§ 3809.3–2 Noncompliance.

* * * * *

(e) An operator or mining claimant who compiles a record of noncompliance is one who has been served with a notice of noncompliance, whose response period has passed, and who has not commenced the actions required by the authorized officer within the time frames set forth in the notice of noncompliance. An operator or mining claimant with a record of noncompliance will continue in noncompliance status until the actions required in the notice of noncompliance have been completed. Any operator or mining claimant with a record of noncompliance must submit a plan of operations within 30 days under § 3809.1–9 of this subpart for all existing and subsequent operations that would otherwise be conducted pursuant to a notice under § 3809.1–3 of this subpart. Operators or mining claimants with a record of noncompliance will be required to post financial guarantees with the authorized officer under § 3809.1–9 within 90 days after notification for all existing disturbance for which said operators or mining claimants are responsible. Failure to post such financial guarantees within the prescribed 90 days will result in the withdrawal of approval of all existing plans of operation, except that the authorized officer may approve actions proposed by an operator with a record of noncompliance to resolve the cause of the noncompliance or to protect public safety or health or prevent further unnecessary or undue environmental degradation. Financial guarantees held by a State will not be acceptable for purposes of this section, and the calculation must be certified at the operator's or mining claimant's expense by a third party professional engineer registered to practice within the State in which the activities are proposed, and agreed to by the authorized officer. The requirements of this paragraph continue in force until the operator or mining claimant has come into and remained in compliance with them and the regulations of this subpart for a period of not less than 1 calendar year but not more than 3 calendar years. The duration of the requirement will be determined by the State Director.

(f)(1) Any person constituting an operator, mining claimant, or its authorized agent, who knowingly and willfully violates any provision of this subpart is subject to arrest and trial by a United States magistrate and, if convicted, shall be subject to a fine of not more than $100,000, or the alternate fine provided for in the applicable provisions of 18 U.S.C. 3571, or imprisoned for no more than twelve months, or both.

(2) Any organization constituting an operator, mining claimant, or its authorized agent, that knowingly and willfully violates any provision of this subpart is subject to criminal prosecution and, if convicted, shall be subject to a fine of not more than $200,000, or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571.

[FR Doc. 97–5016 Filed 2–27–97; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 22

[CC Docket No. 90–6; FCC 96–56]

Amendment of Part 22 of the Commission's Rules To Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and To Modify Other Cellular Rules

AGENCY: Federal Communications Commission.

ACTION: Further memorandum opinion and order on reconsideration.

SUMMARY: In this *Memorandum Opinion and Order on Reconsideration*, the Commission denies the petitions for reconsideration and petitions for partial reconsideration of the Commission's *Third Report and Order and Memorandum Opinion and Order on Reconsideration* 57 FR 53446, November 10, 1992 in this Docket.

FOR FURTHER INFORMATION CONTACT: Ramona Melson, Commercial Wireless Division, Wireless Telecommunications Bureau, (202) 418–7240.

SUPPLEMENTARY INFORMATION: This *Further Memorandum Opinion and Order on Reconsideration* in CC Docket No. 90–6, adopted on February 13, 1996 and released on January 31, 1997, is available for inspection and copying during normal business hours in the FCC Reference Center, Room 575, 2000 M Street N.W, Washington, D.C. The complete text may also be purchased from the Commission's copy contractor, International Transcription Service, Inc. 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857–3800. Synopsis of *Further Memorandum Opinion and Order on Reconsideration*

I. Introduction

1. By these actions, we respond to petitions for reconsideration and partial reconsideration of the *Third Report and Order on Reconsideration and Memorandum Opinion and Order on Reconsideration* 58 FR 27213, May 7, 1993 in this docket. Applicants Against Lottery Abuses (AALA) and the Committee for Effective Cellular Rules (CECR) have filed petitions for reconsideration of the *Third Report and Order*, 58 FR 27213, May 7, 1993 and Cellular Information Systems, Inc., Debtor in Possession (CIS), has filed a petition for partial reconsideration (CIS Petition) of the *Third Report and Order* 58 FR 27213, May 7, 1993. In addition, we have before us five petitions for reconsideration and three petitions for partial reconsideration of our *Memorandum Opinion and Order on Reconsideration* 58 FR 11799, March 1, 1993. We also received a request by PetroCom and Coastel for expedited action on the CIS petition (PetroCom/Coastel Request). For the reasons stated below, we deny the requests for reconsideration and partial reconsideration of the *Third Report and Order and the Memorandum Opinion and Order* 58 FR 27213, May 7, 1993. We dismiss the request for expedited action as moot.

2. As a related matter, we note that PetroCom and Coastel (collectively, ''petitioners'') filed petitions for review with the United States Court of Appeals for the District of Columbia Circuit challenging Sections 22.903(a) and 22.903(d)(1) of the Commission's rules. Petitioners contend, inter alia, that the Commission promulgated a consent requirement for de minimis extensions under Section 22.903(d)(1) without providing proper notice and opportunity for comment as required under the Administrative Procedure Act (APA), 5 U.S.C. § 553. On May 13, 1994, the court denied the petition with respect to petitioners' claim that proper notice and comment was not provided because another party, CIS, had already filed a petition for reconsideration with the Commission alleging similar violations and the petition had not yet been resolved. This *Further Memorandum Opinion and Order* addresses the notice and comment issues raised by the CIS petition and the comments filed by petitioners in support of the CIS petition. Other issues raised by petitioners and the court will be addressed in separate orders.

