TABLE 1.—WASTES EXCLUDED FROM NON-SPECIFIC SOURCES—Continued

Facility	Address	Waste description
		(5) *Data Submittals:* Data obtained in accordance with Condition (2)(A) must be submitted to Jewell Grubbs, Chief, RCRA Enforcement and Compliance Branch, Mail Code: 4WD–RCRA, U.S. EPA, Region 4, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, Atlanta, Georgia 30303. This submission is due no later than 60 days after filling the first roll-off box of BMW Sludge to be disposed in accordance with delisting Conditions (1) through (7) for both the test runs and again for the commencement of production. Records of analytical data from Condition (2) must be compiled, summarized, and maintained by BMW for a minimum of three years, and must be furnished upon request by EPA or the State of South Carolina, and made available for inspection. Failure to submit the required data within the specified time period or maintain the required records for the specified time will be considered by EPA, at its discretion, sufficient basis to revoke the exclusion to the extent directed by EPA. All data must be accompanied by a signed copy of the certification statement in 40 CFR 260.22(i)(12). (6) *Reopener Language:* (A) If, at any time after disposal of the delisted waste, BMW possesses or is otherwise made aware of any environmental data (including but not limited to leachate data or groundwater monitoring data) or any other data relevant to the delisted waste indicating that any constituent identified in the delisting verification testing is at a level higher than the delisting level allowed by EPA in granting the petition, BMW must report the data, in writing, to EPA within 10 days of first possessing or being made aware of that data. (B) If the testing of the waste, as required by Condition (2)(B), does not meet the delisting requirements of Condition (1), BMW must report the data, in writing, to EPA within 10 days of first possessing or being made aware of that data. (C) Based on the information described in paragraphs (6)(A) or (6)(B) and any other information received from any source, EPA will make a preliminary determination as to whether the reported information requires that EPA take action to protect human health or the environment. Further action may include suspending or revoking the exclusion, or other appropriate response necessary to protect human health and the environment. (D) If EPA determines that the reported information does require Agency action, EPA will notify the facility in writing of the action believed necessary to protect human health and the environment. The notice shall include a statement of the proposed action and a statement providing BMW with an opportunity to present information as to why the proposed action is not necessary. BMW shall have 10 days from the date of EPA's notice to present such information. (E) Following the receipt of information from BMW, as described in paragraph (6)(D), or if no such information is received within 10 days, EPA will issue a final written determination describing the Agency actions that are necessary to protect human health or the environment, given the information received in accordance with paragraphs (6)(A) or (6)(B). Any required action described in EPA's determination shall become effective immediately, unless EPA provides otherwise. (7) *Notification Requirements:* BMW must provide a one-time written notification to any State Regulatory Agency in a State to which or through which the delisted waste described above will be transported, at least 60 days prior to the commencement of such activities. Failure to provide such a notification will result in a violation of the delisting conditions and a possible revocation of the decision to delist.
*	*	* * * * * *

[FR Doc. 01–1049 Filed 2–9–01; 8:45 am]
BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 20 and 22

[WT Docket No. 01–14; FCC 01–28]

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

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, we open a proceeding to reexamine the need for Commercial Mobile Radio Services (CMRS) spectrum aggregation limits. Specifically, we seek comment on whether the CMRS spectrum cap and the cellular cross-interest rule should be eliminated, modified, or retained, based on the public interest standard set forth under section 11 of the Communications Act.

DATES: Comments are due on or before April 13, 2001 and reply comments are due on or before March 14, 2001.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Michael Rowan, Wireless Telecommunications Bureau, at (202) 418–7240.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's Notice of Proposed Rulemaking (NPRM), FCC 01–28, in WT Docket No. 01–14, adopted on January 19, 2001 and released on January 23, 2001. The full text of this NPRM is available for inspection and copying during normal

business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, NW., Washington, DC 20037. The full text may also be downloaded at: *http://www.fcc.gov.* Alternative formats are available to persons with disabilities by contacting Martha Contee at (202) 418–0260 or TTY (202) 418–2555.

Synopsis of Notice of Proposed Rulemaking

I. Introduction

1. In this Notice of Proposed Rulemaking (NPRM), we begin our reexamination of the need for Commercial Mobile Radio Services (CMRS) spectrum aggregation limits as part of our 2000 biennial regulatory review of the Commission's telecommunications regulations. Specifically, we are initiating our second comprehensive review of the two regulations that currently limit the aggregation of broadband CMRS spectrum: The CMRS spectrum cap and the cellular cross-interest rule. Pursuant to the mandate of section 11 of the Communications Act of 1934, as amended (Communications Act), 47 U.S.C. 161, we seek comment on whether competitive or other developments in CMRS markets warrant elimination or modification of one or both of these regulations.

II. Background

A. CMRS Spectrum Cap

2. The CMRS spectrum cap rule reads: ''No licensee in the broadband PCS, cellular, or SMR services (including all parties under common control) regulated as CMRS * * * shall have an attributable interest in a total of more than 45 MHz of licensed broadband PCS, cellular and SMR spectrum regulated as CMRS with significant overlap in any geographic area, except that in Rural Service Areas (RSAs), * * * no licensee shall have an attributable interest in a total of more than 55 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any RSA.'' 47 CFR 20.6(a). No more than 10 MHz is attributed to an entity when calculating Specialized Mobile Radio (SMR) spectrum under the cap.

