoff, and termination. Any licensee having sixteen (16) or more full-time employees that changes its existing equal employment opportunity program shall file with the Commission, no later than May 31st thereafter, a revised statement reflecting the change(s).

**Note:** Commercial mobile radio service licensees having sixteen (16) or more full-time employees that do not have a current EEO statement on file with the Commission as of January 2, 1995, must file the statement required by this paragraph no later than May 31, 1995.

(c) *Report of complaints filed against licensees.* Each licensee, regardless of how many employees it has, shall submit an annual report to the Commission no later than May 31st of each year indicating whether any complaints regarding violations by the licensee or equal employment provisions of Federal, State, Territorial, or local law have been filed before anybody having competent jurisdiction.

(1) The report should state the parties involved, the date filing, the courts or agencies before which the matters have been heard, the appropriate file number (if any), and the respective disposition or current status of any such complaints.

(2) Any licensee who has filed such information with the EEOC may file a notification of such filing with the Commission in lieu of a report.

(d) *Complaints of violations of Equal Employment Programs.* Complaints alleging employment discrimination against a common carrier licensee are considered by the Commission in the following manner:

(1) If a complaint raising an issue of discrimination is received against a licensee who is within the jurisdiction of the EEOC, it is submitted to that agency. The Commission maintains a liaison with that agency that keeps the Commission informed of the disposition of complaints filed against common carrier licensees.

(2) Complaints alleging employment discrimination against a common carrier licensee who does not fall under the jurisdiction of the EEOC but is covered by appropriate enforceable State law, to which penalties apply, may be submitted by the Commission to the respective State agency.

(3) Complaints alleging employment discrimination against a common carrier licensee who does not fall under the jurisdiction of the EEOC or an appropriate State law, are accorded appropriate treatment by the Commission.

(4) The Commission will consult with the EEOC on all matters relating to the evaluation and determination of compliance by the common carrier licensees with the principles of equal employment as set forth herein.

(5) Complaints indicating a general pattern of disregard of equal employment practices which are received against a licensee that is required to file an employment report to the Commission under § 1.815(a) of this chapter are investigated by the Commission.

(e) *Commission records.* A copy of every annual employment report, equal employment opportunity program statement, reports on complaints regarding violation of equal employment provisions of Federal, State, Territorial, or local law, and copies of all exhibits, letters, and other documents filed as part thereof, all amendments thereto, all correspondence between the licensee and the Commission pertaining to the reports after they have been filed and all documents incorporated therein by reference, are open for public inspection at the offices of the Commission.

(f) *Licensee records.* Each licensee required to file annual employment reports (pursuant to § 1.815(a) of this chapter), equal employment opportunity program statements, and annual reports on complaints regarding violations of equal employment provisions of Federal, State, Territorial, or local law shall maintain for public inspection a file containing a copy of each such report and copies of all exhibits, letters, and other documents filed as part thereto, all correspondence between the licensee and the Commission pertaining to the reports after they have been filed and all documents incorporated therein by reference. The documents must be retained for a period of two (2) years.

### § 90.169 Construction prior to grant of application.

Applicants may construct facilities prior to grant of their applications, subject to the provisions of this section, but must not operate such facilities until the Commission grants an authorization. If the conditions stated in this section are not met, applicants must not begin to construct facilities.

(a) *When applicants may begin construction.* An applicant may begin construction of a facility thirty-five (35) days after the date of the Public Notice listing the application for that facility as acceptable for filing.

(b) *Notification to stop.* If the Commission for any reason determines that construction should not be started or should be stopped while an application is pending, and so notifies the applicant, orally (followed by written confirmation) or in writing, the applicant must not begin construction or, if construction has begun, must stop construction immediately.