II. Background

3. The first licensee of a cellular radio system authorized on a channel block in

each cellular market is afforded a five-year ''build-out'' period during which it has the exclusive right to construct and operate cellular facilities on its channel block within the market. We initiated this proceeding to adopt rules for the acceptance, processing and selection of applications for new cellular systems proposing service to unserved areas. In our *First Report and Order and Memorandum Opinion and Order on Reconsideration* 56 FR 58503, November 20, 1991 in this docket, we established rules and procedures for processing and granting applications to operate cellular systems in areas as yet unserved upon expiration of the five-year ''build-out'' period. On the same day that we adopted the *First Report and Order* 56 FR 58503, November 20, 1991, we also adopted a *Further Notice of Proposed Rule Making* 56 FR 58529, November 20, 1991 in this docket which proposed changes to various cellular rules and requested additional comments on a number of issues, as a result of earlier comments filed in this docket and not resolved by the *First Report and Order* 56 FR 58503, November 20, 1991. On April 9, 1992, we released our *Second Report and Order* 57 FR 13646, April 17, 1992 in this docket, in which we adopted rules to determine the boundaries of Cellular Geographic Service Areas (CGSAs) by the use of a mathematical formula, with the objective of creating boundaries that would more closely approximate actual service to the public. The *Second Report and Order* 57 FR 13646, April 17, 1992 also modified the authorizations of existing cellular systems to redefine the boundaries of their CGSAs in accordance with the new standard. Our *Third Report and Order and Memorandum Opinion and Order on Reconsideration* 58 FR 27213, May 7, 1993 in this docket dealt with a variety of issues governing our licensing of cellular radio facilities, specifically those issues set forth in the *Further Notice* 56 FR 58529, November 20, 1991 not previously addressed in the *Second Report and Order* 57 FR 13646, April 17, 1992. The *Third Report and Order* 58 FR 27213, May 7, 1993 also disposed of ten petitions for reconsideration of our *First Report and Order* 56 FR 58503, November 20, 1991. Petitions for reconsideration of the *Second Report and Order* 57 FR 13646, April 17, 1992 were addressed in the 1993 *Memorandum Opinion and Order on Reconsideration* 58 FR 11799, March 1, 1993 in this docket.

III. Discussion

A. Petitions for Reconsideration of the Third Report and Order Lottery Rules

4. In the *Third Report and Order* 58 FR 27213, May 7, 1993, we adopted Sections 22.927 and 22.928 of our rules. Under these rules, an applicant or a petitioner may receive only the legitimate and prudent expenses incurred in prosecuting its application or pleading in exchange for agreeing to withdraw a mutually exclusive cellular application or a pleading. AALA argues that with a rule limiting the settlement amount that can be paid to petitioners seeking denial or dismissal of applications, the Commission should at a minimum reinstate the procedure used in the Metropolitan Statistical Area cellular licensing process for the selection and ranking of multiple selectees in cellular lotteries. AALA contends that the settlement limitations will remove all incentive for private parties to assist in checking lottery abuse. As a result, according to AALA, the rules adopted ''will deter not just frivolous petitions, but those meritorious petitions that have proven helpful to the Commission in its enforcement functions.'' AALA argues that ranking multiple selectees is the only alternative which provides the necessary incentive for private parties, through the petition to deny process, to assist the Commission in policing lottery abuses. McCaw urges the Commission to reject AALA's proposal, because history has shown that ranking lottery winners will lead to the filing of frivolous applications ''submitted by entities that figure they have nothing to lose.'' AALA responds to McCaw, contending that the settlement cap imposed on a would-be filer of a frivolous petition would ensure that the petitioner would have nothing to gain because ''the very best such a petitioner could hope for is to break even.''

5. Section 309(d) of the Communications Act provides that any party in interest may file with the Commission a petition to deny challenging the grant of an application. The petition must contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity. 47 U.S.C. § 309(d). Our obligation under the Communications Act is to provide the forum and mechanism for the filing of those petitions by parties with standing. By establishing limitations on settlements, we did not intend to encourage or discourage the filing of petitions to deny. Notwithstanding limitations on settlements, we have no basis for concluding that meritorious petitions will not continue to be filed by those parties desiring corrective or appropriate action on defective or otherwise non-grantable applications. Further, our experience with lotteries has taught us that ranking applicants for initial cellular systems encourages the filing of frivolous petitions to deny. Moreover, in the future we intend to use competitive bidding to select from among mutually exclusive cellular unserved area applications filed on or after July 26, 1993, as well as most other applications for Part 22 licenses. Thus, we do not plan to make much use of lottery procedures in the future. In light of the foregoing, we deny AALA's petition.

Standards for De Minimis Extensions

6. Section 22.903(d)(1), as adopted in the *Second Report and Order* 57 FR 13646, April 17, 1992, allowed an applicant to propose Service Area Boundary (SAB) extensions into adjacent Metropolitan Statistical Areas (MSAs) or Rural Service Areas (RSAs), if such extensions were: (1) de minimis; and (2) demonstrably unavoidable for technical reasons of sound engineering design. The *Third Report and Order* 58 FR 27213, May 7, 1993 modified Section 22.903(d)(1) to allow only those extensions that meet the two foregoing requirements and that do not extend into the CGSA of any other licensee's cellular system on the same channel block (unless the other licensee consents to the extension), or into any adjacent MSA or RSA on a channel block for which the five year fill-in period has expired (i.e., into areas that are unserved and may be applied for only pursuant to the licensing process described in Section 22.949 of the Commission's rules).