3. Section 20.6(d) of the Commission's rules provides generally that ownership interests of 20 percent or more are deemed attributable. Once all the applicable CMRS spectrum attributable to a given entity is identified, one then determines whether the attributable CMRS spectrum serves markets having a ''significant overlap.'' 47 CFR 20.6(a), (c). When a situation involves both a PCS license and a cellular or SMR license, a significant overlap exists when 10 percent or more of the population of the designated PCS licensed service area is within the cellular geographic service area (CGSA) or SMR service area(s) in question. Where only PCS licenses are involved, however, this analysis does not apply, and any overlap between BTA-licensed and MTA-licensed spectrum is considered significant.

4. In our *First Biennial Review Order,* issued in September 1999 as part of the 1998 biennial review, we decided substantially to retain the CMRS spectrum cap (and the cellular cross-interest rule), with targeted modifications to reflect circumstances in rural areas and to permit passive institutional investors to acquire greater non-attributable interests in CMRS carriers. *See* 1998 Biennial Regulatory Review, Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98–205, *Report and Order,* 15 FCC Rcd 9219, 9249 paragraph 66 (1999) (*First Biennial Review Order*). We reaffirmed the 45 MHz limit as striking the proper balance (in non-rural areas) in providing carriers with sufficient spectrum until we could allocate additional amounts suitable for the provision of CMRS, while helping assuage the competitive consequences of the spectrum-related barriers to entry in today's CMRS markets. We concluded that a 55 MHz spectrum ceiling in RSAs recognizes the reality that higher concentration through efficiency-enhancing partnering and other arrangements is likely or inevitable in rural areas.

B. Cellular Cross-Interest Rule

5. To the extent licensees on different channel blocks have any degree of overlap between their respective CGSAs, § 22.942 of the Commission's rules prohibits any entity from having a direct or indirect ownership interest of more than 5 percent in one such licensee when it has an attributable interest in the other licensee. An attributable interest is defined generally to include an ownership interest of 20 percent or more, as well as any controlling interest. Under the rule, however, an entity may have non-controlling and otherwise non-attributable direct or indirect ownership interests of less than 20 percent in licensees for different channel blocks in overlapping CGSAs.

6. As part of our 1998 biennial review of the cellular cross-interest rule, we determined that the restriction continued to be necessary to protect against substantial anticompetitive threats from common ownership between the two cellular carriers in any given geographic area. However, because competition from other services had increased on the whole since the rule's inception in 1991, we altered what had been a near absolute bar against cross-ownership by relaxing application of the rule's attribution standards to the current limits under § 22.942.

III. Discussion

A. Section 11 Review of CMRS Spectrum Aggregation Limits

7. In passing the Telecommunications Act of 1996 to significantly amend the Communications Act, Congress anticipated that, as competition developed, market forces would reduce the need for regulation. Specifically, in adopting section 11 of the Communications Act, Congress required the Commission, every two years, to review all regulations that apply to ''the operations or activities of any provider of telecommunications service'' and to ''determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.'' 47 U.S.C. 161(a)(1), (2). If we determine that, as the result of competition in CMRS markets, certain regulations applicable to CMRS providers are no longer necessary in the public interest, then we ''shall repeal or modify'' those regulations per Congress'' mandate. 47 U.S.C. 161(b).

8. To determine whether the CMRS spectrum cap and the cellular cross-interest rule are no longer necessary in the public interest as the result of meaningful economic competition, we are here soliciting detailed comments from wireless telecommunications carriers, consumers of their services, and other interested parties on whether we should retain, repeal or modify these limits under the standards of section 11 of the Communications Act. Under section 11, our fundamental inquiry is whether, as a result of meaningful economic competition among providers of telecommunications services, spectrum aggregation limits are no longer necessary in the public interest, *e.g.,* to prevent harmful concentration of spectrum ownership or to ensure meaningful opportunities for broadband CMRS market entry. In order to make this determination, we seek comment

regarding what providers of ''telecommunications service'' fall within the purview of our section 11 analysis of our spectrum aggregation policies. What constitutes ''meaningful economic competition'' under section 11, and to what degree have the relevant competitive conditions changed since our 1998 biennial review of these rules? If meaningful competition between providers of telecommunications services now exists, have spectrum aggregation limits served their purpose and are they no longer in the public interest? Or, are there public interest reasons to retain spectrum aggregation limits notwithstanding the development of meaningful economic competition? We ask commenters to consider generally the relation between ''public interest'' and ''meaningful economic competition'' under section 11's terms. We note that we are incorporating by reference all comments on the spectrum cap that we received in our *2000 Staff Report* proceeding. *See* In the Matter of the 2000 Biennial Regulatory Review, CC Docket No. 00–175, *Report,* FCC 00–456 (rel. Jan. 17, 2001) (*2000 Staff Report*).

B. Reexamination and Public Interest Determination

9. In this review under section 11, we seek public comment and input, including the submission of specific market data and studies, to assist our public interest determination of whether the CMRS spectrum aggregation rules are no longer necessary in the public interest and, if they are necessary, whether our existing spectrum limits should be modified.