(c) *Assumption of risk.* Applicants that begin construction pursuant to this section before receiving an authorization do so at their own risk and have no recourse against the United States for any losses resulting from:

(1) Applications that are not granted;

(2) Errors or delays in issuing Public Notices;

(3) Having to alter, relocate, or dismantle the facility; or

(4) Incurring whatever costs may be necessary to bring the facility into compliance with applicable laws, or Commission rules and orders.

(d) *Conditions.* Except as indicated, all pre-grant construction is subject to the following conditions:

(1) The application is not mutually exclusive with any other application;

(2) No petitions to deny the application have been filed;

(3) The application does not include a request for a waiver of one or more Commission rules;

(4) For any construction or alteration that would exceed the requirements of § 17.7 of this chapter, the licensee has notified the appropriate Regional Office of the Federal Aviation Administration (FAA Form 7460–1), filed a request for antenna height clearance and obstruction marking and lighting specifications (FCC Form 854) with the Commission;

(5) The applicant has indicated in the application that the proposed facility would not have a significant environmental effect, in accordance with §§ 1.1301 through 1.1319 of this chapter; and,

(6) Under applicable international agreements and rules in this part, individual coordination of the proposed channel assignment(s) with a foreign administration is not required.

24. Section 90.179 is amended by adding a new paragraph (g) to read as follows:

**§ 90.179 Shared use of radio stations.**

* * * * *

(g) The provisions of this section do not apply to licensees authorized to provide commercial mobile radio service under this part.

25. Section 90.403 is amended by revising paragraph (c) to read as follows:

**§ 90.403 General operating requirements.**

* * * * *

(c) Except for stations that have been granted exclusive channels under this part and that are classified as commercial mobile radio service providers pursuant to part 20 of this chapter, each licensee must restrict all transmissions to the minimum practical transmission time and must employ an efficient operating procedure designed to maximize the utilization of the spectrum.

* * * * *

26. Section 90.405 is amended by revising paragraph (b) to read as follows:

**§ 90.405 Permissible communications.**

* * * * *

(b) The provisions contained in paragraph (a) of this section do not apply where a single base station licensee has been authorized to use a channel above 470 MHz on an exclusive basis, or to stations licensed under this part that are classified as CMRS providers under part 20 of this chapter.

27. Section 90.415 is amended by revising paragraph (b) to read as follows:

**§ 90.415 Prohibited uses.**

* * * * *

(b) Render a communications common carrier service, except for stations in the Special Emergency Radio Service providing communications standby facilities under § 90.49, operational fixed stations licensed in the Railroad Radio Service handling public telegraph messages as agents of telegraph common carriers in those instances where such public telegraph service cannot be provided through other railroad facilities, and stations licensed under this part in the SMR, private carrier paging, Business Radio, or 220–222 MHz services.

28. Section 90.425 is amended by adding paragraph (e) to read as follows:

**§ 90.425 Station identification.**

* * * * *

(e) Special provisions for stations licensed under this part that are classified as CMRS providers under part 20 of this chapter.

(1) Station identification will not be required for 929–930 MHz nationwide paging licensees and MTA-based SMR licensees. All other CMRS stations will be required to comply with the station identification requirements of paragraphs (a) through (d) of this section.

(2) CMRS stations subject to a station identification requirement will be permitted to use a single call sign for commonly owned facilities that are operated as part of a single system. The call sign must be transmitted each hour within five minutes of the hour, or upon completion of the first transmission after the hour.

(3) CMRS stations granted exclusive channels may transmit their call signs digitally. The station licensee must provide the Commission with information sufficient to decode the digital transmission to ascertain the transmitted call sign.

29. Section 90.437 is amended by revising paragraphs (b) and (c) to read as follows:

**§ 90.437 Posting station licenses.**

* * * * *

(b) Entities authorized under this part must make available either a clearly legible photocopy of the authorization for each base or fixed station at a fixed location at every control point of the station or an address or location where the current authorization may be found.

(c) Entities operating under a temporary permit authorized in accordance with § 90.159 shall post an executed copy of the Form 572 at every control point of the system or an address or location where the current executed copy may be found.