7. CIS argues that the circumstances under which *de minimis* extensions are permitted under Section 22.903(d)(1) will not serve the public interest. CIS argues that the rule will make it more difficult for carriers to cover their markets and create the seamless cellular coverage the Commission has long encouraged. CIS claims that under the former version of the rule section, there was little incentive for a neighboring carrier to challenge a *de minimis* extension, unless that carrier had ''specific concerns'' or the extension significantly affected the market. CIS asserts that the new rule adds a layer of negotiation, and perhaps litigation, to most *de minimis* applications. Thus, CIS argues, if a licensee wants to propose a de minimis extension, it first must determine whether that extension

overlaps with the adjacent carrier's CGSA and if it does, negotiate for consent to that extension. CIS contends that if consent is not forthcoming, it is possible that the carrier requesting consent will be unable to build facilities with *de minimis* extensions in that area. According to CIS, the new rule essentially treats extensions as mutually exclusive with existing or proposed CGSAs. CIS believes our adoption of Section 22.903(d)(1) is not needed if the principles underlying our mutual exclusivity rules and original *de minimis* extension rules were followed. The net result of the new rule, CIS alleges, is to favor the earlier-licensed market over the later-licensed market and to favor well-financed carriers over less financially secure carriers, because the well-financed carriers are more likely to win the ''race to the border'' created by the new rule. CIS also maintains that, prior to the rule revision, extensions that overlapped a neighbor's CGSA did not require consent during the first ten years of cellular licensing, whereas such consent now is required. CIS contends that requiring such consent will cause some licensees to be treated differently than others have been treated in the past, even though there has been no change in the justification underlying the Commission's published rules and policies concerning *de minimis* extensions.

8. We find that CIS's arguments are not persuasive. The cellular radio industry has matured to the point where many licensees have CGSAs that have reached the borders of their respective MSAs or RSAs. In such an environment, ''border wars'' may become more common. Nevertheless, our rules do not favor either earlier-licensed carriers or better-financed carriers. Rather, any licensee, regardless of when it was licensed or how well it is financed, is entitled to protection within its CGSA, and conversely, must not cause interference by extensions into the CGSAs of other licensees, unless the parties agree to accept the intrusion. It is in the interest of cellular licensees to find mutually beneficial ways to accommodate their respective needs in providing service within their respective CGSAs.

9. Our current rule requiring consent for any SAB extensions into a licensee's CGSA is consistent with our previous policies protecting a licensee's reliable service area. Prior to the adoption of our *Second Report and Order* 57 FR 13646, April 17, 1992, *de minimis* contour extensions overlapping a neighbor's CGSA did not require prior consent from the neighbor. At that time, the CGSA was the area within an MSA or RSA that an applicant for an initial cellular system intended to serve, so it was possible for contours to extend into a neighbor's CGSA without causing interference to the neighbor's reliable service area. Furthermore, (as discussed *infra* at ¶ 14), all such contour extensions were subject to a standard authorization condition that required a licensee to change frequencies or ''pull back'' its service area boundary, if a current or future adjacent licensee encountered interference caused by any such extension. Pursuant to the *Second Report and Order* 57 FR 13646, April 17, 1992, the CGSA now represents the actual service area. Since the CGSA now is the current, rather than planned, service area, any extension into an adjacent CGSA would amount to an incursion into that licensee's actual service area. Thus, before and after the adoption of the *Second Report and Order* 57 FR 13646, April 17, 1992, a cellular licensee's reliable service area has been protected from overlap with the reliable service areas of neighboring cellular licensees by the standard pull back condition. The changes we made in the *Third Report and Order* 58 FR 27213, May 7, 1993 allow the parties to agree to have overlapping contours without imposing the pull back requirement.

10. Therefore, we conclude that the standards set forth in Section 22.903(d)(1) of the rules concerning *de minimis* SAB extensions into adjacent MSAs and RSAs serve the public interest and are consistent with our previous policies protecting a licensee's reliable service area.

Alleged Due Process Violations and Lack of Notice Under APA

11. In its petition, CIS argues that the Commission provided no notice that Section 22.903(d)(1) would be amended by the *Third Report and Order* 58 FR 27213, May 7, 1993, and thus violated the notice and comment requirements of the Administrative Procedures Act (APA). Similarly, PetroCom and Coastel argue that the *Initial NPRM* 55 FR 4882, February 12, 1990 and the *First Report and Order* 56 FR 58503, November 20, 1991 in this proceeding stated that the Commission was adopting no new requirements affecting the extension applications of existing cellular licensees. PetroCom and Coastel claim that no reasonable reader of the Commission's *Initial NPRM* 55 FR 4882, February 12, 1990 could have inferred that the Commission would change the ''*de minimis* extension regulation as it applied to existing cellular licensees.''

12. In addition, CIS, PetroCom, and Coastel contend that the only reference to contour extensions applicable to licensees seeking to expand their existing system boundaries is the proposal to codify a standard authorization condition that requires a licensee to change frequencies or ''pull back'' its service area boundary, if a current or future adjacent licensee encounters interference caused by a *de minimis* extension. The three petitioners conclude that the Commission provided no notice that it planned to change existing policy by requiring a licensee seeking to extend its contour into a neighboring licensee's CGSA to obtain the neighboring licensee's consent to that extension. CIS also argues that the Commission did not provide a reasoned explanation for the obligations adopted in the rules. CIS alleges that, by not providing sufficient notice or a reasonable basis for the new rule, we have violated due process.

13. As CIS acknowledges, proposed rules do not have to be identical to the final adopted rules, but important changes must be a ''logical outgrowth'' of the proceeding. Thus, courts have taken the view that changes from the original proposals in a rule making do not require an additional round of notice and comments where the final rules represent a ''logical outgrowth'' of the proposals. We believe that the rule changes implemented in the *Third Report and Order* 58 FR 27213, May 7, 1993 are well grounded in our previous rules and policies, and that these changes were an outgrowth of the issues raised at the initiation of this proceeding to modify the CGSAs of existing and new cellular systems.