1. Development of Meaningful Economic Competition

10. Since we last reviewed spectrum aggregation limits in September 1999, CMRS markets have continued to grow in size, range of service offerings, and the pace of technological advances. In our *Fifth Annual CMRS Competition Report*, released in August 2000, we described considerable evidence that the mobile telephony market has experienced strong growth and competitive development. *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Fifth Report,* FCC 00–289 (rel. Aug. 18, 2000) (*Fifth Annual CMRS Competition Report*). For example, we reported that non-cellular carriers had for the first time attracted a majority of the industry's total new subscribers. As a result, cellular licensees' market share of mobile telephone subscribers nationwide had dropped from 86 percent at the end of 1998 to approximately 75 percent at the end of 1999. Concurrent with, and we believe largely as the result of, the continued growth of competition in the mobile telephony market, consumers have benefited from declining prices, rapidly expanding coverage areas, new service packages, and technological innovation.

11. In light of these developments in competition, we now seek comment on whether these regulations continue to serve the public interest by promoting or protecting competition in CMRS services. Will our spectrum aggregation limits continue to contribute to the rise of competition and resulting benefits to consumers, as we have found in the past, or are they no longer necessary? We seek comment regarding the correlation between the number of competitors maintained by current spectrum aggregation limits and the growth and maintenance of competition that has produced the benefits to consumers that we have observed.

12. We seek comment on whether competitive developments since 1999 have obviated the need for limits such as the spectrum cap to prevent potentially harmful reconsolidation. How valuable a role do spectrum limits play in preventing potentially harmful concentration versus allowing consolidations that benefit the public interest? In this regard, we note that spectrum aggregation limits do not appear to have prevented the consolidation of carriers into nationwide networks with the resulting beneficial service options for consumers.

13. We ask for comment on the various economic relationships on which our spectrum cap policy is based. How do recent developments affect our concern that limits were necessary in order to ensure a minimum number of competitors in any given geographic area? Should the relevant measures of market capacity (*e.g.,* assigned spectrum, subscriber shares, *etc.*) be weighted differently than in the past? What role should we continue to afford HHI calculations or similar measures of concentration of ownership or control, and what inputs should we use in calculating HHI? Should we continue to apply the cap to all broadband PCS, cellular, and SMR spectrum regulated as CMRS, regardless of the use to which the spectrum currently is dedicated; or, should we limit application of the cap to CMRS spectrum used for mobile voice service? If we were to limit the cap to mobile voice services only, how would we further and clearly define the included and excluded product markets? Also in the increasingly converging marketplace, are these product markets truly segregable? Moreover, how would such a policy affect the spectrum cap's goal to guard against excessive accumulation of CMRS spectrum? Also, how should we define the relevant geographic market, especially in light of the trend toward nationwide footprints and affiliations? Commenters should specifically address whether today's CMRS markets will enable new entrants—both existing carriers seeking to expand their footprints and firms, including small businesses, seeking to enter the market *ab initio*—to have access to the limited spectrum that is practically available today for mobile telephone services.

14. We also seek comment on the implications for our spectrum aggregation limits of our authority under section 310(d) of the Communications Act to determine that a particular consolidation is not in the public interest. If we were to eliminate or relax the spectrum cap, could we, or should we, adopt new standards or methodologies such as a processing threshold that if a proposed transaction would cause an applicant to exceed 45 MHz of covered spectrum (or some other threshold amount), it must provide an additional public interest showing meeting certain criteria (*e.g.,* HHI and/or other economic data demonstrating concentration of market)? Alternatively, would it be preferable to establish a threshold based on the number of competitors providing CMRS (or CMRS mobile voice telephony) in a geographic market? Commenters should consider the impact of any standards that will increase time and expense for small businesses, which often may not have the requisite resources for case-by-case reviews. To the extent that we decide to eliminate the spectrum cap and rely on the section 310(d) review process, we note that attribution and ownership issues could also arise outside that process if licensees are permitted to lease spectrum usage rights without prior section 310(d) approval.

15. We seek comment on the implications of other agencies' enforcement of antitrust laws for our spectrum aggregation limits and our public interest review required by section 310(d). Can we, and should we, defer to the Department of Justice (DOJ) in cases where it has entered into consent decrees with merging CMRS carriers to prevent competitive harm, and if so, what form should such deference take? For example, can we, and should we, adopt an approach such that all transfers resulting in

consolidation of spectrum below a spectrum threshold should be exempt from section 310(d) competitive analysis? Can we, and should we, eschew an independent review of the competitive implications of license transfers that are part of mergers that are subject to some specified level of DOJ review, and, if so, how should we define that level? What would be the legal and policy implications of adopting these or any alternative approaches? Do spectrum aggregation limits continue to promote other public interest goals that stress policies such as the beneficial role of market entry?

16. If we conclude that spectrum aggregation limits remain necessary at this time, we ask commenters to address whether subsequent competitive developments could obviate the need for such limits and thereby enable us to sunset these regulations. If commenters believe that a sunset provision is appropriate, we seek further comment on whether it should be tied to a specific date in the future, and how best to predict the timing of the competitive developments on which it would be based. Alternatively, we seek comment on whether a sunset should be based on the development of specified competitive conditions or other criteria, in some or all markets, regardless of when they occur.

17. We ask for comment on the potential harms or benefits of adopting limits other than the current 45/55 MHz spectrum cap thresholds. For example, assuming consolidation between broadband PCS and cellular operators, a 55 MHz cap would still ensure at least four broadband competitors under the 180 MHz of covered spectrum. However, under such a limit, it is possible that one competitor could have significantly less spectrum than the other three under current allocations. Under increased thresholds, which combinations would harm or benefit consumers?