* * * * *

30. Section 90.449 is revised to read as follows:

**§ 90.449 Answers to official communications and notices of violation.**

(a) Licensees are required to respond to official communications with reasonable dispatch and according to the tenor of the communication. Failure to do so may be considered by the Commission to reflect adversely on a person's qualifications to hold Commission authorizations and may also create liabilities for other sanctions.

(b) Any licensee receiving official notice of a violation of the terms of the Communications Act of 1934, as amended, any legislative act or treaty to which the United States is a party, or the rules and regulations of the Commission, shall, within ten (10) days from such receipt or such other period as may be specified by the Commission, send a written answer to the office of the Commission originating the original notice. If an answer cannot be sent, or an acknowledgement made, within such period, acknowledgement and answer shall be made at the earliest practicable date with a satisfactory explanation of the delay. The answer to each notice shall be complete in itself and shall not be abbreviated by reference to other communications or answers to other notices. The reply shall set forth the steps taken to prevent a recurrence of improper operation.

31. Section 90.476 is amended by adding paragraph (c) to read as follows:

**§ 90.476 Interconnection of fixed stations and certain mobile stations.**

* * * * *

(c) The provisions of this section do not apply to commercial mobile radio service providers, as defined in part 20 of this chapter.

32. Section 90.483 is amended by revising the introductory paragraph to read as follows:

**§ 90.483 Permissible methods and requirements of interconnecting private and public systems of communications.**

Interconnection may be accomplished by commercial mobile service providers licensed under this part by any technically feasible means. Interconnection may be accomplished by private mobile service providers either manually or automatically under the supervision and control of a transmitter control operator at a fixed position in the authorized system of communications or it may be accomplished under the supervision and control of mobile operators, and is subject to the following provisions:

* * * * *

33. Section 90.494 is amended by revising paragraph (c) to read as follows:

**§ 90.494 One-way paging operations in the 929–930 MHz band.**

* * * * *

(c) All frequencies listed in this section may be used to provide one-way paging communications to persons eligible for licensing under subpart B, C, D, or E of this part, representatives of Federal Government agencies, individuals, and foreign governments and their representatives. The provisions of § 90.173(b) apply to all frequencies listed in this section.

* * * * *

34. Section 90.603 is amended by revising paragraph (c) to read as follows:

**§ 90.603 Eligibility.**

* * * * *

(c) Any person, except wireline telephone common carriers, eligible under this part and proposing to provide on a commercial basis base station and ancillary facilities as a Specialized Mobile Radio System operator, for the use of individuals, Federal Government agencies, foreign governments and their representatives, and persons eligible for licensing under subparts B, C, D, or E of this part.

35. Section 90.607 is amended by revising the introductory text of paragraphs (b) and (c) to read as follows:

**§ 90.607 Supplemental information to be furnished by applicants for facilities under this subpart.**

* * * * *

(b) Except for applicants for SMR licenses, all applicants for conventional radio systems must:

* * * * *

(c) Except for applicants for SMR licenses, all applicants for trunked systems must:

* * * * *

36. Section 90.623 is amended by revising the introductory text of paragraph (c) to read as follows:

**§ 90.623 Limitations on the number of frequencies assignable for conventional systems.**

* * * * *

(c) No non-SMR licensee will be authorized an additional frequency pair for a conventional system within 64 kilometers (40 miles) of an existing conventional system, except where:

* * *

* * * * *

37. Section 90.627 is amended by revising the introductory text of paragraph (b), removing "; or," and adding in its place "." at the end of paragraph (b)(2) and removing paragraph (b)(3) to read as follows:

**§ 90.627 Limitation on the number of frequency pairs that may be assignable for trunked systems and on the number of trunked systems.**

* * * * *

(b) No non-SMR licensee will be authorized an additional trunked system within 64 kilometers (40 miles) of an existing trunked system, except where:

* * * * *

38. Section 90.631 is amended by revising the first sentence of paragraph (a), and revising paragraphs (b) and (c) to read as follows:

**§ 90.631 Trunked systems loading, construction, and authorization requirements.**

(a) Non-SMR trunked systems will be authorized on the basis of a loading criteria of one hundred (100) mobile stations per channel. * * *

(b) Each applicant for a non-SMR trunked system must certify that a minimum of seventy (70) mobiles for each channel authorized will be placed into operation within five (5) years of the initial license grant. Except for SMR systems licensed in the 806–821/851–866 MHz band and as indicated in paragraph (i) of this section, if at the end of five (5) years a trunked system is not loaded to the prescribed levels and all channels in the licensee's category are assigned in the system's geographic area, authorizations for trunked channels not loaded to seventy (70) mobile stations cancels automatically at a rate that allows the licensee to retain one channel for every one hundred (100) mobiles loaded, plus one additional channel. If a trunked system has channels from more than one category, General Category channels are the first channels considered to cancel automatically. All non-SMR licensees initially authorized before June 1, 1993, that are within their original license term, or SMR licensees that are within the term of a two-year authorization granted in accordance with paragraph (i) of this section, are subject to this condition. A licensee that has authorized channels cancelled due to failure to meet the above loading requirements will not be authorized additional channels to expand that same system for a period of six (6) months from the date of cancellation.

(c) Except for SMR applicants and as provided in paragraph (d) of this section, an applicant seeking to expand a trunked system by requesting additional channels from the Commission, or through intercategory sharing, or through an assignment, must have a loading level of seventy (70) mobiles per channel on the existing system that is the subject of the expansion request.

* * * * *

39. Section 90.633 is amended by revising paragraph (a), and the first sentence of paragraph (e) to read as follows:

**§ 90.633 Conventional systems loading requirements.**

(a) Non-SMR conventional systems of communication will be authorized on the basis of a minimum loading criteria of seventy (70) mobile stations for each channel authorized.

* * * * *

(e) A non-SMR licensee may apply for additional frequency pairs if its authorized conventional channel(s) is loaded to seventy (70) mobiles.* * *

* * * * *

40. Section 90.645 is amended by revising paragraph (c) to read as follows:

**§ 90.645 Permissible operations.**

* * * * *

(c) Except for licensees classified as CMRS providers under part 20 of this chapter, only for the transmission of messages or signals permitted in the services is which the participants are eligible.

* * * * *

41. Section 90.703 is amended by revising paragraph (c) to read as follows:

**§ 90.703 Eligibility.**

* * * * *

(c) Any person, except wire line telephone common carriers, eligible under this part and proposing to provide on a commercial basis base station and ancillary facilities as a Specialized Mobile Radio System operator, for the use of individuals, Federal Government agencies, foreign governments and their representatives, and persons eligible for licensing under subparts B, C, D or E of this part.

42. Section 90.733 is amended by revising paragraph (a)(3) to read as follows:

**§90.733 Permissible operations.**

(a) * * *

(3) Except for licensees classified as CMRS providers under Part 20 of this chapter, only for the transmission of messages or signals permitted in the services in which the participants are eligible.

* * * * *

[FR Doc. 94-28199 Filed 11-18-94; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 20

RIN 1018-AA24

### Migratory Bird Hunting; Early Seasons and Bag and Possession Limits for Certain Migratory Game Birds in the Contiguous United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands; Correction

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule; Correction.

**SUMMARY:** The U.S. Fish and Wildlife Service (hereinafter the Service) is correcting errors made in the September 1, 1994, **Federal Register** (59 FR 45588) on early seasons and bag and possession limits for certain migratory game birds in the contiguous United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands. Alabama erroneously selected season dates and shooting hours for mourning doves in the North Zone of September 17–October 30 and December 26–January 10 from 12 noon to sunset, and no dates for shooting hours of ½ hour before sunrise to sunset.