14. A cellular licensee's service area has been protected from the contour extensions of other licensees by a standard license condition utilized prior to the adoption of the *First Report and Order* 56 FR 58503, November 20, 1991 in this proceeding. The condition was implemented as part of the Commission's longstanding policy of protecting a cellular licensee's actual service area. Prior to the adoption of the *First Report and Order* 56 FR 58503, November 20, 1991, carriers granted a *de minimis* extension into an adjacent MSA or RSA had been subject to a standard condition requiring that the extension be ''pulled back,'' if it caused interference to the protected service area of the adjacent MSA or RSA. The *Initial NPRM* 55 FR 4882, February 12, 1990 in this proceeding proposed to codify this standard condition and the *First Report and Order* 56 FR 58503, November 20, 1991 adopted this condition as Section 22.902(d)(4) of the rules. Thus, both

prior to and after the adoption of the *Second Report and Order* 57 FR 13646, April 17, 1992, a cellular licensee's reliable service area was protected by the standard pull back condition. A reasonable reader of the *Further Notice* 56 FR 58529, November 20, 1991 which proposed to establish the CGSA in the manner ultimately adopted in the *Second Report and Order* 57 FR 13646, April 17, 1992, could have anticipated that the Commission would continue to protect a licensee's service area from interference by other licensees.

15. We believe that the changes to Section 22.903(d)(1) reflect a logical and necessary step in redetermining the CGSA of each cellular licensee. In the *Second Report and Order* 57 FR 13646, April 17, 1992, we revised Section 22.903(a) to determine the CGSA based on a licensee's authorized service area, because the method proposed in the *Initial NPRM* 55 FR 4882, February 12, 1990 underestimated the service area boundaries. Both the *Initial NPRM* 55 FR 4882, February 12, 1990 and the *Further Notice* 56 FR 58529, November 20, 1991 in this proceeding explained that a central purpose of this proceeding was to make a licensee's CGSA more closely approximate its authorized service area.

16. The modification of a licensee's CGSA to more closely approximate its service area under Section 22.903(a) means that any non-consensual extension into a licensee's CGSA on the same channel block would constitute interference from which the licensee and its customers have a right to be protected, pursuant to Section 22.911 of our rules. Our modification of the text of Section 22.903(d)(1) regarding SAB extensions encroaching upon the CGSA of another licensee was necessitated by the change in methodology to determine the CGSA and our existing interference protection rule under Section 22.911. Thus, we modified Section 22.903(d)(1) to prohibit *de minimis* extensions into the CGSA of a carrier on the same channel block in an adjacent market without the consent of the neighboring licensee. Such changes do not violate due process, nor were the changes without notice, as CIS, Petrocom and Coastel allege.

17. CIS, PetroCom, and Coastel also assert that the *Third Report and Order* 58 FR 27213, May 7, 1993 mislabeled the Commission's modification of Section 22.903(d)(1) of its Rules as a ''clarification.'' They claim that the modification of the referenced rule was more than a clarification, noting that the term ''clarification'' implies that no substantive change to the rule is being made.

18. We do not dispute that our modification of Section 22.903(d)(1) involved a revision of that rule, and we did not intend, by the language we used in the *Third Report and Order* 58 FR 27213, May 7, 1993, to suggest otherwise. The revision of Section 22.903(d)(1) simply reinforced a concept which already was stated in the introductory paragraph of Section 22.903, as revised by the *Second Report and Order* 57 FR 13646, April 17, 1992, namely, that because the method of determining the CGSA is changed to reflect a licensee's authorized service area, the CGSA is protected from interference caused by all other licensees, just as cellular licensees' service areas had been protected from interference in the past by the standard pull back condition. Once we modified the CGSA to be a licensee's authorized protected service area, no incursions into the CGSA could be allowed under our standard policy against interference, unless the carrier causing the SAB extension received consent from the affected licensee.

19. We also had to modify Section 22.903(d)(1) to prohibit extensions into an adjacent MSA or RSA for which the five-year build-out period had expired, to be consistent with our unserved area rules. Sections 22.903(d)(3)(i) through 22.903(d)(3)(iii) provided that, with respect to cellular systems proposed for unserved areas, the service area boundaries (SABs) of the proposed cells must not extend into the CGSA of any other licensee's cellular system on the same channel block, except for permissible contract extensions, or into any adjacent MSA or RSA where the five-year build-out period had expired. The same concern about interference created by SAB extensions into adjacent CGSAs that applies to unserved area applicants also applies to proposed extensions into CGSAs by existing licensees. The rights of unserved area applicants would be compromised if we allowed a licensee in an adjacent MSA or RSA to extend its service contour into the unserved area of an MSA or RSA for which the build-out period had expired without complying with the unserved area licensing procedures.

20. Therefore, we conclude that the Commission gave adequate notice for the changes the *Third Report and Order* 58 FR 27213, May 7, 1993 made in Section 22.903(d)(1) of the rules, that those changes were well grounded in our previous rules and policies, and that the changes were a logical outgrowth of the issues raised in this proceeding.

Contour Extensions During Phase I Processing

21. In the *Third Report and Order* 58 FR 27213, May 7, 1993, we modified our policies for allowing applicants for unserved areas to propose SAB extensions during Phase I of our application processing procedures for all markets in which the five-year build-out period has expired. Specifically, we determined that initial applications filed in Phase I would not be allowed to propose any extensions into adjacent MSAs or RSAs, even if those extensions were de minimis or contract extensions. In prohibiting contour extensions in these circumstances, we explained that this restriction would simplify and expedite our licensing process and would remove a possible source of litigation as to whether such extensions were permissible. We stated that applications proposing such extensions would be dismissed as defective. We added language to effectuate our policy change to Section 22.902(b)(4)(i) of the rules and appropriately revised the language of Sections 22.903(d)(3)(ii) through Sections 22.903(d)(3)(iv).

22. CECR asserts that the Commission erred in making the foregoing rule changes. CECR argues that the *First Report and Order* 56 FR 58503, November 20, 1991 clearly delineated the circumstances under which contract extensions are permissible: where a contract exists, extensions are valid, and if no contract exists, the extension application is deemed defective. Thus, claims CECR, permitting contract extensions cannot serve as a possible source of litigation. CECR also argues that former Section 22.903(d)(3)(ii) of the rules explicitly explained the situations in which unserved area applications can propose de minimis extensions, and served to eliminate any confusion over the validity of proposed extensions, thus greatly reducing the possibility for litigation.