18. We also seek comment on whether we should repeal the cellular cross-interest rule. The distinctions between cellular and PCS services appear to have decreased since our 1998 biennial review. On the other hand, most broadband PCS operators are still deploying their networks and do not yet provide facilities-based coverage comparable to the current combined nationwide cellular footprint. We therefore seek comment on whether the need for a separate cellular cross-interest rule has lessened, or whether the cellular sector may still have the potential to undermine the level of CMRS competition we have seen so far. Can we continue to make distinctions and compare competitive differences between ''cellular carriers'' and their competitors, *e.g.,* ''PCS carriers''? We ask commenters to provide empirical evidence and/or studies on the relative competitive and buildout status of cellular, SMR, and broadband PCS carriers on a market-by-market as well as comprehensive basis.

19. We also seek comment on whether the cellular cross-interest rule may still be necessary to prevent cellular carriers from merging in rural and/or certain other markets where there is limited or no competition from other CMRS providers. Could the purpose of the cross-interest rule still be served by its application in these circumstances?

20. Finally, we seek comment on whether and, if so, how our spectrum aggregation limits affect CMRS providers' ability to enter into and compete in local telecommunications markets. Since September 1999, has the spectrum cap enhanced or impeded the provision of wireless services as a competitive alternative to wireline services? How significant are the opportunity costs of dedicating broadband CMRS spectrum to mobile services when other spectrum bands are available for fixed wireless services? To the extent that incumbent licensees build networks using CMRS spectrum that are targeted mainly to particular services, are opportunities for entry and development of competition in other services limited in the short to medium term?

2. Spectrum Management and Other Regulatory Considerations

21. We must also review the CMRS spectrum aggregation rules in light of our spectrum management responsibilities, pursuant to which we issue the licenses for spectrum necessary to provide CMRS, as well as other regulatory considerations. We begin by acknowledging that, relative to demand, there is a limited amount of spectrum available that, as a practical matter, is suitable for the provision of broadband CMRS within the foreseeable future. For example, the propagation characteristics of spectrum above approximately 3 GHz make it generally unsuitable for mobile use using current technology. In addition, many bands below 3 GHz are allocated for multiple uses other than CMRS, including broadcast operations, private mobile and fixed services, and various types of satellite operations. Moreover, significant amounts of spectrum below 3 GHz are allocated for important federal government uses, such as defense, national security, law enforcement, and air traffic control. Because scarcity issues to some degree affect all users of spectrum (and, indeed, all users of any finite natural resource) and all spectrum bands, scarcity in and of itself is not sufficient to justify a limit on the aggregation of spectrum. However, significant shortages of spectrum relative to demand raise concerns, especially in service markets where there are few close non-spectrum substitutes. The scarcity of this spectrum relative to demand is evidenced by the increasing market value of broadband CMRS licenses. The Commission has found that the particular conditions that apply to broadband CMRS spectrum support the use of aggregation limits in the bands currently used for these services. In other bands, where different conditions prevail, we have taken a different approach. For instance, there are several substantial, technologically suitable bands allocated for fixed wireless services, and we do not impose any aggregation limits on such spectrum. Moreover, wireline services are for many customers close substitutes for such wireless services and so aggregation of such spectrum in a small number of licensees would not necessarily raise competitive concerns.

22. There have been a number of regulatory actions since the last biennial review that may affect our decisions here regarding CMRS spectrum aggregation limits. For example, we recently reconfigured the licenses available in the broadband PCS C and F block auction—Auction No. 35—to better enable all carriers to acquire additional CMRS spectrum in most markets without triggering any CMRS spectrum cap concerns. In addition, we decided to exclude from spectrum aggregation limits the 700 MHz bands that will be auctioned early this year. We also eliminated the separate narrowband PCS spectrum aggregation limit earlier last year.

23. Another significant regulatory consideration is spectrum efficiency. Increases in the number of competitors and the associated demand for CMRS spectrum are leading to increases in spectrum efficiency. As operators seek to increase mobile voice capacity and deploy spectrum-intensive, advanced wireless services such as high-speed Internet access and mobile video conferencing, we see the marketplace responding with technological solutions that are increasing the technical capacity of wireless networks.

24. In addition, we found in the *First Biennial Review Order* that bright-line rules like the spectrum cap and cellular cross-interest rules hold many benefits over alternative regulatory tools. In

particular, we reconfirmed that the spectrum cap would allow review of CMRS acquisitions in an administratively simple manner and lend certainty to the marketplace. We determined that bright-line rules reduce burdens placed on both the Commission and industry, especially small businesses, as well as give industry advance notice of which types of cross-ownership situations the Commission would find anticompetitive. In recognition that any bright-line test may be over-inclusive or under-inclusive in individual cases, we specifically provided that parties who believed that individualized analysis is appropriate could always request a waiver of the spectrum cap and/or cross-interest rule.

25. Choices about CMRS spectrum aggregation limits appear to involve market structure and fundamental spectrum management issues regarding this limited amount of spectrum. For example, the Commission is exploring the possible use of several frequency bands below 3 GHz to support the introduction of new advanced wireless services, including third-generation (3G) wireless systems. Accordingly, we seek comment on our above analysis of CMRS spectrum scarcity issues and its implications for our decisions on CMRS spectrum aggregation limits.