**EFFECTIVE DATE:** September 1, 1994.

**FOR FURTHER INFORMATION CONTACT:** Paul R. Schmidt, Chief, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, ms 634–ARLSQ, 1849 C Street, NW., Washington, DC 20240 (703) 358–1714.

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** document published on September 1, on page 45590, under Alabama, the mourning dove season dates in the North Zone are corrected to read for shooting hours of 12 noon to sunset as September 17, October 1–October 30, and December 26–January 10; and for shooting hours of ½ hour before sunrise to sunset as September 18–September 30. The daily bag and possession limit is 15.

**List of Subjects in 50 CFR Part 20**

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

Dated: November 9, 1994.

**George T. Frampton, Jr.,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 94-28700 Filed 11-18-94; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 650

[Docket No. 94111-4311; I.D. 102494B]

### Atlantic Sea Scallop Fishery

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to implement Framework Adjustment 2 to the Atlantic Sea Scallop Fishery Management Plan (FMP). This rule implements an exemption from Federal gear regulations for vessels when fishing in state waters under a state scallop management program.

**EFFECTIVE DATE:** November 16, 1994.

**ADDRESSES:** Copies of Amendment 4 to the FMP, and its regulatory impact review (RIR), initial regulatory flexibility analysis (IRFA), final supplemental environmental impact statement (FSEIS), and Framework Adjustment 2 are available from Douglas Marshall, Executive Director, New England Fishery Management Council, 5 Broadway, Saugus, MA 01906–1097.

Comments regarding the burden-hour estimates or any other aspect of the collection-of-information requirements contained in this final rule should be sent to Allen E. Peterson, Jr., Acting Regional Director, One Blackburn Drive, Gloucester, MA 01930, and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) (Attention NOAA Desk Officer), Washington, D.C. 20503.

**FOR FURTHER INFORMATION CONTACT:** Paul H. Jones, Fishery Policy Analyst, 508–281–9273.

**SUPPLEMENTARY INFORMATION:**

**Background**

Amendment 4 to the FMP was approved on November 5, 1993, and implemented on March 1, 1994. Amendment 4 changed the primary management strategy from a meat count (size) control to effort control. The FMP controls total fishing effort through limited entry and a schedule of reductions in allowable time at sea. Supplemental measures include gear restrictions, limits on the number of crew members, and vessel restrictions. There are also catch limits for vessels not in the limited access fishery and a framework procedure for adjusting all the management measures in the FMP.

This framework adjustment exempts Federal permit holders from Federal gear restrictions when fishing in state waters under a state management program that has been determined by NMFS not to jeopardize the fishing mortality/effort reduction objectives of the FMP. The principal gear restrictions from which participants in the program are exempted are minimum ring size requirements, restrictions on dredge width, the use of chafing gear, ring configuration and linkage restrictions, and restrictions on spare dredges and nets.

Current state management measures in Maine and Massachusetts and the restrictions proposed by New Hampshire have been determined by NMFS not to jeopardize the fishing mortality/effort reduction objectives of the FMP. All have restrictions that are adequate to address Federal conservation and management concerns because they have overall gear requirements that are more restrictive than Federal regulations and because they apply to scallop resources that are predominantly in state waters. Massachusetts and New Hampshire management measures, in particular, are more restrictive because both include a minimum 3¼-inch (83-mm) ring size requirement in addition to other restrictions on dredge size. The Gulf of Maine and Cape Cod stocks of sea scallops are separate from the major stocks on Georges Bank and in the Mid-Atlantic area, and therefore are not included in the rebuilding program for the fishery. Based on landings, approximately 80 percent of the Gulf of Maine fishery takes place in state waters and its management is predominately a state responsibility.

The purpose of this action is to allow Federal permit holders to compete in the state waters fishery on a more equitable basis where Federal and state laws are inconsistent and to encourage