23. We shall not revise our rules concerning SAB extensions by Phase I applicants for unserved areas. As we stated earlier, our purpose in not permitting Phase I requests for extensions was to provide a simple and expeditious means of licensing unserved area applicants in Phase I. In addition, we believe that our Phase I licensing rules should be consistently applied across all markets. Phase I of the unserved area licensing process has ended for most of the MSAs and many of the RSAs. By the end of calendar year 1995, the five-year build-out period for most RSAs will have ended. The revisions suggested by CECR only would confuse the unserved area

licensing process by changing the rules after many of the markets have been subject to restricted SAB extension rules in the Phase I unserved licensing process.

24. We note that the prohibition against having SAB extensions beyond the borders of a particular MSA or RSA only applies to initial Phase I applications. Once a Phase I initial unserved area application has been granted, the licensee can file one Phase I major modification application and that application may propose *de minimis* or contract extensions. The application is not subject to competing applications. In addition, Phase II applications may propose a CGSA covering more than one cellular market, which includes *de minimis* and contract extensions. Thus, the prohibition against SAB extensions beyond the borders of a particular MSA or RSA is narrowly defined to include only initial Phase I unserved area applications.

System Information Update Maps

25. CECR asserts that the Commission erred by neglecting to recognize that System Information Update (SIU) maps are more than informational filings, because they define the rights of third parties, i.e., potential unserved area applicants. CECR argues, as it did in its petition for reconsideration of the *First Report and Order* 56 FR 58503, November 20, 1991, that the Commission should establish procedures by which interested parties may challenge SIU maps prior to the filing of unserved area applications. McCaw argues that CECR already has argued this issue unsuccessfully and has shown no reason why its argument warrants further Commission consideration. McCaw argues that this portion of CECR's petition should be dismissed as repetitive. CECR also observes that the *Third Report and Order* 58 FR 27213, May 7, 1993 provided that parties aggrieved by the licensee's depiction of its CGSA informally may request the Commission to correct the maps under Section 1.41 of the Commission's Rules. CECR contends that this procedure is illusory because the Commission has no obligation or timetable to resolve an informal challenge, and therefore can continue to license unserved areas within the challenged market during the pendency of the informal challenge. CECR also challenges on due process grounds the procedures established for challenging SIU maps, stating that they force unserved area applicants ''to place their own applications at risk in order to challenge a licensee's improper SIU map.'' Further, CECR claims that licensees should not be allowed to base their SIU maps on cell sites that violate state law.

26. We find that CECR's arguments are not sufficiently compelling to warrant revision to our rules. Section 22.947(c) of our rules, 47 CFR § 22.947(c), requires a licensee of a cellular system to file with the Commission 60 days before the end of its five-year build out period a system information update (SIU) consisting of a full size map, a reduced map, and an exhibit showing technical data relevant to determining the system's CGSA. These materials must accurately depict the cell locations and coverage of the system at the end of the five-year build-out period. Although SIU materials, especially the maps, are required so that potential applicants may know which areas within a particular market already are served, it is important to note, as we did in the *Third Report and Order* 58 FR 27213, May 7, 1993, that the SIU maps are more in the nature of pictorial aids for potential unserved area applicants. The SIUs are not a declaration of the cellular service rights of licensees. As set forth in the *Second Report and Order* 57 FR 13646, April 17, 1992, the position of the CGSA boundaries officially will be determined by the geographical coordinates of cell sites and the authorized facilities for the relevant cells which are contained in the Commission's station license files. Further, as we stated in the Third Report and Order, these maps will not require any Commission action, since they are not submitted for approval. The manner in which the SIU maps are drawn is determined by the new mathematical formula for determining service areas set forth in Section 22.911(a) of our rules. We expect that licensees will accurately depict their CGSAs using the prescribed formula, and that errors will be the exception and not the rule.

27. It is not necessary to delay the filing, processing, and granting of unserved area applications in order to afford potential litigants the opportunity to challenge SIUs. Applicants who believe that reported adjacent CGSAs are in error or have been misdepicted may file applications, pursuant to the requirements of the unserved area rules, for areas they believe constitute at least 130 square kilometers (50 square miles), and state in their applications why they disagree with the depictions or representations of adjacent CGSAs. Once such an applicant has become a tentative selectee, if it has made a *prima facie* case that an adjacent licensee has misdepicted its CGSA, that licensee will have the burden of responding to any allegations concerning the depiction of its CGSA, and the Commission will resolve the dispute. Further, we have noted that interested parties may file informal requests for Commission action to correct SIU maps pursuant to Section 1.41 of the Rules. As to the state law concerns raised by CECR, if a licensee has constructed cellular facilities that violate relevant state law, any member of the public can notify the appropriate state authority, which then can impose appropriate sanctions.

Phase I Processing Procedures

28. In the *Third Report and Order* 58 FR 27213, May 7, 1993, we explained that, during Phase I of our processing procedures for unserved area applications, an existing licensee may file an application to expand its existing CGSA in any manner or, in the alternative, apply for a new non-contiguous CGSA in an unserved portion of its market. Either of the applications would be considered to be a single unserved area application. CECR requests that we clarify that the *Third Report and Order* 58 FR 27213, May 7, 1993 allows an existing licensee to file either an initial Phase I unserved area application to expand its existing CGSA, or an application specifying a new non-contiguous CGSA within its market, but not both. CECR's request has been rendered moot by the changes to Section 22.949(a)(1)(ii) of the rules, which became effective after the release of the *Third Report and Order* 58 FR 27213, May 7, 1993. The rule section now expressly prohibits applicants from filing more than one Phase I initial application for any cellular market.