26. We seek comment on the potential efficiency benefits or costs of our spectrum aggregation limits. Have such limits provided incentives to the development and deployment of spectrum-efficient technologies that will better serve the public interest in the middle and long term? Or, would such innovation have occurred independent of our spectrum aggregation limits? In addition, do spectrum limits do more to impede the efficient development of new 3G technologies that may be spectrum-intensive in the short term?

27. We seek comment on the extent, if any, to which our regulations impede beneficial economies of scale and the introduction of innovative new technologies and services. We seek specific comment on how the decision to limit carriers' access to CMRS spectrum affects the deployment of next-generation services and the migration of 2G service providers to those services. How do aggregation limits impact the emergence of mobile Internet access and other data services? We seek comment on how to promote advanced wireless services while simultaneously ensuring that meaningful economic competition continues to develop.

28. We also seek comment on how our spectrum aggregation limits may impair potential efficiencies for all CMRS markets, including those within urban areas. We noted in 1999 that up to a point, horizontal concentration in CMRS markets may be in the public interest because it could allow efficiencies and economies that would otherwise not be achievable. In today's CMRS markets, would achieving such economies be in the public interest despite any potential increased risk of anticompetitive consolidation?

29. In discussing the availability of spectrum for advanced wireless services, commenters should address the extent to which companies' ability to use alternative spectrum—*i.e.,* spectrum outside of the broadband PCS, cellular and SMR bands subject to the cap—should affect our analysis here. To the extent that future spectrum bands like 700 MHz are not subject to the cap, does this lessen the need to increase the spectrum cap by creating opportunities for CMRS incumbents to obtain spectrum in these bands? Or, will new spectrum eliminate the access-to-spectrum barrier to entry faced by potential competitors, and thus lessen the need to maintain a spectrum cap at all?

30. Similarly, we seek comment on how to assess the treatment of newly allocated spectrum for spectrum cap purposes. As a general matter, we believe that newly available CMRS-suitable spectrum either should be excluded from the spectrum cap or, if it is included, that the cap should be adjusted accordingly. We seek comment on the factors to consider in deciding between these two options. While we will not be making specific decisions in this proceeding on what, if any, constraints ought to apply to concentration of ownership in newly available spectrum bands, we plan to consider an analytical framework to apply to such bands.

31. We also seek comment on whether the impact of the spectrum cap on development of advanced services could be adequately addressed by continuation of the waiver policy that we adopted in the *First Biennial Review Order.* Does our specific waiver process enable carriers with a demonstrable need for additional spectrum, especially for advanced wireless services, to obtain such spectrum? We request parties to provide specific evidence and concrete examples of the extent to which carriers' holdings in markets approach or are at the 45/55 MHz cap.

32. Commenters are also asked to address whether any developments in the last year should lead us to alter our determination that a bright-line approach remains preferable to exclusive reliance on case-by-case review under section 310(d). We seek comment on the extent to which our approach has benefited licensees, including licensees that are small businesses. Commenters are encouraged to provide specific examples where our aggregation limits either did or did not provide the certainty or efficiency that a particular marketplace transaction required.

33. Finally, we seek specific comment on whether we should make any fundamental changes in rural and high-cost markets, which appear not to have seen the development of competition in mobile wireless services to the degree that is evident in urban areas. We seek comment on whether increasing the existing spectrum cap last year in rural areas has had any impact on the delivery of service to rural customers in terms of prices, availability of digital services, or other factors. Should we, at a minimum, continue to retain the cellular cross-interest rule until increased PCS and other service deployments become more firmly established?

3. International Developments

34. We also wish to examine the significance for our reexamination of spectrum aggregation limits of foreign mobile licensing policies, and particularly the 3G licensing process now taking place in Europe and Asia. A recent study issued by the Organization for Economic Cooperation and Development has documented a global trend in mobile licensing policy towards increasing numbers of operators in a given market, a trend that predates the 3G licensing process. Moreover, many Western European countries are using the 3G licensing process as an opportunity to promote the development of competitive market structures.

35. European countries are able both to ensure a minimum number of competitors and to permit each provider access to more spectrum because substantially more suitable spectrum has been allocated for commercial mobile telecommunications services in Europe than in the United States. With the additional 140 to 145 MHz of spectrum that most Western European countries have allocated to licensed 3G use, the total amount of spectrum available for mobile telephony services in these countries now exceeds 180 MHz, in most cases by a wide margin. In particular, we estimate that the total amount of spectrum available for first-, second- and third-generation mobile communications services in most Western European countries is generally about 250–300 MHz, and ranges from a

high of almost 365 MHz in the United Kingdom to a low of about 187 MHz in Norway. Thus, because most European countries have allocated more total spectrum for mobile telecommunications services, they are able to allow individual carriers to acquire larger total spectrum holdings than would be permitted under our spectrum cap policy, while at the same time ensuring that there are at least four, and often more, competitors in their markets.

36. We also note that other countries limit the amount of spectrum operators can acquire in the secondary market. In the vast majority of countries, including European Union (EU) Member States, strict limits on trading of wireless licenses and/or spectrum rights render a spectrum cap largely superfluous. Apart from the United States, only a relative few countries, including Canada, Australia and New Zealand, allow spectrum licenses to be traded both in whole and in part.