B. Petitions for Reconsideration of the Memorandum Opinion and Order

Alleged Lack of Notice Under APA

29. The *Memorandum Opinion and Order* 58 FR 11799, March 1, 1993 in this proceeding established that interference occurs when subscriber traffic is captured in a home market by an adjacent market system, due to contour extensions into the home market's CGSA, and that cellular licensees are entitled to protection from this type of interference. A cellular licensee may continue to operate existing facilities that produce a service area boundary extension into a subsequently-authorized portion of the CGSA of another cellular system on the same channel block until the licensee of that system requests that the SAB extension be removed from its CGSA. When such a request is received, the adjacent market system operator is obligated to pull back the SAB

extensions by reducing the transmitting power or antenna height (or both) at the offending cell site locations, or obtain written consent from the other licensee to permit the SAB extension.

30. Five petitions for reconsideration and three petitions for partial reconsideration of the *Memorandum Opinion and Order* 58 FR 11799, March 1, 1993 were filed. These petitions allege, *inter alia,* that our adoption of Section 22.903(f) of the rules, 47 CFR 22.903(f), violated the notice and comment requirements for rule making proceedings under Section 553 of the APA, 5 U.S.C. § 553, and the notice and hearing provisions of Sections 309 and 316 of the Communications Act of 1934, 47 U.S.C. §§ 309 and 316, and former Section 22.100(b)(4) of the Commission's rules.

31. New Par, CIS and the Joint Petitioners claim that the Commission gave no public notice it was contemplating the rule changes incorporated in new Section 22.903(f), and therefore the Commission did not comply with Section 553 of the APA, 5 U.S.C. § 553, which requires an agency to give adequate written notice and opportunity to comment on proposals in rule making proceedings. New Par claims that the Commission provided no notice that it even was considering a change to the standard by which interference and SAB extensions would be evaluated. CIS also argues that there is no mention of the new substantive obligations imposed by Section 22.903(f) on licensees either in the *Further Notice* 56 FR 58529, the *First Report and Order* 56 FR 58503, November 20, 1991, or the *Second Report and Order* 57 FR 13646, April 17, 1992 in this proceeding.

32. New Par and the Joint Petitioners assert that prior to the adoption of Section 22.903(f), the Commission's rules concerning interference between cellular licensees provided that remedial action was required only where actual, as opposed to theoretical, electrical interference occurred. New Par argues that former Section 22.100(b)(ii) stated that the Commission ''will only consider complaints of interference which significantly interrupt or degrade a radio service,'' and former Section 22.902(a) provided that, in the event ''harmful interference'' occurs that two or more cellular licensees cannot resolve themselves, the Commission may require a licensee to make system changes ''necessary to avoid such interference.'' In contrast, New Par argues, Section 22.903(f) assumes that interference exists where licensee SABs overlap and requires the entire removal of SAB extensions without regard to whether the complaining party's service in fact has experienced a significant degradation and without regard to whether the removal of such extensions might result in harmful effects on service to the public in either licensee's market.

33. We reject petitioners' argument that our adoption of Section 22.903(f) did not comport with the notice and comment requirements of the APA. We have reasonably and consistently placed the public on notice of our intention to change the standards for measuring cellular service areas in our continuing efforts to provide seamless cellular service with the least amount of interference to licensed carriers. The matters at issue in this docket encompassed the manner in which service area contours were to be calculated and the implications for existing systems if the defined contours changed. Section 22.903(f) reflects a logical outgrowth of this debate.

34. As previously discussed (supra at ¶ 14), the *Initial NPRM* 55 FR 4882, February 12, 1990 and *Further Notice* 56 FR 58529, November 20, 1991 in this proceeding made clear that we intended to change the method by which a CGSA is determined. Ultimately, the *Second Report and Order* 57 FR 13646, April 17, 1992 established that the CGSA is the geographic area the Commission considers served by a cellular system and the area within which a cellular system is entitled to protection. A companion issue raised in evaluating the boundaries of the CGSA was the potential for interference caused by the extension of newly-redefined SABs outside a licensee's MSA or RSA into the CGSA of a neighboring cellular system on the same channel block. Based upon the comments we received, we concluded that capture of subscriber traffic is a form of interference. Thus, we were compelled to amend our rules to provide protection to cellular licensees against such interference.

Alleged Notice and Hearing Rights Under the Communications Act and the Commission's Rules

35. The Joint Petitioners and New Par contend that the Commission cannot order (or allow an adjacent licensee to require) licensees to pull back authorized contour extensions (including new SABs created by the new formula adopted in the *Second Report and Order* 57 FR 13646, April 17, 1992) without complying with the notice and hearing requirements of Sections 309 and 316 of the Communications Act and Section 22.100(b)(4) of the Commission's rules.

36. New Par argues that each SAB extension authorized by the Commission is conditioned upon the licensee not causing interference to adjacent licensees and that any action requiring a licensee to withdraw its SAB from areas where its RF signals in fact do not significantly degrade or disrupt other radio service is a modification of that licensee's authorization. According to New Par, Sections 309 and 316 of the Communications Act require the Commission to conduct a hearing to determine whether and to what extent interference exists each time it wishes to order an authorized contour extension to be ''pulled back.'' New Par also contends that Section 22.100(b)(4) of the rules codifies the foregoing theory by providing that the Commission may order cellular system modifications to eliminate alleged interference only after notice and opportunity for hearing.

37. We reject the petitioners' argument that the Commission must comply with the notice and hearing requirements of Sections 309 and 316 of the Communications Act each time a licensee is directed to pull back authorized contour extensions. Those provisions provide for a hearing process before Commission modification of a particular license. The sections do not deprive the Commission of its authority to establish rules of general applicability to an industry through its rule making authority.

38. It is well established that licenses may be modified through rule making proceedings without affording parties an adjudicatory hearing, if the generic rules otherwise are procedurally and substantively valid. In *WBEN Inc.* v. *United States,* 396 F.2d 601 (2d Cir. 1968), *cert. denied,* 393 U.S. 914 (1968), the Court held that the Commission need not engage in evidentiary hearings required for modification of a particular license, explaining that,

> [W]hen, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring an agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them.