37. We generally seek comment on the lessons to be learned from experience internationally. In addressing these issues, commenters should consider the significance of the differences summarized above, as well as the fact that unlike our ''flexible use'' approach in the United States, spectrum management policies abroad generally do not afford wireless operators the flexibility to deploy 3G technologies on spectrum currently licensed for 2G services.

38. We also seek comment generally on how international developments relate to the question of whether to eliminate spectrum limits to direct the course of development in U.S. CMRS markets. We note that most EU Member States have already licensed 3G spectrum or are planning to do so by the first half of 2001 to give operators sufficient lead time to plan for 3G deployment. Spectrum aggregation limits may affect U.S. development of advanced wireless services over the short term. We ask parties to comment on the trade-offs that we will face in the United States during this time. We also seek comment on whether U.S. carriers may require smaller amounts of total spectrum for 2G and 3G services than their counterparts in Europe and Asia because our policies afford U.S. carriers more flexibility with respect to spectrum use and alternative means of acquiring access to spectrum. Finally, we seek comment on whether any of the mechanisms other countries use to ensure they have an adequate number of competitors in their markets might be adapted to the U.S. market, as an alternative to our spectrum cap approach.

C. Possible Modifications to the CMRS Spectrum Cap and Cellular Cross-Interest Rule

39. In the event that we do not eliminate our spectrum aggregation limits, we also request comment on whether specific attributes of the CMRS spectrum cap and cellular cross-interest rule should be modified to allow some of the benefits that may arise from additional cross-ownership interests. Commenters should also address any possible interim modifications that would benefit the public interest in the event that we decide to sunset our spectrum aggregation limits in the future.

1. Possible Modifications to the CMRS Spectrum Cap

40. We seek comment on aspects of the CMRS spectrum cap that could be modified to increase carriers' flexibility and promote our various public policy objectives. To begin, we seek comment on the effect of recent changes in CMRS markets, particularly the emergence of broadband PCS licensees as competitors to cellular licensees, on the rationale for a 10 percent population overlap threshold. What are the public interest benefits of increasing the threshold and do those benefits outweigh any potential for reduced consumer benefits from the concentration of ownership or control of CMRS licenses?

41. We solicit comment on whether there is a mechanism for triggering the application of a spectrum cap in given geographic areas that might be superior to our current overlap standard. We ask for comment on the pros and cons of adopting a simplified overlap standard that turns on a certain allowable percentage of overlap between *licensed* service areas. For example, assuming a 10 percent threshold, one possible approach would be a standard where a PCS BTA-based license's overlap with a partitioned MTA-based license would not come under the cap if the population covered by the overlap were less than 10 percent of the total population of the PCS BTA *and* less than 10 percent of the total population of the partitioned PCS MTA. Similarly, if we were to eliminate the cellular cross-interest rule under such a standard, an A-Block cellular license's overlap in CGSA with the CGSA of a B-Block cellular license would not trigger the cap if the population covered by the overlap were less than 10 percent of the total population of the A-Block CGSA *and* less than 10 percent of the total population of the B-Block CGSA. A variation of this standard would be to exempt overlaps from the cap if the population in the overlap area were less than 10 percent of the total population of the more populous licensed service area. In addition, the threshold could be set at some level other than 10 percent. We seek comment on these and any other possible approaches.

42. We seek comment here on whether recent developments in the SMR industry warrant any modification of the special provisions for SMR overlap analysis and calculation of attributable spectrum. The original justification for the maximum attribution of 10 MHz was based on the conclusion that SMR spectrum is not equivalent to cellular or broadband PCS. We seek comment on whether the rationale for this 10 MHz limit continues in today's marketplace for broadband CMRS. For example, how have our recent auctions of SMR spectrum affected the rationale to limit the amount of SMR spectrum attributed to a carrier? Do we need to clarify our spectrum cap analysis to account for application of the cap when these auctioned geographic-based SMR licenses overlap with PCS licensed service areas? In addition, should significant recent acquisition and merger activity lead us to question the assumption that SMR spectrum is difficult to reconfigure? If we were to revise our approach to station-defined SMR spectrum, should we increase the maximum attributable amount from 10 MHz to a higher figure (*e.g.,* 15 or 20 MHz), or should we simply attribute to each carrier the actual spectrum it has in each market? If we were to adopt the latter approach, how would we determine the amount of spectrum and define the geographic area for our overlap analysis?

43. We also seek comment on whether we should modify our ownership attribution standards. Should the 20 percent general attribution standard be modified? We seek comment on the effect that a 40 percent attribution standard has had on the ability of CMRS providers to obtain capital. Have small businesses benefited from their general 40 percent attribution standard? We also seek comment on whether any of our other ownership attribution criteria should be modified. For example, are there situations proscribed by our attribution rules that do not pose a threat to competition? Should we attribute spectrum used pursuant to potential spectrum leasing arrangements, or to management and joint marketing agreements?

2. Possible Modifications to the Cellular Cross-Interest Rule

44. If we decide not to repeal the cellular cross-interest rule, we seek comment on whether we should modify the rule so that it does not apply in certain circumstances where other regulations will provide adequate safeguards. We seek comment on whether there is a need to maintain any cellular-specific restrictions in more urban areas, where there is generally a larger number of competitive choices for consumers. Although cellular providers still maintain large market shares in MSAs, would cellular/cellular combinations be more anticompetitive than cellular/PCS or PCS/PCS combinations if the cellular cross-interest rule is repealed in MSAs? Commenters should focus on whether cellular combinations would be able to sustain prices above the competitive level without reduction in market shares and explain their conclusions with specific data such as customer churn percentages and whether these are price driven, quality/coverage driven, or both.

45. Another possibility, given that cellular licensees can now disaggregate their spectrum, would be to replace the current rule with a separate cellular spectrum cap of 35 MHz (or some other amount). Under the current cross-interest rule, an entity with an attributable interest in a cellular license cannot hold a 5 percent interest in a disaggregated license for even 1 MHz of spectrum on the other channel block in an overlapping CGSA. Such a rule change would allow increased opportunities for partnering while maintaining protection against the complete consolidation of two 25 MHz cellular carriers. We ask parties to comment on any modifications necessary to permit parties to disaggregate spectrum.

46. In addition, we seek comment on the public interest benefits and/or harms of increasing the 5 percent ownership interest limit in a cellular licensee when one has a controlling or otherwise attributable interest in the other licensee in an overlapping CGSA. Although the cross-interest rule prohibits interests greater than 5 percent, our ownership disclosure standards for wireless telecommunications services only require licensees to report interests greater than 10 percent. We therefore seek comment on whether conformity between these two provisions would permit the Commission more accurately to regulate compliance with the cellular cross-interest rule.

47. We also seek comment on whether we should modify the divestiture provisions related to the cellular cross-interest rule. For example, should we revise the rule to operate similar to the spectrum cap? In contrast to the cross-interest rule, we consider parties to have come into compliance with the spectrum cap once they have submitted an application for assignment or transfer of control of sufficient spectrum to comply with the cap. Commenters are asked to address the competitive and public interest implications of harmonizing these and any other provisions of the two rules.

IV. Procedural Matters

A. Regulatory Flexibility Act

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

B. Ex Parte Rules

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

C. Filing Procedures

50. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before April 13, 2001 and reply comments on or before March 14, 2001. Comments and reply comments should be filed in WT Docket No. 01–14. All relevant and timely filings will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, interested parties must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th St., SW., Rm. TW–A325, Washington, DC 20554, with a copy to Michael J. Rowan, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th St., SW., Rm. 4A–131, Washington, DC 20554. One copy of all filings should also be sent to the Commission's copy contractor.

51. Comments may also be filed using the Commission's Electronic Comment Filing System (ECFS). Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Generally, only one copy of an electronic submission must be filed. Parties may also submit an electronic comment by Internet E-Mail. To obtain filing instructions for E-Mail comments, commenters should send an E-mail to ecfs@fcc.gov, and should include the following words in the body of the message: ''get form (your E-Mail address).'' A sample form and directions will be sent in reply. Or you may obtain a copy of the ASCII Electronic Transmittal Form (FORM–ET) at *http://www.fcc.gov/e-file/email.html.*

52. Comments and reply comments will be available for public inspection during regular business hours at the FCC Reference Information Center, Rm. CY–A257, at the Federal Communications Commission, 445 12th St., SW., Washington, DC 20554. Copies of comments and reply comments are available through the Commission's duplicating contractor: International Transcription Service, Inc. (ITS, Inc.), 1231 20th Street, NW., Washington, DC 20037, (202) 857–3800.

V. Initial Regulatory Flexibility Analysis

53. As required by the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et. seq.,* the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and proposals in this Notice of Proposed Rulemaking (NPRM), WT Docket No. 01–14. Written public comments are requested on this IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the rest of this NPRM, as set forth above, and they must have a separate and distinct heading designating them as responses to the IRFA.

A. Need for, and Objectives of, the Proposed Rules

54. As part of our biennial regulatory review, pursuant to section 11 of the Communications Act, we solicit

comment on whether we should retain, modify, or eliminate the commercial mobile radio services (CMRS) spectrum cap. We also seek comment on whether we should retain, modify, or repeal the cellular cross-interest rule. In asking these questions, the NPRM looks at recent competitive changes in CMRS markets, reexamines the public interest objectives that the spectrum limits are designed to achieve, and asks whether there are alternatives to the existing rules that avoid any potential public interest costs. It seeks comment on how international trends and developments in the marketplace since the completion of our last biennial review in September 1999 may affect our analysis. The NPRM discusses reliance on case-by-case analysis of the potential competitive effects of a proposed spectrum holding pursuant to section 310(d) of the Communications Act as one potential alternative to the current rules, and it discusses possible modifications to the spectrum cap and cross-interest rules. These include, among other things: (1) increasing the amount of spectrum that a single entity may hold in a given geographic area beyond 45/55 MHz; (2) modifying the spectrum cap's 10 percent population overlap threshold and/or attribution rules; (3) eliminating or modifying the rule that limits attributable Specialized Mobile Radio (SMR) spectrum to 10 MHz; (4) altering the cellular cross-interest rule's provisions as they relate to disaggregation of spectrum and/or post-licensing divestiture; and (5) modifying the ownership attribution standards under both rules. Through the process of seeking public comment and collecting data, we hope to assess the impact of recent competitive trends, international developments, and spectrum management and other regulatory considerations.