Once a rule has been adopted, there is no need to hold a hearing each time that rule is applied. Our *Memorandum Opinion and Order* 58 FR 11799, March 1, 1993 makes clear that Section 22.903(f)(2)(i) allows the Commission (or an adjacent licensee) to require a licensee to ''pull back'' an authorized SAB extension into the adjacent licensee's CGSA. Thus, there is no need for a hearing each time Section 22.903(f)(2)(i) or its replacement, Section 22.911(d), is enforced.

39. We find that the hearing procedure under Section 22.100(b)(4) of our rules is inapplicable to rule changes made through our rule making authority. Section 22.100(b)(4) requires that interference between base stations that have been properly authorized shall be ''resolved'' by the licensees. The rule section also states that if the licensees cannot resolve the interference, the Commission, ''after notice and opportunity for hearing,'' may order whatever changes in equipment or operation it deems necessary. Hearings under Section 22.100(b)(4) would be involved only if the carriers could not comply with the directive of the rule section to resolve interference problems. Such hearings would not be required between cellular licensees because cellular licensees have always been licensed on the condition that licensees must ''pull back'' any contour that interferes with a neighboring cellular system and Section 22.911(d) provides a specific remedy for resolving the interference problem at hand. We also observe that the Commission has been given the power recently to make changes in the frequencies, authorized power, and the times of operation of any station without conducting a hearing.

Standards for Determining Permissible SAB Extensions

40. The Joint Petitioners, New Par, Sussex, and CIS argue that the adoption of Section 22.903(f)(1) of the rules regarding capture is inconsistent with the Commission's goal of achieving nationwide seamless cellular service. New Par, Sussex, and CIS note that the *Memorandum Opinion and Order* 58 FR 11799, March 1, 1993 states that overlapping SAB contours actually promote a seamless environment and that SAB extension ''pullbacks'' should be used only as a last resort. CIS and Sussex argue that the new rule is contrary to basic principles of cellular system design and will restrict the ability of licensees to provide adequate coverage within their markets, thus undermining the original purpose of the Commission's de minimis extension policy. CIS claims that the rule will discourage the development of seamless cellular coverage at the borders between markets.

41. Joint Petitioners argue that Section 22.903(f) undermines the Commission's stated goals of creating a ''level playing field'' for all cellular licensees and devising rules and policies to encourage informal agreements between licensees to resolve boundary disputes. New Par, McCaw, and the Joint Petitioners claim that Section 22.903(f) neither requires good faith negotiations among adjacent licensees nor enables an extending licensee to rebut the presumption of interference in the form of capture of subscriber traffic. McCaw and New Par assert that the rule appears to conflict with the *Memorandum Opinion and Order,* 58 FR 11799, March 1, 1993 which states that progress toward achieving the Commission's goal of establishing ''rules and policies that will lead to the efficient provision of nationwide seamless cellular service to the public'' will depend in large part upon the success of informal negotiations between cellular licensees on ''mutually agreeable arrangements of facilities that provide an efficient juncture between adjacent systems.'' New Par argues that later-licensed carriers will have the ability and incentive to force neighboring licensees to consent to otherwise unwarranted extensions, because of the earlier-licensed carrier's inability to suffer the loss of service that would result from an SAB pull-back. Joint Petitioners similarly conclude that existing operators may be forced to curtail service from previously authorized facilities ''largely at the whim'' of subsequent licensees.

42. New Par argues that the institution of the presumption that subscriber capture occurs in every case where an SAB overlaps with a CGSA is arbitrary and capricious and results in removing from the Commission its statutory obligation to resolve service issues consistent with the public interest. McCaw opposes the rule because it has the practical effect of precluding SAB extensions where no subscriber traffic capture actually occurs. Sussex argues that an administrative agency cannot create a presumption which operates to deny a fair opportunity to rebut it without violating the due process clauses of the Fifth and Fourteenth Amendments. Consequently, Sussex argues that the U.S. Constitution will not allow the Commission to impose an automatic requirement to remove SAB overlap without first granting the encroaching carrier the opportunity to show: (1) that there is no subscriber capture, or (2) that the capture does not result from SAB overlap.

43. McCaw and New Par recommend modifications to Section 22.903(f) as follows: (1) require licensees protesting SAB extensions to demonstrate that these extensions cause actual interference, prior to mandating system modification; and (2) continue to promote good faith negotiations of such boundary disputes on an informal basis prior to having to ''pull back'' authorized SAB extensions. Sprint agrees with McCaw and New Par that boundary questions should be settled with good faith negotiations on an informal basis. The Joint Petitioners also urge that Section 22.903(f)(2)(i) be modified to make rebuttable the presumption of subscriber capture, where an SAB extension has been authorized into an adjacent licensee's CGSA during the latter licensee's five-year fill-in period.

44. CIS also recommends that former Section 22.903(d)(1) of the rules, setting forth *de minimis* extension criteria, be modified to allow a contour extension when the extension is necessary to compensate for an existing extension from another cellular system. Sussex recommends that the Commission allow carriers to install cells with contour overlaps into adjacent carriers' CGSAs so long as the overlaps are *de minimis* and are necessary to provide service within the overlapping carrier's market area, regardless of whether the carrier consents to the extension. Further, Sussex argues that any conflicts arising from such overlaps be resolved through the frequency coordination process and the requirement of inter-carrier cooperation. In essence, Sussex asks that the Commission return to the means of handling contour overlap which existed before the adoption of Section 22.903(f). Radiofone opposes Sussex's solution, fearing that elimination of protection of CGSAs against intrusions from neighboring carriers would lead to ''rampant interference, endless litigation and disservice to the public.''