B. Legal Basis

55. The potential actions on which comment is sought in this NPRM would be authorized under sections 1, 4(i), 11, 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 161, 303(g), and 303(r).

C. Description and Estimate of the Small Entities Subject to the Rules

56. The RFA requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the Agency certifies that ''the rule will not, if promulgated, have a significant impact on a substantial number of small entities.'' *See* 5 U.S.C. 603(b)(3). The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. This IRFA describes and estimates the number of small-entity licensees that may be affected if the proposals in this NPRM are adopted.

57. This NPRM could result in rule changes that, if adopted, would affect small businesses that currently are or may become licensees in the cellular, broadband Personal Communications Services (PCS) and/or SMR services.

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

59. *Broadband Personal Communications Service (PCS).* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined ''small entity'' for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional classification for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These regulations defining ''small entity'' in the context of broadband PCS auctions have been approved by the SBA. No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders initially won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission reauctioned 347 C, D, E, and F Block licenses; there were 48 small business winning bidders. Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks plus the 48 winning bidders in the re-auction, for a total of approximately 231 small entity PCS providers as defined by the SBA and the Commission's auction rules. In addition, the Commission anticipates that a total of 422 licenses will be auctioned in the broadband PCS reauction of the C & F Blocks that began December 12, 2000. Therefore, we conclude that the number of additional C & F Block broadband PCS licensees that may ultimately be affected by these proposals could be as many as 422.

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

December 8, 1997. Ten (10) winning bidders for geographic area licenses for the upper 200 channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard.

61. The lower 230 channels in the 800 MHz SMR band are divided between General Category channels (the upper 150 channels) and the lower 80 channels. The auction of the 1,053 800 MHz SMR geographic area licenses (1,050—800 MHz licenses for the General Category channels, and 3—800 MHz licenses for the upper 200 channels from a previous auction) for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. At the close of the auction, 1,030 licenses were won by bidders. Eleven (11) winning bidders for geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. The auction of the 2,800 800 MHz SMR geographic area licenses for the lower 80 channels of the 800 MHz SMR service began on November 1, 2000, and was completed on December 5, 2000. Nineteen (19) winning bidders for geographic area licenses for the lower 80 channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. In addition, there are numerous incumbent site-by-site SMR licensees on the 800 and 900 MHz bands. The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to firms that had revenues of no more than $15 million in each of the three previous calendar years.

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

62. This NPRM neither proposes nor anticipates any additional reporting, recordkeeping or other compliance measures.

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

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

64. In our September 1999 *First Biennial Review Order,* we concluded that retention of the CMRS spectrum cap and cellular cross-interest rule serves the public interest. We found that the benefits of these bright-line rules in addressing concerns about increased spectrum aggregation continued to make these approaches preferable to exclusive reliance on case-by-case review under section 310(d). By setting bright lines for permissible ownership interests, we found that the rules continued to benefit both the telecommunications industry and subscribers, including small businesses, by providing regulatory certainty and facilitating more rapid processing of transactions. Specifically, we noted that case-by-case review is especially expensive and time-consuming for small businesses, which often do not have the requisite resources.

65. In our 2000 biennial regulatory review pursuant to section 11, we here reexamine our findings and determinations in September 1999. Since that time, there have been international and economic developments that have significantly affected CMRS markets. For example, consolidation within the CMRS industry in an effort to create national service footprints has tended to reduce the number of smaller entities providing broadband CMRS on a purely local level. As part of this 2000 biennial review, we seek to develop a record regarding whether the CMRS spectrum cap and cellular cross-interest rule continue to make regulatory and economic sense in CMRS markets in the current-, mid-, and long-term. In doing so, we generally request comment on whether retention, modification, or elimination of the CMRS spectrum cap and/or cellular cross-interest rule is appropriate with respect to small businesses that are licensees in the cellular, broadband PCS and/or SMR services. We seek comment on whether there continues to be a need for these rules to ensure that new entrants, including small businesses, have access to spectrum licenses both at auction and in the secondary market. We inquire whether these bright-line rules continue to create efficiencies and reduce transaction costs for small business. We consider the impact on small businesses if we were to adopt alternative approaches that rely more heavily on case-by-case review. We also seek specific comment on various aspects of these rules that particularly affect small business, such as the whether our September 1999 decision to increase attribution standards to 40 percent has benefited small businesses.

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

66. None.

VI. Ordering Clauses

67. Accordingly, *It Is Ordered,* pursuant to the authority of sections 1, 4(i), 11, 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 161, 303(g), and 303(r), that this Notice of Proposed Rulemaking is *Adopted.*

68. *It Is Further Ordered* that the Commission's Consumer Information Bureau, Reference Information Center, *Shall Send* a copy of the Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 01–3521 Filed 2–9–01; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AG38

Endangered and Threatened Wildlife and Plants; Reopening of Public Comment Period and Notice of Availability of Draft Economic Analysis for Proposed Critical Habitat Determination for the Spruce-Fir Moss Spider

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; notice of reopening of public comment period and availability of draft economic analysis.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the availability of the draft economic analysis for the proposed designation of critical habitat for the spruce-fir moss spider (*Microhexura montivaga*). We also provide notice that the public comment period for the proposal is reopened to allow all interested parties to submit written comments on the proposal and the draft economic analysis. Comments previously submitted during the comment period need not be resubmitted as they will be incorporated into the public record and