45. Before addressing the petitioners' arguments, we emphasize that a cellular licensee has an obligation to serve the public wherever demand exists within its market, and that cellular licensees therefore have a duty to negotiate with each other in good faith regarding agreements for SAB overlaps. Successful negotiations of such contracts or agreements could be offered as evidence of performance in the public interest when cellular licenses are considered for renewal, pursuant to new Section 22.940 of our Rules. Conversely, failure to serve the public due to failure to negotiate reasonable solutions to SAB overlap problems with adjoining carriers could reflect negatively on a licensee seeking renewal.

46. The language of former Section 22.903(f)(2)(i) was somewhat ambiguous, because the first sentence stated that it is ''presumed'' that subscriber traffic is captured if a service area boundary (SAB) of one cellular system extends into the CGSA of another operating cellular system. Nevertheless, New Par and Sussex's arguments concerning the creation of a

rebuttable presumption have been rendered moot by the removal of the presumption language in rule Section 22.903(f). The *Part 22 Rewrite Order* 59 FR 59502, November 17, 1992 transferred most of the language of former Section 22.903(f) to current rule Section 22.911(d) and changed some of the introductory language in the new rule. Section 22.911(d)(2)(i) expressly prohibits non-consensual contour extensions from one cellular system into the CGSA of another cellular system. The first sentence of Section 22.911(d)(2)(i) states: ''Subscriber traffic is captured if an SAB of one cellular system overlaps the CGSA of another operating cellular system''—(emphasis added). The new rule removes any suggestion of a presumption created by the prior rule.

47. We observe that current Section 22.911(d)(2)(i) of our rules is based upon predicted service areas as defined by an expert agency and is designed to avoid litigation over the exact location of actual interference. The idea of ''interference free'' service areas is a constant in Part 22 of our rules. See, e.g., Sections 22.351, 22.537, 22.567, and 22.912(a) of our rules. 47 CFR 22.351, 22.537, 22.567 and 22.912(a). In order to ensure uniformity and simplicity in administering our rules, and to prevent potentially endless litigation, we must rely on objective, rather than subjective standards for the protection of services. Section 22.911(d)(2)(i) provides a simple, objective standard to determine when capture occurs, and encourages parties to reach agreement on the resulting effects of SAB overlap.

48. We also reject CIS's request that Section 22.903(d)(1) [now 22.912(a)] of the rules be modified to allow a cellular licensee to extend service contour into an adjoining market to compensate for the adjoining licensee's extension into the licensee's market. Absent agreement between the affected parties, licensees are entitled to operate in their service areas free from co-channel and first adjacent channel interference and from capture of subscriber traffic by adjacent systems on the same channel block. 47 CFR 22.911(d) (formerly 22.903(f)).

49. Our goal is to provide nationwide seamless cellular service to the public. As we indicated in the *Memorandum Opinion and Order*, 58 FR 11799, March 1, 1993 rather than require the total elimination of SAB extensions, or mandate reciprocal SAB extensions as suggested by CIS, a better result in most cases is some degree of SAB overlap between systems with the location of balanced signal strengths negotiated informally between the adjacent licensees on the same channel block. We believe informal negotiations between parties in determining mutually agreeable arrangements between adjacent systems will achieve the most expeditious and effective resolution of service boundary issues. Thus, promoting negotiation between parties eliminates possible protracted administrative and court proceedings, and provides incentives for cellular providers to come to agreement on boundary issues arising from the convergence of expanding systems. In sum, permitting market forces to drive resolution of these issues will effectuate seamless cellular service nationwide more quickly than the proposals offered by petitioners.

IV. Ordering Clause

50. Accordingly, pursuant to Sections 4(i), 303(r) and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 405(a), *It is ordered* that the petitions for reconsideration and partial reconsideration of the *Third Report and Order and Memorandum Opinion and Order on Reconsideration* 58 FR 27213, May 7, 1993 in this docket, and the *Memorandum Opinion and Order on Reconsideration*, 58 FR 11799, March 1, 1993 *Are denied*, and the ''Request to Expedite Action and Comments in Support of Cellular Information Systems, Inc.'' *Is dismissed* as moot.

List of Subjects in 47 CFR Part 22

Communications common carriers, Radio.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 97–4870 Filed 2–27–97; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1319

[STB Ex Parte No. 598]

Exemption of Freight Forwarders in the Noncontiguous Domestic Trade From Rate Reasonableness and Tariff Filing Requirements

AGENCY: Surface Transportation Board.

ACTION: Final rules.

SUMMARY: The Board exempts freight forwarders in the noncontiguous domestic trade from tariff filing requirements. This action eliminates an unnecessary regulatory burden and should provide freight forwarders with additional flexibility to meet the needs of their customers.

EFFECTIVE DATE: These rules are effective March 30, 1997.

FOR FURTHER INFORMATION CONTACT: James W. Greene, (202) 927–5612. [TDD for the hearing impaired: (202) 927–5721.]

SUPPLEMENTARY INFORMATION: The Board's decision adopting these regulations is available to all persons for a charge by phoning DC NEWS & DATA, INC., at (202) 289–4357.

Small Entities

The Board certifies that this rule will not have a significant economic effect on a substantial number of small entities. The rule removes an unnecessary regulatory burden and, to the extent that it affects small entities, the effect should be favorable.

Environment

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 49 CFR Part 1319

Exemptions, Freight forwarders, Tariffs.

Decided: February 13, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams,

Secretary.

For the reasons set forth in the preamble, the Board adds a new part 1319 to title 49, chapter X, of the Code of Federal Regulations to read as follows:

PART 1319—EXEMPTIONS

Sec.

Authority: 49 U.S.C. 721(a) and 13541.

§ 1319.1 Exemption of freight forwarders in the noncontiguous domestic trade from tariff filing requirements.

Freight forwarders subject to the Board's jurisdiction under 49 U.S.C. 13531 are exempted from the tariff filing requirements of 49 U.S.C. 13702.

[FR Doc. 97–4868 Filed 2–27–97; 8:45 am]

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